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

BRIEF FOR RESPONDENT

Team R. 30
Counsel for Respondent

Oral Argument Requested

QUESTIONS PRESENTED

I. When a two-party dispute is governed by a valid arbitration agreement, and one party files for bankruptcy, does the underlying purpose of the Bankruptcy Code (the "Code") inherently conflict with the Federal Arbitration Act ("FAA") such that the Code implicitly repeals the FAA, thus permitting the bankruptcy judge to deny a motion to compel arbitration?

II. To determine whether a creditor violated the automatic stay by repossessing property of the estate, does 11 U.S.C. § 362(c)(3)(A) terminate the stay in its entirety, or only "with respect to the debtor," as the plain text of the statute provides?

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OPINIONS BELOW

The decision of the U.S. Bankruptcy Court for the District of Moot is unreported and therefore unavailable. The decision for the U.S. Court of Appeals for the Thirteenth Circuit is also unreported. The opinion for the Thirteenth Circuit is set forth in Case No. 19-0805, dated March 4, 2020, and is incorporated in the record on appeal (hereinafter, "R.").

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

9 U.S.C. §§ 1–4;

11 U.S.C. §§ 362, 506, 521, 541, 704, 157, 654;

28 U.S.C. §§ 1331, 1334;

Fed. R. Bankr. P. 2019, 9019.

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BRIEF FOR RESPONDENT

TO THE SUPREME COURT OF THE UNITED STATES:

Respondent, Earl Thomas Petty, appellee in Case No. 19-0805 before the United States Court of Appeals for the Thirteenth Circuit, respectfully submits this brief on the merits and asks this Court to affirm the decision of the Thirteenth Circuit Court of Appeals.

STATEMENT OF FACTS

The Parties. This case involves a small business entrepreneur who started brewing beer in his basement, eventually opening his own award-winning craft brewing company. The bank that helped fund the early growth of the business was ultimately the same bank that shut it down. (R. at 3,6). Respondent Earl Thomas Petty ("Petty") opened his brewery, Great Wide Open Brewing Company, Inc., ("GBO") in 2002, purchasing a 9,000 square foot taproom and small batch brewing equipment with his own savings. (R. at 3). GBO soon became wildly successful statewide and Petty began thinking about expanding. (R. at 3-4).

The Agreement. To expand, Petty turned to Appellant Wildflowers Community Bank (the "Bank"), and the two parties entered into a $35 million revolving credit agreement. (R. at 4). GBO granted the Bank a first priority lien on substantially all of its assets and Petty executed a personal guaranty, unconditionally guaranteeing repayment of the business's obligations. (R. at 4). To secure this guarantee, Petty granted the Bank a first priority lien on the small batch brewing equipment (the "Equipment"). (R. at 4).

The Terms. The Credit Agreement and Guarantee contained a "Remedies" clause granting the Bank "the right to enter any premises where Collateral may be located for the purposes of repossessing Collateral without the need for any prior judicial action." (R. at 4). Additionally, the agreements contained a binding arbitration clause to resolve any disputes. (R. at 4).

The Bankruptcy Filing. Following an increase in competition and reduction in demand for craft beer, GBO began accruing significant debt. (R. at 5). GBO and Petty defaulted on their respective payment obligations in April 2018, prompting the Bank to file a demand for arbitration and a breach of contract action, seeking approximately $33.2 million in damages. (R. at 5). On July 11, 2018, GBO ceased all operations. (R. at 5). The next day, the business filed a chapter 7

bankruptcy petition in the Bankruptcy Court for the District of Moot. (R. at 5). The same day, Petty filed his own chapter 11 petition. (R. at 5). Petty's initial petition was dismissed on August 27, 2018, and he filed a second chapter 11 petition on January 11, 2019. (R. at 5). The Bank recovered the lion's share of the distribution from GBO's chapter 7 liquidation—approximately $31.1 million. The Bank filed a proof of claim for the remaining $2.1 million in Petty's second chapter 11 case.

