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

COUNSEL FOR RESPONDENT
Team 2

QUESTIONS PRESENTED

I. Under the Bankruptcy Code's automatic stay, 11 U.S.C. § 362, does enforcement of an arbitration agreement between the debtor, his business, and the secured creditor create an inherent conflict with the purpose of the Code's automatic stay provision?

II. Under 11 U.S.C. § 362(c)(3)(A) does the automatic stay extend beyond thirty days to protect the property of the estate from a creditor seeking to violate § 362(a) prohibitions, if the debtor in possession does not extend the stay and the statutes plain language states "with respect to the debtor"?

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The Thirteenth Circuit Court of Appeals' Decision is available at No. 19-0805. The bankruptcy court decided in favor of Earl Thomas Petty. On direct appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed.

STATEMENT OF JURISDICTION

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

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

This action implicates the statutory construction of provisions within Title 11 of the United States Code. The statutory construction is relevant to related Constitutional provisions. Additionally, comparing the language of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, to that of the Bankruptcy Code, is critical.

Article 1, Section 8, clause 3 of the United States Constitution provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Article 1, Section 8, clause 4 of the United States Constitution provides:

> The Congress shall have Power . . . To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

The relevant portion of 11 U.S.C. § 362(a) provides:

> (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;

The relevant portion of 11 U.S.C. § 362(c)(3) provides:

(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)—

(i) as to all creditors, if—

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

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 FACTS

This appeal arises from Petitioner's attempt to sidestep the requirements of the automatic stay within the Bankruptcy Code. As a result, this appeal threatens to jeopardize an integral proceeding within the Code and the debtor's ability to effectively reorganize pursuant to Code Chapter 11.

I. FACTUAL HISTORY

A. Great Wide Open is a successful brewery with multiple awards and several taproom locations in the state of Moot.

Respondent Earl Thomas Petty is an entrepreneur and the founder of two craft breweries. R. at 3 and 6. He toiled away at night and on weekends, in his basement, to brew great beer. R. at 3. All of his hard work culminated when he quit his day job to open a craft brewery. R. at 3. He opened the first brewery, Great Wide Open, in 2002. R. at 3. He opened the second brewery, Full Moon Fever Brewing, in 2018. R. at 6. Petitioner Wildflowers Community Bank ("Wildflowers") is a local bank that offered Petty and the first brewery a revolving credit agreement. R. at 4.

In 2005, Petty opened the first Great Wide Open taproom with brewing equipment ("Equipment") purchased outright. R. at 3. Within five years, the brewery was drowning in awards and developing quite a name for itself in Moot. R. at 3–4. After the success and increased demand, Petty opened four additional taproom locations in Moot in 2010 and a brewhouse in 2012. R. at 4. He was living the American Dream.

With the increase in business locations, Petty and Great Wide Open needed more capital for operating expenses and they agreed to a $35 million revolving credit agreement ("Agreement") with Wildflowers. R. at 4. The Agreement provides Wildflowers a first priority lien on all assets and a personal guaranty from Petty. R. at 4. The Agreement, and the guaranty, grant "Wildflowers the right to enter any premises where Collateral may be located for the purpose of repossessing

Collateral…" R. at 4. Additionally, the Agreement includes arbitration clauses for "any and all disputes, claims, or controversies of any kind" and requires those "be resolved through mandatory, binding arbitration." R. at 4.

Despite Petty's early success with Great Wide Open, the financial successes were getting fewer and farther between. The brewery began experiencing financial difficulties in 2017. R. at 5. The community was less interested in craft beers and more interested in other pursuits. R. at 5. As a result, Petty attempted to salvage the business by shutting down a few locations. R. at 5. In 2018, Great Wide Open closed three taprooms voluntarily and one involuntarily, when the landlord for the first taproom location decided to terminate the real property lease. R. at 5. In early 2018 Great Wide Open and Petty defaulted on the Agreement with Wildflowers. R. at 5. Following the default, Wildflowers filed an arbitration and breach of contract complaint with the American Arbitration Association. R. at 5. The complaint alleged $33.2 million remained owed by Petty and Great Wide Open, from the initial $35 million Agreement. R. at 5. Petty's efforts to remain open were no longer feasible. Great Wide Open was forced to cease operations the day before arbitration was scheduled to begin. R. at 5.

B. Great Wide Open and Petty encounter financial difficulties and file for Chapters 7 and 11, respectively.

After shutting down, Great Wide Open filed for Chapter 7 on July 12, 2018 in the Bankruptcy Court for the District of Moot. R. at 5. Great Wide Open's assets were liquidated, and the Chapter 7 case was closed. R. at 6.

Petty filed for Chapter 11 ("Initial Bankruptcy Proceeding"), individually, in the same court on the same day as Great Wide Open. R. at 5. In this Initial Bankruptcy Proceeding, Petty failed to file all of the documents in a timely matter. R. at 5. The bankruptcy court dismissed the proceeding on August 27, 2018. R. at 5.

Shortly before arbitration was to resume, Petty filed a second Chapter 11 case ("Second Bankruptcy Proceeding"). R. at 5. The Second Bankruptcy Proceeding was timely filed and Petty proposed repayment of forty cents on the dollar to all creditors, including Wildflowers, over five years. R. at 6. Wildflowers was still owed $2.1 million, following the close of Great Wide Open's Chapter 7 liquidation. R. at 6. During the plan's confirmation hearing, Petty informed the court that he opened a new brewery in the same location as his first taproom. R. at 6. Because the Equipment from when he started Great Wide Open remained in that real property lease location, he was operating Full Moon Fever Brewing with that Equipment and turning a profit. R. at 6.