The Dispute. During the course of the second proceeding, Petty negotiated a lease for the original taproom and had reopened a new business that quickly proved profitable in its first month of operations. (R. at 6). However, Petty failed to file a motion to extend the automatic stay under 11 U.S.C. § 362(c)(3)(B). (R. at 6). Thirty-two days after the commencement of the second case, the Bank repossessed the small batch brewing equipment in Petty's taproom. (R. at 6). One week later, Petty filed a motion alleging the Bank had violated the automatic stay, effectively shutting down his new business. (R. at 6-7). The Bank filed a response, arguing in the first instance that no automatic stay existed with respect to the property of the estate, including the Equipment, pursuant to 11 U.S.C. § 362(c)(3)(A). (R. at 7). The Bank further argued that Petty should be compelled to bring any claims against it in an arbitration proceeding because of the provision in the agreements. (R. at 7).

The Decision and Subsequent Appeals. The bankruptcy court ruled against the Bank, holding that the arbitration agreement would conflict with the Bankruptcy Code and that a creditor may not take action with respect to property of the debtor's estate, regardless of whether the stay extended. (R. at 7). In the bankruptcy court's view, the Equipment was indisputably property of Petty's estate. (R. at 7). The bankruptcy court certified both issues for direct appeal, and the Thirteenth Circuit affirmed. (R. at 7, 19). This appeal followed. (R. at 1).

SUMMARY OF THE ARGUMENT

The bankruptcy court properly denied a motion to compel arbitration filed by petitioner/creditor Wildflowers Community Bank (the "Bank") because Congress enacted the Bankruptcy Code (the "Code") with an underlying purpose that inherently conflicts with the Federal Arbitration Act ("FAA"), such that the Code implicitly repeals the FAA. Applying a well-reasoned textual analysis to 11 U.S.C. § 362(c)(3)(A), the court then correctly ruled that the Bank violated the automatic stay when it repossessed certain small batch brewing equipment (the "Equipment") owned by respondent/debtor Earl Thomas Petty ("Petty") because (a) the Equipment was property of Petty's individual chapter 11 bankruptcy estate, and (b) the court, following the approach taken by a majority of the nation's courts, construed the plain text of 11 U.S.C. § 362(c)(3)(A) to mean the automatic stay terminates "with respect to the debtor," but not property of the estate.

When Congress enacted the Code, it did so with full knowledge of the FAA. The Code was intended to serve a unique purpose, which at times inherently conflicts with the FAA to such degree that the Code implicitly overrides the FAA. The Bank's attempt to force Petty's public bankruptcy proceeding into private arbitration undermines fundamental Congressional bankruptcy policies promoting a centralized, collective process for resolving claims, the equitable distribution of estate assets among creditors, and notice and opportunity to object for all interested parties. Congress gave bankruptcy courts broad original jurisdiction "*notwithstanding* other Acts of Congress," including the FAA. And legislative history tells us that Congress intended for this comprehensive jurisdiction to cover arbitration, at least to the point that the bankruptcy judge decides to exercise permissive abstention.

The court was also correct in adopting the majority's plain language approach in its interpretation of 11 U.S.C. § 362(c)(3)(A), the text of which is objectively unambiguous, and even clearer in the wider context of the Code. The majority approach promotes the congressional goals of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") by discouraging "bad faith repeat filers" while also adhering to the statute's ordinary meaning and avoiding absurd and unfair results.

For these reasons, this Court should affirm the Thirteenth Circuit.

ARGUMENTS AND AUTHORITIES

The Thirteenth Circuit rightly affirmed that Petty's claim against the Bank for violating the automatic stay was valid and properly adjudicated in the bankruptcy court, despite a prior agreement between the parties to arbitrate. The text, history, and underlying purposes of the Bankruptcy Code (the "Code") and related provisions inherently conflict with the Federal Arbitration Act ("FAA"), to the degree necessary to infer congressional intent to override the FAA. Additionally, the bankruptcy court was justified in holding the Bank liable for violating the automatic stay because, by the plain text of the relevant statute, the stay terminated only "with respect to the debtor," not property of the estate. Accordingly, this Court should affirm the lower court's award of damages, allowing Petty to fund his chapter 11 plan for the benefit of all his creditors and customers.