While the Second Bankruptcy Proceeding was underway, Wildflowers repossessed the Equipment from Full Moon Fever Brewing. R. at 6. The repossession was done on the thirty-second day following the commencement of the First Bankruptcy Proceeding. R. at 6. The Equipment was subject to the Agreement's first priority lien. R. at 6.

Petty filed a motion with the bankruptcy court after Wildflowers violated the automatic stay. R. at 6. Wildflowers returned the Equipment the day before the hearing. R. at 7, n. 6. However, the damage was already done. The removal of the brewing equipment forced Petty to close Full Moon Fever Brewing very soon after opening. R. at 7. Wildflowers callous acts destroyed Petty's newly established brewery company, and any hopes the Chapter 11 reorganization plan had at success. R. at 7.

II. PROCEDURAL HISTORY

The bankruptcy court and the Court of Appeals for the Thirteenth Circuit ruled in favor of Earl Thomas Petty, holding that (1) the automatic stay in 11 U.S.C. § 362 is an inherent conflict with the arbitration agreement between the parties, and (2) a creditor is stopped from acting against

property of the estate under subsection 362(c)(3)(A)—regardless of whether the automatic stay is extended beyond the thirty days. R. at 7.

STANDARD OF REVIEW

The questions presented are based on statutory interpretation of the Bankruptcy Code and Federal Arbitration Act. As such, this review is of questions of law and the standard of review for this appeal is de novo. "Fact findings of the bankruptcy court are reviewed under a clearly erroneous standard and issues of law are reviewed de novo." *Nationwide Mut. Ins. Co. v. Berryman Prods. (In re Berryman Prods.)*, 159 F.3d 941, 943 (5th Cir. 1998).

SUMMARY OF THE ARGUMENT

For this first issue before the Court, the Thirteenth Circuit correctly determined that the Bankruptcy Code, specifically the automatic stay, conflicts with the Federal Arbitration Act. Allowing the dispute between the parties to be arbitrated creates an inherent conflict with the automatic stay provisions of the Code.

The main purpose of bankruptcy is to allow the debtor a fresh start. From this main goal, the Code sets two things in motion upon filing the petition: a bankruptcy estate and the automatic stay. The bankruptcy estate includes all of the debtor's interests. The automatic stay prohibits creditors from collection efforts outside of bankruptcy. The stay ensures safeguarding of the estate property. This benefits the bankruptcy estate as a whole and ensures all creditors better access to estate assets. The jurisdiction over core proceedings is often restricted to the bankruptcy courts, as they pose the most efficient resolutions when the bankruptcy estate is involved.

The Federal Arbitration Act ("FAA") was enacted by Congress to settle contract disagreements as quickly and efficiently as possible. In that regard, the FAA and the Code carry out similar objectives—effective and efficient resolution. However, the similarities end there. The

FAA is designed to resolve disputes between two parties and the Code is designed to resolve conflicts between multiple parties. In furthering those designs, the bankruptcy courts and the arbitrators oversee different jurisdictions as well.

Because the FAA is designed to resolve disputes, there is a strong presumption in favor of arbitration. That presumption is overcome by contrary commands from Congress or when an inherent conflict arises between the FAA and the statute in conflict. Congress did not issue a contrary command as to whether the Code and FAA receives preference. However, many courts refuse to arbitrate a core bankruptcy proceeding. The current precedent within the Fifth Circuit allows the court discretion to decline to enforce arbitration when the proceeding deals explicitly with rights conferred in the Bankruptcy Code and when arbitration and the Code provision inherently conflict.

On the other hand, this Court has repeatedly rejected conflicts between the FAA and other federal statutes. What makes a conflict between the Bankruptcy Code and the Arbitration Act distinct from the lack of conflicts with laws, such as the National Labor Relations Board, is that the Bankruptcy Code is mentioned in Article 1, Section 8 of the United States Constitution. Many other laws generated by Congress stem from the Constitutional authority in the Commerce or Necessary and Proper Clause. Though the limits of the Commerce Clause have expanded over the years, Congress is still limited in the laws enacted pursuant to that clause. In contrast, the Bankruptcy Code is explicitly and specifically mentioned in the Constitution. As a result, this Court, and others, often view Bankruptcy laws as on a different level from other statutes.

Despite this Court's hesitation to find conflicts between the FAA and the Code, circuit courts readily determine that some bankruptcy proceedings, such as the automatic stay, inherently conflict with arbitration resolutions. When an inherent conflict occurs, the bankruptcy courts

possess discretion as to whether they will enforce the arbitration agreement or side with the Code. Without an inherent conflict or contrary congressional command, the bankruptcy courts lack discretion to refuse to enforce the arbitration agreement. Because of the differences in the objectives of the Code and the FAA, and the importance of the automatic stay to the bankruptcy proceedings, an inherent conflict exists between the FAA and the automatic stay provisions of the Code.

This Court should affirm the decision of the Thirteenth Circuit's decision that the arbitration agreement is in conflict with the Bankruptcy Code's automatic stay for two reasons. Firstly, the purpose of the automatic stay and the FAA are in conflict. As such, the courts have discretion to decline to enforce the arbitration agreement. Secondly, the Bankruptcy Code's Article I status places it on a different level than an act linked loosely to another Article I authority.