This appeal turns solely on questions of law, and the facts presented herein are undisputed. A bankruptcy court's conclusions of law are generally subject to *de novo* review. *In re Gerhardt*, 348 F.3d 89, 91 (5th Cir. 2003). Therefore this Court should apply the *de novo* standard to the legal questions presented below.

I. CONGRESS ENACTED THE BANKRUPTCY CODE WITH A UNIQUE PURPOSE IN MIND—ONE WHICH INHERENTLY CONFLICTS WITH THE FAA, THEREBY EFFECTING ITS IMPLICIT REPEAL

Despite a valid arbitration agreement between the Bank and Petty, the bankruptcy court correctly determined it had the authority to adjudicate Petty's claims for damages flowing from the Bank's violation of the automatic stay. The text, history, and purpose of the Bankruptcy Code make clear that Congress intended the Code to override the FAA.

Arbitration agreements are matters of contract and should be enforced that way—that is, by their terms. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). But

for hundreds of years, courts had shown themselves 'unduly hostile to arbitration.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). So in 1925, Congress enacted the FAA. 9 U.S.C. §1 et seq.; *Id*. The statute was "designed to place arbitration agreements upon the same footing as other contracts." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974). It instructed courts to treat arbitration agreements as "valid, irrevocable, and enforceable" and to "rigorously" enforce them according to their terms. *Epic*, 138 S. Ct. at 1621; 9 U.S.C. §§ 2–4; *see also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) ("[T]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered"). The FAA's only exception is for agreements that are somehow flawed in their making. 9 U.S.C. § 2 ("[enforceable,] save upon such grounds as exist at law or in equity for the revocation of any contract"). Examples of these kinds of "generally applicable contract defenses" are "fraud, duress, or unconscionability." *Rent-A-Ctr., W., Inc. v. Jackson,* 561 U.S. 63, 68 (2010). Thus, notwithstanding a type of common law defense which would invalidate any contract, the FAA mandates enforcement of all arbitration agreements.

For all its importance, the FAA is still only a creature of legislative provenance. At any time, Congress is free to revise or repeal it. *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987) ("Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command"). Congress sometimes prefers the black pen to the red pen, however, and instead of revising current law, simply passes new legislation that conflicts with prior law, thus effecting a "repeal by implication."

When presented with two statutes that are in apparent conflict, courts first strive to harmonize both acts of Congress, operating under a strong presumption that Congress will expressly rather than implicitly repeal prior legislation. *Epic*, 138 S. Ct. at 1624. The party

asserting repeal-by-implication bears the burden of demonstrating that Congress manifested a clear intention that the latter override the former. *See id.*; *Wood v. United States*, 41 U.S. 342, 363 (1842). Congressional intent to override a prior statute "will be deducible from the statute's text or legislative history, or an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227 (internal quotations and alterations omitted).

Because the text, history, and underlying purposes of the Bankruptcy Code inherently conflict with the FAA, such that it is clear that Congress intended to repeal the FAA, the Thirteenth Circuit was correct in affirming the bankruptcy court's refusal to enforce the arbitration agreement For these reasons, this Court should affirm the lower courts.

A. Congress Intentionally Enacted a Bankruptcy Code with an Underlying Purpose that Inherently Conflicts with the Federal Arbitration Act.

As evidenced by the text and legislative history of the Bankruptcy Code, Congress intentionally crafted a legislative scheme designed to balance a debtor's fresh start with providing creditors with a centralized, collective process allowing them to participate and receive a fair distribution from the debtor's estate. The bankruptcy court was therefore correct in denying the Bank's motion to compel arbitration because arbitrating Petty's stay-violation claim outside of the bankruptcy court would limit the notice and participation of important stakeholders, such as the trustee and Petty's other creditors. As Petty's claim was a "core" issue, the court rightly retained jurisdiction over the matter—the outcome of which would implicate the interests of all parties.