With regard to the second issue before this Court, the Thirteenth Circuit correctly read "with respect to the debtor" using the plain language present in the statute, instead of the more ambiguous readings offered by other circuit courts. As a result, the court correctly decided the stay extended beyond the thirty days for property of the state.

Several courts read the provision in subsection 362(c)(3)(A) as ambiguous. The ambiguity read into that statute occurs when the courts describe the drafting of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") as poorly written. However, any reading of the statute needs to begin with the plain language meaning of the terms.

Plain language looks at the ordinary and usual usage of the terms. As it is applied in subsection 362(c)(3)(A) the language of the provision is limited to termination of the stay regarding the debtor, and not to the property of the estate. Additionally, the automatic stay applies to all Chapters of the Code. As such, the narrow interpretation is logical because the property of

the estate may need preservation in Chapter 7 or allocation in a plan under Chapter 11. Reading it to mean anything else incorrectly impacts the court's control over the estate in question.

After assessing the plain language of the terms, the court should next consider the statutory context. The minority view espoused by the Petitioner does not correctly analyze the statutory context. First, the Ninth Circuit reads subsection 362(c)(3)(A) only in comparison to other parts of subsection 362(c)(3).

Secondly, the Ninth Circuit incorrectly focuses on a distinction between the debtor and the debtor's spouse. In comparing the language to subsection 362(c)(3) only, the Ninth Circuit draws a distinction that "if a single or joint case" is the division in subsection (3) that is referred to by "with respect to the debtor" in subsection (3)(A). Unfortunately, that distinction is illogical and fails to account for the Code's other uses of "with respect to the debtor."

Additionally, Congress knew how to terminate the entire stay, as evidenced in subsection 362(c)(4)(A). In that section of the Code, Congress omitted the limiting language found in subsection 362(c)(3)(A). When Congress omits a specific phrase used in another subsection, Congress demonstrates that it understands the use of the phrase and how that phrase limits the other terms in the statute.

Furthermore, it is a well-known canon of construction to read the statute in context with the Code as a whole. Section 362(a) includes property of the estate, property of the debtor, and acts against the debtor. Thus, three separate categories are stayed under section 362(a). However, when section 362(a) is read in conjunction with subsection 362(c)(3)(A), "with respect to the debtor" can only mean the debtor, and not the property of the estate. Congress makes additional distinctions between property of the estate and property of the debtor in section 521 as well. By

showing that the language still gives effect to the plain meaning, the better interpretation of the statutory context is not as limited as the minority approach views it.

This court should affirm the decision of the Thirteenth Circuit and adopt the plain meaning definition of "with respect to the debtor" for two reasons. Firstly, the use of "with respect to the debtor" is not ambiguous and the Court should not read into the statute terms and meanings that are not present. Secondly, the statutory context and canons of construction support the plain language meaning.

ARGUMENT

I. A cause of action under 11 U.S.C. § 362 of the Bankruptcy Code is not arbitrable because an inherent conflict exists between the Code and the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*.

The main purpose of the Code is to give the debtor a "fresh start." *Marrama v. Citizens Bank of Mass*., 549 U. S. 365, 367 (2007) (quoting *Grogan v. Garner*, 498 U. S. 279, 286 (1991)). From this main goal, the Code sets two things in motion upon the filing of a petition. Firstly, the bankruptcy estate is created. 11 U.S.C. § 541(a). The bankruptcy estate includes "all legal or equitable interests of the debtor." 11 U.S.C. § 541(a)(1). For a debtor to succeed with a Chapter 11 or Chapter 13 reorganization plan, the debtor or debtor-in-possession need income to pay the creditors. *See generally* 11 U.S.C. § 109(e) ("individuals with regular income" are required for Chapter 13).

Secondly, the automatic stay stalls any creditor collection efforts against the debtor arising from prepetition legal rights. 11 U.S.C. § 362(a). The purpose of the stay is to prevent a creditor from altering, to the detriment of the other parties in interest, the bankruptcy estate. *See* 11 U.S.C.

§ 362(a). The courts have discretion to alleviate the automatic stay when the debtor is able to provide a creditor adequate protection. 11 U.S.C. § 362(d)(1).

The issue in this appeal involves the crossroads of two different areas of law: arbitration and bankruptcy. The Federal Arbitration Act ("FAA") was enacted by Congress to settle contract disagreements as quickly and efficiently as possible. 9 U.S.C. § 2. In that regard, the FAA and the Code espouse similar objectives—efficient resolution. However, the similarities end there.

The FAA is designed to resolve disputes between two parties and the Code is designed to resolve conflicts between multiple parties. *Compare* 9 U.S.C. § 2 (relating to a written provision or contract) *with* Fed. R. Bankr. P. 2018(a) ("the court may permit any interested entity to intervene generally or with respect to any specified manner"). Additionally, arbitration does not bind the interested entities who are not parties. *Patel v. Regions Bank,* 808 F. App'x 242, 244 (5th Cir. 2020) ("non-signatories to a contract cannot be bound by arbitration agreements"). Other creditors and interested parties cannot be compelled to participate in the arbitration. Lastly, the bankruptcy courts and the arbitrators oversee different jurisdictions as well. *In re Spectrum Info. Techs., Inc.*, 183 B.R. 360, 363 (Bankr. E.D.N.Y. 1995) ("arbitration should not triumph over the specific jurisdiction bestowed upon the bankruptcy courts"); *see Ins. Co. of N. Am. V. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.),* 118 F.3d 1056, 1061 (5th Cir. 1997) ("[The] bankruptcy court was the most efficient forum to determine the issue raised in the complaint. Accordingly, the Bankruptcy Court refused to abstain or to stay the adversary proceeding pending arbitration").