In many ways, bankruptcy courts offer the same expediency as arbitration, so for some controversies, it can be a "close call" as to which is the preferable forum. *Compare In re Acis Capital Mgmt., L.P.*, 600 B.R. 541 (Bankr. N.D. Tex. 2019) ("the equitable and expeditious distribution of assets of the Debtor's estate" is a goal that "might support a denial of arbitration"); *with Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (trading

"the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration").

But at the "core" stage of inquiry, courts will consider conflicting congressional commands and the appropriateness of referral to arbitration. Under 28 U.S.C. § 157, a proceeding is "core" if it "arises under" title 11 (a proceeding that invokes a substantive right provided by the Bankruptcy Code), or if it "arises in" a bankruptcy case (a proceeding that, by its nature, could arise only in the context of a bankruptcy case). *See In re U.S. Brass Corp.*, 301 F.3d 296, 304 (5th Cir. 2002); *In re Senior Care Ctrs., LLC*, 622 B.R. 680, 692-93 (Bankr. N.D. Tex. Nov. 13, 2020). Bankruptcy courts have discretion to deny enforcement of arbitration agreements when the cause of action at issue is "core," and "that enforcement of the arbitration provision would conflict with the purposes/goals of the Bankruptcy Code." *See In re Nat'l Gypsum Co.*, 118 F.3d 1056, 1069 (5th Cir. 1997); *In re Acis Cap. Mgmt., L.P.*, 600 B.R. 541, 559 (Bankr. N.D. Tex. Apr. 16, 2019).

The Bank appeals the bankruptcy court's denial of a motion to compel arbitration, specifically of Petty's § 362(k) claim for damages arising from violations of the automatic stay. By its nature, a § 362(k) claim invokes a substantive right provided by the Bankruptcy Code, and is therefore a "core" proceeding. *See Budget Serv. Co. v. Better Homes of Virginia, Inc.*, 804 F.2d 289, 292 (4th Cir. 1986)("a proceeding to prosecute a violation of the automatic stay is a core proceeding within the meaning of 28 U.S.C. § 157(b)(1) and (2)"). Because arbitration under these facts would effectively prevent all third-party creditors from vindicating their rights, it is at odds with the purposes of the Bankruptcy Code, and this Court should therefore affirm the lower court's denial of arbitration.

1. Bilateral Arbitration Outside of an Existing Bankruptcy Case Inherently Conflicts with the Objectives of a Collective and Centralized Bankruptcy Process.

The private nature of arbitration is in conflict with the bankruptcy process, which is inherently a public affair. While parties are free to contract among themselves as they see fit, a problem arises when one of the parties to the contract enters into bankruptcy. The rest of that person's creditors are not signatories to the arbitration agreement, yet the document can have a profound impact on their rights, not least of which are creditors' due process rights. Bankruptcy provides a centralized forum to efficiently work out the parties' disputes, while allowing the debtor a chance to reorganize debts and rehabilitate their business. *See In re White Mountain Mining Co., L.L.C.*, 403 F.3d 164, 169–70 (4th Cir. 2005)

The Bank's attempts to unilaterally remove its claims against Petty to arbitration also runs counter to one of the essential objectives of the Bankruptcy Code—to provide a centralized forum for creditors to receive a fair opportunity to participate in proceedings affecting their interests. *See In re U.S. Lines, Inc.*, 197 F.3d 631, 640 (2d Cir. 1999); *Owens v. LVNV Funding, LLC*, 832 F.3d 726,732 (7th Cir. 2016) ("Above all, bankruptcy is a collective process, designed to gather together the assets and debts of the debtor and to effect an equitable distribution of those assets on account of the debts. The more participation there is; the better this process works"). Requiring arbitration outside of Petty's bankruptcy case would "seriously jeopardize the objectives of the Code" by affecting the substantive rights of Petty's other creditors, who are locked out of participating in the arbitration proceeding and denied notice and an opportunity to object. *See U.S. Lines*, 197 F.3d at 640 .

Arbitration is not prohibited by the Code or Rules, and where parties to the case consent, arbitration is allowed by court approval. 28 U.S.C. § 654; Rule 9019(c). Importantly, though,

while this statutory framework allows for the benefits of arbitration, it also gives other interested parties the chance to protect their rights and make their interests known in a public forum. *Id*.

Petty, having negotiated settlements with several of his creditors, filed a chapter 11 plan which proposed paying all creditors including the Bank forty cents on the dollar over the course of five years. (R. at 6). Were the Bank—a first-lien creditor—able to successfully pursue its $2+ million claims against Petty in a separate arbitration proceeding, Petty's chapter 11 bankruptcy plan would almost certainly fail, and his other creditors would likely face a recovery of zero cents-on-the-dollar. In other words, arbitration of the dispute between the Bank and Petty would severely jeopardize the prospects of a successful reorganization, frustrating any prospects of an equitable recovery for Petty's other creditors. Granting the Bank's motion to compel arbitration would therefore achieve an effect analogous to lifting the automatic stay for the Bank only. Legislative history discussing the automatic stay reminds us that this is precisely the type of outcome Congress intended to avoid when it enacted the Bankruptcy Code in 1978:

> "The automatic stay . . . also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally."

H.R.Rep. No. 595, 95th Cong. 1st Sess. (1977), S.Rep. No. 989, 95th Cong.2d Sess. 49 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5963, 6010).

Arbitration is by its very nature a closed-door proceeding, and participation is limited to signatory parties to the agreement. Dr. Stavros Brekoulakis, *The Relevance of the Interests of Third Parties in Arbitration: Taking A Closer Look at the Elephant in the Room*, 113 Penn St. L. Rev. 1165, 1166 (2009). Third parties, like the other creditors in Petty's bankruptcy case, are left

standing out in the cold: "[i]n short, third parties are considered aliens, with interests that are largely irrelevant to arbitration." *Id*. at 1167.

In contrast, outside of arbitration, when a third party has a legal or financial interest closely linked to the outcome of a bilateral proceeding, they have an opportunity to intervene, appear, and be heard. For example, Federal Bankruptcy Rule 7024, which incorporates Rule 24(a) of the Federal Rules of Civil Procedure, provides "[o]n timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action. . . ." Additionally, 11 U.S.C. § 1109(b) gives third parties the right to "be heard on *any issue* in a [chapter 11] case." (emphasis added). *See also* Fed. R. Bankr. P. 2019.

The irreconcilable conflict here is that "[t]he preeminent concern of Congress in passing the [FAA] was to enforce *private* arbitration agreements into which the parties had entered," *Scherk,* 417 U.S. at 519–20 (emphasis added). Meanwhile, the text of the Bankruptcy Code and Federal Bankruptcy Rules, as well as legislative history surrounding the Code's enactment clearly evidence a congressional intention for these conflicting commands to take precedence over the FAA. This Court should therefore affirm the bankruptcy court's denial of the Bank's motion to compel arbitration.

B. Clear Evidence of Congressional Intent to Override the Federal Policy Favoring Arbitration is Manifest in Bankruptcy Code's Jurisdictional Provisions.

When Petty filed for bankruptcy, his case commenced under the exclusive jurisdiction of the federal district courts, and by reference the bankruptcy courts. 28 U.S.C. §§ 1334(a), 157(a). The automatic stay went into effect, pausing the Bank's breach of contract arbitration proceeding. 11 U.S.C. § 362(a)(1). Petty filed a § 362(k) motion alleging the Bank violated the automatic stay, and the Bank countered with a motion to compel arbitration. (R. at 6–7). At this point, the

bankruptcy court had choice to make: refer or refuse? It rightly refused. *Id*. Because Congress gave the bankruptcy courts original jurisdiction over Petty's stay-violation proceeding, notwithstanding any other act of Congress granting exclusive jurisdiction elsewhere, it was the bankruptcy court's decision whether to divest itself of jurisdiction over the matter. *See* 28 U.S.C. 1334(c). On the other hand, the FAA says that if there is a valid arbitration agreement, and a party in court so moves, the court *must* refer the matter to arbitration. 9 U.S.C. § 4. Something has to give. In light of the plain preclusive language in Congress's broad jurisdictional grant, along with the legislative history and underlying purposes of the Code, this Court should affirm the lower court's holding—that under these facts, there is clear congressional intent to override the FAA's policy favoring arbitration.