There is a strong presumption that arbitrations are valid and enforceable. *See Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Despite the presumption, the bankruptcy court may decline to enforce the arbitration agreement. *Id*. The FAA mandate may be overridden by

contrary congressional command or from "an inherent conflict between arbitration and the statute's underlying purposes." *Id.* at 226–27. As noted in the Second Circuit, some of the purposes of the automatic stay are "providing debtors with a fresh start, protecting assets of the estate, and allowing the bankruptcy court to centralize disputes concerning the estate." *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 109 (2d Cir. 2006) (finding no conflict between the automatic stay and arbitration when the recovery and cause of action would not impact the bankruptcy estate).

The party in opposition must show Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 227. Thus, the strict mandate in favor of arbitration must be enforced unless an inherent conflict exists between the automatic stay in the Code and the FAA. *See id.* at 226–27.

A. The lower courts correctly decided an inherent conflict exists between 11 U.S.C. § 362 and the Federal Arbitration Act.

When determining whether the court should compel the arbitration, bankruptcy courts often assess whether the dispute arises between a core and non-core proceeding. *See United States Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (In re U.S. Lines, Inc.)*, 197 F.3d 631, 636 (2d Cir. 1999). Core bankruptcy proceedings arise under the Code but are not prepetition rights. *See In re Wood*, 825 F.2d. 90, 94 (4th Cir. 2012). Congress devised a list of core areas of the Code in 28 U.S.C. § 157. 28 U.S.C. § 157(b)(2) ("Core proceedings include, but are not limited to…") *but see Stern v. Marshall*, 564 U.S. 462, 487-88 (2011) (questioning the validity of the list due to Article III limitations). However, motions for relief from the automatic stay in 11 U.S.C. § 362 are the most common core proceedings. *In re Nat'l Gypsum Co.*, 118 F.3d at 1068.

Whether the dispute is core or non-core is important. If the dispute is non-core, the bankruptcy courts lack discretion and must compel the arbitration. *See In re U.S. Lines, Inc.,* 197 F.3d at 636. In contrast, if the bankruptcy court determines that the proceeding is a core bankruptcy

proceeding, the court has discretion to decline to enforce the arbitration agreement—effectively overriding the policy favoring arbitration. *See Celotex Corp. v. Edwards*, 541 U.S. 300, 308 (1995) ("Congress intended to grant comprehensive jurisdiction to bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate"); *Henry v. Educ. Fin. Serv. (In re Henry)*, 944 F.3d 587, 590 (5th Cir. 2019); *S.G. Phillips Constructors, Inc. v. City of Burlington (In re S.G. Phillips Constructors, Inc.)*, 45 F.3d 702, 704 (2d Cir. 1995) (quoting 28 U.S.C. § 157(b)(1)) ("Bankruptcy judges have the authority to 'hear and determine all ... core proceedings arising under title 11…'").

Many courts find an inherent conflict exists between the FAA and the Code's core proceedings. In the Second Circuit, the court found the declaratory judgment proceedings were "integral to the bankruptcy court's ability to preserve and equitably distribute … assets." *In re U.S. Lines, Inc.,* 197 F.3d at 641. Likewise, the Fourth Circuit, in *Moses v. CashCall, Inc.*, refused to arbitrate a core claim. *Moses v. CashCall, Inc.*, 781 F.3d 63, 73 (4th Cir. 2015) (finding that a core proceeding related to the proof of claim under dispute was not arbitrable but the non-core claim relating to damages under state law was arbitrable).

Even though core claims represent pressing bankruptcy concerns, the courts must still find an inherent conflict between the specific Code section and the FAA before exercising discretion. *In re U.S. Lines, Inc.,* 197 F.3d at 641; *In re Nat'l Gypsum Co.,* 118 F.3d at 1068-69 ("bankruptcy courts regularly have permitted arbitration to continue (or commence) in spite of the presence of core bankruptcy jurisdiction"). Only if the court determines the proceeding "adjudicate[s] statutory rights conferred by Bankruptcy Code and not debtor's pre-petition legal rights," *In re Nat'l Gypsum*, 118 F.3d at 1069, and if the court then determines that "requiring arbitration would conflict with the purpose of the Bankruptcy Code," *In re Gandy*, 299 F.3d 489 (5th Cir. 2002),

does the court have the discretion not to enforce the arbitration agreement. *In re Henry*, 944 F.3d 587, 590–91 (5th Cir. 2019).

The courts must "carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause." *In re U.S. Lines, Inc.*, 197 F.3d at 640 (quoting *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1161 (3d Cir. 1989)). To show that the bankruptcy jurisdiction conflicts with arbitration, the respondent must prove the costs are substantial, delays are severe, or arbitration prejudices the rights of the creditors. *In re Nat'l Gypsum*, 118 F.3d at n. 21; *In re Gaughf*, No. 19-50947-KMS, 2020 WL 1271595 (Bankr. S.D. Miss. March 12, 2020); *Hays & Co*, 885 F.2d at 1158.

The purpose of the automatic stay of the Code is in inherent conflict with the FAA. The stay is designed to halt pending cases or the commencement of new cases against the debtor or to obtain possession of property of the estate. 11 U.S.C. §§ 362(a)(1) and (3). The stay also prohibits acts that would occur during arbitration—liens, enforcements against property of the estate or debtor, and acts to recover a claim that arose before commencement. 11 U.S.C. §§ 362(a)(4)–(6). The stay is in direct conflict with the purpose of the FAA—to "stay the trial of the action until such arbitration has been had." 9 U.S.C. § 3. Thus, the Code specifically limits entities from seeking prepetition remedies while the FAA encourages it. By following the policy in favor of arbitration, the automatic stay of the Code is superseded—the authority of the bankruptcy court is limited in its control and authority over the bankruptcy estate. As such, the automatic stay inherently conflicts with the FAA.

Additionally, the respondent met his burden at the lower courts. The repossession of the brewery equipment impacts not only Wildflowers, but Petty's other creditors in the reorganization plan. Petty's entire ability to reorganize stems from his ability to fund his reorganization plan with

the earnings from the second brewery and its assets. With Wildflowers taking possession of the brewery equipment, Petty's other creditors were less likely to receive any repayment. Additionally, if allowed to arbitrate, the other creditors would lose access and experience delays to assets of the estate in the Chapter 11 proceeding. Resolving the dispute with Wildflowers in the bankruptcy court is imperative if Petty is to receive a "fresh start."

B. Bankruptcy is explicitly mentioned in the United States Constitution—giving it greater authority and weight than the Federal Arbitration Act.

The United States Constitution divides authority among the three branches—Executive, Judicial, and Legislative. U.S. Const. arts. I, II, and III. The congressional authority, in Article 1, "are defined, and limited." *Marbury v. Madison*, 5 U.S. (Cranch) 137, 176 (1803). "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000). Eighteen clauses in Article 1 enumerate specific powers. U.S. Const. art. I, § 8. Of importance, clause 4 grants Congress "[p]ower . . . [t]o establish. . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. In the third clause, Congress is given the power to regulate commerce "among the several States". U.S. Const. art. I, § 8, cl. 3.

The Bankruptcy Code stems from the enumerated, or specific, authority conferred on Congress. U.S. Const. art. I, § 8, cl. 4. As a result of that authority, Congress passed the first United States bankruptcy law in 1800 and later enacted the Bankruptcy Code in 1978. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 6–7 (1995). The current Code was revised heavily in 2005 with passage of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). Pub. L. No. 109-8, 119 Stat. 23.

Over the years, significant litigation has occurred—from debating the meaning of Code passages to whether other federal statutes conflict. *See e.g. Epic Sys. Corp. v. Lewis*, 138 S. Ct.

1612, 1628 (2018) (finding no conflict between the Code and National Labor Relations Act). Following BAPCPA's enactment, numerous courts have noted statutory interpretation problems. *See e.g. Attorneys Milavetz, Gallop & Milavetz, P.A. v. United States,* 559 U.S. 229, 235–36 (2010) (finding attorneys could be included as debt relief agencies under BAPCPA) and *Baud v. Carroll*, 634 F.3d 327, 330 (6th Cir. 2011) (discussing the difficulties with the projected disposable income test in 11 U.S.C. § 1325(b)(1)).

In *Allen v. Cooper*, this Court heard an argument comparing copyright law and the Bankruptcy Code. *Allen v. Cooper*, 140 S. Ct. 994 (2020). Petitioners there relied on the fact that the two areas of law are both mentioned in Article 1 of the United States Constitution. *Id.* In the opinion, this Court referenced an earlier holding, *Central. Va. Community College v. Katz*. In *Central. Va. Community College v. Katz*, this Court used the Framers's reasoning behind the bankruptcy clause's enactment to highlight the uniqueness of the Code among the authorities granted in Article 1. "Our decision, in short, viewed bankruptcy as on a different plane, governed by principles all its own." *Allen v. Cooper*, 140 S. Ct. at 1002–03 (referring to the decision in *Central Va. Community College v. Katz*, 546 U.S. 356 (2006)). As a result, this court has set the precedent that the Bankruptcy Code deserves special treatment compared to other federal laws.

In contrast, the FAA stems from the Commerce clause. 9 U.S.C. § 2 ("a transaction involving commerce"). Other acts, such as the National Labor Relations Act, also find their roots in the Commerce Clause. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). Despite the recent expansion of Congress's powers, the Commerce Clause "power is [still] subject to outer limits." *United States v. Lopez*, 514 U.S. 549, 557 (1995).

This Court has repeatedly rejected conflicts between the FAA and other federal statutes. In *Epic*, this Court opined that it did not find "congressional command sufficient to displace the

Arbitration Act" in several earlier cases and did not find congressional intent in the National Labor Relations Act did either. *Epic Sys. Corp.*, 138 S. Ct. at 1628; *see also Bauer v. Credit Cent., LLC (In re Bauer)*, 2020 Bankr. LEXIS 1532, at *4 (Bankr. D.S.C. June 8, 2020) (highlighting the lack of conflicts with the National Labor Relations Act, Securities Exchange Act, and others). However, there is an important distinction between the Bankruptcy Code and most other federal statutes—Bankruptcy is specifically enumerated in Article 1. While the presumption in favor of arbitration, and the weight of the Commerce Clause, is lofty enough to win conflicts against other acts passed by Congress, the FAA does not have the same weight as a law enacted because of a specified enumerated power. Where the Commerce Clause is limited, the Bankruptcy Clause is less so. Unlike the other cases heard before the courts, where the presumption in favor of arbitration was not displaced, here those relationships between the statutes and their authorities weight in favor of the Code. Because the Code holds greater authority than the FAA, it may impliedly repeal the Arbitration Act during inherent conflicts.

C. The tests opined in *Epic Sys.* and *McMahon* both promote the presumption in favor of arbitration until the party in opposition demonstrates an inherent conflict.

Lastly, the Petitioners argued that this Court's decision in *Epic Sys. Corp. v. Lewis* eliminated a court's discretion to decline arbitration. *Wildflowers Comm. Bank v. Petty*, Case No. 19-0805, 9 (13th Cir. March 4, 2020). However, *Epic* does not overturn *McMahon*. *In re Henry*, 944 F.3d 587, 591 (5th Cir. 2019). "*Epic Systems* never stated an intention to overrule *McMahon* or render any prong of its tripartite test dead letter." *Belton v. GE Capital Retail Bank (In re Belton)*, 961 F.3d 612, 616 (2d Cir. 2020). Instead, *Epic* cites to *McMahon* for support and the tests outlined by this Court in both cases are essentially the same. *In re Henry*, 944 F.3d at 591; *see Epic Sys. Corp.*, 138 S. Ct. at 1627 (referring to Court precedents).

In both cases, this Court agreed that the presumption in favor of arbitration could be overridden. *Compare Epic Sys. Corp.,* 138 S. Ct. at 1623–24 *with McMahon,* 482 U.S. at 226. In *McMahon*, this Court outlined a test to determine a "deducible" congressional intent. *McMahon*, 482 U.S. at 227. The same test is outlined in *Epic,* only there it is referred to as "clear and manifest." *Epic Sys. Corp.*, 138 S. Ct. at 1624. The only difference between the tests is that *McMahon* looked at the legislative history while in *Epic*, this Court did not need to assess the legislative history in its analysis. *Compare McMahon*, 482 U.S. at 227 *with Epic Sys. Corp.,* 138 S. Ct. at 1632.

This "difference," however, is a perception based on the narrow question before the Court in *Epic.* When the Fifth Circuit applied *McMahon* in *In re Nat'l Gypsum*, the court did not look at the legislative history for support, but rather focused on the Code. *In re Henry,* 944 F.3d 587, 592 (5th Cir. 2019). As a result, the court essentially applied *Epic* before it was decided by this Court. *See id.* at 592. Because the decision in *In re Nat'l Gypsum* looked to the Code for support, the Fifth Circuit followed both *McMahon* and *Epic.* As a result, *Epic* does not stand for the proposition that legislative history is irrelevant, nor does it replace *McMahon*. Instead, *McMahon* remains binding precedent.

II. 11 U.S.C. § 362(c)(3)(A) indicates the stay terminates only "with respect to the debtor."

The automatic stay occurs spontaneously with the filing of the bankruptcy case. 11 U.S.C. § 362. There are two provisions that limit the stay for repeat filers. *See* 11 U.S.C. §§ 362(c)(3) and (4). When an individual previously filed a bankruptcy proceeding within the prior year, but that proceeding was dismissed, the automatic stay is limited to thirty days after filing. 11 U.S.C. § 362(c)(3)(A). Upon "the motion of a party in interest" the court may extend the stay beyond the initial thirty days. 11 U.S.C. § 362(c)(3)(B). The party in interest must rebut the presumption that

the second case was filed in bad faith. 11 U.S.C. § 362(c)(3)(B). If a party in interest is unsure whether the stay was extended beyond the thirty days, that party can seek a confirmation from the court as to the date of expiration of the stay. 11 U.S.C. § 362(j).

In this case, Petty did not seek an extension of the stay. R. at 6. Wildflowers waited two days, believing the stay expired after thirty day, before moving to repossess the collateral. R. at 6. Though Wildflowers filed this petition with hope that they did not violate the automatic stay, the lower courts correctly decided the stay remained in effect beyond the thirty days, because the stay expiration applied only to the debtor and not the property of the estate.

The differences in viewpoints are the result of statutory interpretation. There are many schools of thought as to statutory interpretation. *See e.g. Price v. Del. State Police Fed. Credit Union (In re Price),* 370 F.3d 362, 369 (3d Cir. 2004) ("susceptible to differing constructions"). Textualists follow the plain meaning or linguistic canons of construction. *Harbison v. Bell*, 556 U.S. 180, 198 (2009) (Thomas, J., concurring). Intentionalists start with the plain meaning, but quickly focus on the legislative history and several of the other canons of construction. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992) ("Legislative history helps a court understand the context and purpose of a statute").

A. The plain meaning of "with respect to the debtor" in 11 U.S.C. § 362(c)(3)(A) is not ambiguous.

Regardless of which statutory interpretation viewpoint the judge follows, this Court has repeatedly said that statutory interpretation begins with plain meaning. *See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist*., 541 U.S. 246, 252 (2004). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Id.* (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,* 469 U.S. 189, 194 (1985)). "[W]hen the statute's language is plan, the sole

function of the courts. . . is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6 (2000) (internal quotation marks and citation omitted). Likewise, courts are not to "deviate from the result suggested by the structure of the statute itself." *Jeffers v. United States,* 432 U.S. 137, 156–57 & n. 26 (1977). "The presumption is that the accepted and plain meaning of the words is what Congress intended." *In re Trejos*, 352 B.R. 249, 255 (Bankr. D. Nev. 2006), aff'd, 374 B.R. 210 (B.A.P. 9th Cir. 2007).

Beginning with the plain meaning is also in line with how courts interpret the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). Section 362(c)(3) was added to the Code in 2005 as part of the BAPCPA. Pub. L. No. 109-8, 119 Stat. 23. This Court's earlier decisions analyzing BAPCPA provisions follow four steps: (1) the plain meaning of the text, (2) the statutory context, (3) whether the meaning creates absurdities, and (4) the Congressional purpose. *Carnegie v. Nationstar Mortg., LLC (In re Carnegie)*, 621 B.R. 392, 404 (Bankr. M.D.N.C. 2020) (applying the steps as outlined in *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69–78 (2011)). Typically, where the language is clear, courts do not factor in the legislative history in the interpretation. *In re Jones*, 339 B.R. 360, 364 (Bankr. E.D.N.C. 2006). However, this Court's precedent does weigh the Congressional purpose last. *See In re Carnegie*, 621 B.R. at 404 (applying the steps as outlined in *Ransom*, 562 U.S. at 69–78).

A minority of courts read the provision in subsection 362(c)(3)(A) as ambiguous. The ambiguity read in by those courts describes the drafting as "poorly written" and "bad work product." *In re Baldassaro*, 338 B.R. 178, 182 & n.3 (Bankr. D.N.H. 2006); see *In re Williford*, No. 13-31738, 2013 WL 3772840, at *2 (Bankr. N.D. Tex. July 17, 2013) (collecting cases). However, a statute is not rendered ambiguous just because it is awkward. *See Lamie,* 540 U.S. at

534. "[A] provision is ambiguous when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive." *In re Price*, 370 F.3d 362, 369 (3d Cir. 2004).

The language Congress chose in section 362 is clear and unambiguous upon a natural reading of the provision. Section 362(c)(3)(A) states: "the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt 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). As applied to subsection 362(c)(3) the "[p]lain language. . . dictates. . . the limit only applies to 'debts' or 'property of debtor' and not to 'property of estate.'" *In re Johnson*, 335 BR 805, 806 (Bankr. W.D. Tenn. 2006). "Section 362(c)(3)(A) as a whole is not free from ambiguity, but the words "with respect to the debtor" in that section are entirely plain." *In re Jones*, 339 B.R. at 363. There is a clear division between property of the estate and the debtor's property. *In re Reswick*, 446 B.R. 362, 366 (9th Cir. BAP 2011).

Additionally, the court in *In re Jones* also noted that a narrow interpretation makes the most sense because the property may need preservation in Chapter 7 or may need allocation in the plan under Chapter 13. *In re Jones*, 339 B.R. at 365. Because subsection (c) applies to all Chapters, the Chapter 7 trustee retains the opportunity to assess whether the property of the estate should "be liquidated for the benefit of the creditors." *In re Williams*, 346 B.R. 361, 369 (Bankr. E.D. Pa. 2006). The trustee would not need to move quickly to assess the property of the estate until the third filing. *Id*. The plain meaning of the phrase aligns with the narrow interpretation of the section. As a result, the plain meaning is not ambiguous.

B. Any perceived ambiguity in the text is resolved in the debtor's favor by reading the Code as a whole and considering the statutory context.

Comparing the plain language meaning to the statutory context also supports the plain meaning usage promoted by the majority of courts. Following the second and third steps as

outlined in *In re Carnegie,* statutory context and whether the usage renders the statute redundant, further promotes the plain meaning of the language "with respect to the debtor". *See In re Carnegie,* 621 B.R. at 404.

Statutory context compares the use of "with respect to the debtor" in subsection 362(c)(3)(A) with other uses of the phrase within the Code. *See In re Carnegie,* 621 B.R. at 404. *"*A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear. . ." *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988) (citations omitted). "A court must consider 'the broader context of the statute as a whole.'" *In re Reswick*, 446 B.R. at 367 (quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997)). This "Court has acknowledged that within a code such as the Bankruptcy Code, similar words and phrases presumptively will receive the same construction, even if found in different parts of the code." *In re Trejos*, 352 B.R. 249, 257 (Bankr. D. Nev. 2006), aff'd, 374 B.R. 210 (B.A.P. 9th Cir. 2007).

The minority view fails to consider the broader statutory context, instead focuses only on the context of the language within the section of 362(c)(3). *In re Reswick*, 446 B.R. at 366. Despite correctly stating that "reading the phrase in context, rather than in isolation, better comports with principles of statutory construction," the minority courts view the distinction as one between the debtor and debtor's spouse because subsection 362(c)(3) begins with "single or joint case." *Id.* at 366–67. This argument is not persuasive, and it fails to consider other uses of "with respect to the debtor" in other Code sections.

The majority view correctly considers the rest of section 362 and other sections of the Code. *See Rose v. Select Portfolio Servicing, Inc.,* 945 F.3d 226, 230 (5th Cir. 2019), *cert. denied,*

141 S. Ct. 158 (2020) ("[W]e note that § 362(c)(3)(A) cannot be read in isolation; it must be read in conjunction with § 362(a). . .") Section 362(a) includes acts against the debtor, property of the debtor and property of the estate. *In re Jones*, 339 B.R. at 364. Thus, three separate categories are stayed under subsection 362(a). When subsection 362(c)(3) is read in conjunction with subsection 362(a), the meaning of "with respect to the debtor" becomes clear. The stay is terminated "with respect to the debtor" with no mention of the bankruptcy estate or a distinguishment between the debtor and debtor's spouse. Any other interpretation of the plain meaning would essentially delete that language or read the other two categories of property into the language. The Fifth Circuit has declined to read such language into the provision. *Rose,* 945 F. 3d at 230.

Further supporting the statutory context, Congress showed its ability to distinguish between property of the estate and property of the debtor and how to terminate the entire stay. *See e.g. In re Jones*, 339 B.R. at 364 (Section 521 "distinguishes between property of the estate and property of the debtor."). In subsection 362(c)(4)(A)(i) the lack of a qualifier terminates the stay in its entirety. *Rose*, 945 F.3d at 230–231. Congressional silence is as important as its express usage of terms.

In contrast, Congress chose to use a qualifier in section 362(c)(3)(A). This can only be interpreted as "implying a limitation upon the scope of the termination of the automatic stay." *See e.g. In re Williford*, 2013 WL 3772840, at *3 (discussing section 362(c)(4)(A)(i)'s language in relation to section 362(c)(3)(A)'s). By showing the ability to distinguish the terms in other statutes, the reader gleans clarity to the understanding of the terms when they are present and when they are noticeably absent.

Just as the statutory context as a whole supports the Respondent's argument against ambiguity, the third stage—looking at whether use of the term renders a section redundant—

highlights the canon against surplusage. This canon is often used when considering the statutory context and requires courts give each word effect. *See Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Meaning, that statutes should not be read to render another statute inoperative or redundant. *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *see Colautti*, 439 U.S. at 392. If using the plain meaning would create redundant statutes or render another section of the code inoperative, the plain meaning should not be used. *See Yates v. United States,* 574 U.S. 528, 543 (2015) (plurality opinion).

Here, use of the plain meaning does not render another section inoperative. Indeed, sections 362(c)(3)(A) and (B) are not inconsistent, redundant, or rendered inoperative by the plain meaning use. *In re Jones*, 339 B.R. at 364. If (c)(3)(A) only applies to the debtor, no other interested party will seek an extension of the stay, as allowed to "any party in interest" under (c)(3)(B). However, that does not render the interpretation invalid, only slightly inconsistent. *In re Jones*, 339 B.R. at 364 (noting that BAPCPA is known for its inconsistencies). While it is unlikely another party in interest, other than the debtor, or debtor-in-possession, would benefit from an extension of the automatic stay beyond the thirty days—it is not an impossible scenario. Because a party in interest will almost always benefit from extending the automatic stay beyond the thirty days, the text still performs as written when following the plain meaning approach.

C. Repetition within the Code of "with respect to the debtor" indicates Congressional purpose to use the term the same way each time.

The fourth step of the analysis looks to the congressional purpose. *In re Carnegie*, 621 B.R. at 404 (applying the steps as outlined in *Ransom,* 562 U.S. at 69–78). When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). Additionally, "repetition of the same

language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998).

Courts have repeatedly found the language of "with respect to the debtor" unambiguous. *See e.g. In re Johnson,* 335 BR at 806 (finding the language clearly refers to the debtor and not the property of the estate); *Rinard v. Positive Invs., Inc. (In re Rinard)*, 451 B.R. 12, 20 (Bankr. C.D. Cal. 2011) ("There are no fuzzy words; there are no hanging paragraphs; there are no words requiring a dictionary"). Courts have even looked at the similar phrasing of "by the debtor" as unambiguous. *See e.g. Deroche v. Miller (In re Miller)*, 196 B.R. 334, 336 (Bankr. E.D. La. 1996) (describing the plain meaning of "by the debtor" correlates to the phrase after it). As a result, it is very likely Congress understood the plain meaning of the phrase "with respect to the debtor" when they modified the statute in 2005.

The Petitioner incorrectly assumes the changes to the Code section through BAPCPA are contrary to the Congressional goals behind BAPCPA. First, with Congressional purpose aligned with the plain meaning, legislative history into the "ambiguity" is irrelevant because there is no ambiguity. *See In re Jones*, 339 B.R. at 364. Second, the argument is circular, as Congress drafted the language for section 362(c)(3) to prevent abusive filings by limiting the automatic stay to certain scenarios, namely "with respect to the debtor". *See Ransom v. FIA Card Servs., N.A.,* 562 U.S. 61, 64 (2011). Terminating the stay only with respect to the debtor means that suits against the debtor continue, judgments against the debtor are enforceable, and collection efforts or liens against the debtor are allowed. *See In re Williams*, 346 B.R. 361, 367–69 (Bankr. E.D. Pa. 2006). As a result, the Congressional purpose is best interpreted as in line with the common or plain meaning of the terms "with respect to the debtor".

CONCLUSION

The present case perfectly demonstrates the importance of the automatic stay in the Bankruptcy Code. Allowing arbitration diminishes the statutory protections afforded the property of the estate and the strong presumption in favor of bankruptcy law. Additionally, reading extra language into section 362(c)(3)(A) renders the statute ambiguous and judicially creates new meaning than the plain language used by Congress in drafting. For the reasons stated, this Court should affirm the decisions of the Thirteenth Circuit Court of Appeals.