1. In Granting Original Jurisdiction to the Bankruptcy Courts, Congress Clearly Intended to Repeal Prior Acts Conferring Exclusive Jurisdiction Elsewhere.

In 1978, Over fifty years after the FAA, Congress enacted the Bankruptcy Code, which broadly expanded bankruptcy court jurisdiction, and provided "*notwithstanding any Act of Congress* that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts [and the bankruptcy courts by referral under 11 U.S.C. § 157(a)] 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." 28 U.S.C. § 1334(b) (emphasis added). Some courts have wrongly insisted that despite this broad jurisdictional mandate, there is "no evidence within the text or in the legislative history that Congress intended to create an exception to the FAA in the Bankruptcy Code." *See e.g., In re Elec. Mach. Enters., Inc.*, 479 F.3d 791, 796 (11th Cir. 2007). But under *McMahon*, where there is an "inherent conflict between arbitration and the underlying purposes of the Bankruptcy Code," congressional intent to override the FAA may be deduced from the "text, history, or purposes of the statute." 482 U.S. at 227; *Elec. Mach.*, at 796. Here, the plain text of

the phrase “notwithstanding any Act of Congress” demonstrates Congressional intent to repeal by necessary implication any other act of Congress granting jurisdiction—even exclusive jurisdiction. *See* John R. Hardison, *Express Preclusion of the Federal Arbitration Act for All Bankruptcy-Related Matters*, 93 St. John's L. Rev. 627, 667 (2019).

The dissent mischaracterizes authority to support its claim that an arbiter may determine for itself whether the arbitration proceeding over which it presides is subject to a currently-in-effect automatic stay in the bankruptcy court. (R. at 24) (“(“The court in which [a non-bankruptcy] proceeding is pending . . . has jurisdiction to decide whether the proceeding is subject to the stay.”)”). What the court in *Dominic’s* actually says is “[t]he court in which *the judicial* proceeding is pending. . . .” *Dominic’s Rest. of Dayton, Inc. v. Mantia*, 683 F.3d 757, 760 (6th Cir. 2012) (citing *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 939 (6th Cir. 1986)). It is true that the district courts (and by referral the bankruptcy courts under 28 U.S.C. § 157(a)) are given concurrent jurisdiction under 28 U.S.C. § 1334 (b) to hear automatic stay proceedings. But importantly—they are given “*original* jurisdiction” over bankruptcy proceedings “*notwithstanding* any Act of Congress that confers exclusive jurisdiction on [other courts].” *McMahon*, 482 U.S. at 232 (emphasis added).

The dissenting judge in the Thirteenth Circuit’s opinion also misuses precedent by oversimplifying the holding in *Henry Schein* to foreclose any and all court consideration of arbitrability questions. (R. at 22 n.13). This is misleading. What this Court actually said in *Henry Schein* was that “[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract.” 139 S. Ct. at 531. But this Court went on to affirm that “courts should not assume that the parties agreed to arbitrate

arbitrability unless there is clear and unmistakable evidence that they did so." *Id.* (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (internal quotations omitted)).

When parties *do* agree to arbitrate, the FAA grants jurisdictional "dibs" to the arbitral forum. But Congress gave the bankruptcy courts "first dibs" over core matters like Petty's automatic stay proceedings. Arbitrators may indeed have the competence to hear a stay-violation proceeding, and bankruptcy courts are indeed permitted to abstain from hearing such matters. The rub is that bankruptcy courts *may* refer the matter to arbitration, but the FAA commands that courts (even bankruptcy courts) *shall* refer the matter to arbitration. *Compare* 28 U.S.C. § 1331(c)(1) *and* 9 U.S.C. § 4. It is impossible to reconcile the FAA's mandate with the merely permissive abstention available to bankruptcy courts under Title 28. *Cf.* 28 U.S.C. § 1334(c) (mandatory abstention).

The scope of the automatic stay is broad, "staying all proceedings, *including arbitration*." *In re U.S. Lines*, 197 F.3d at 639 (emphasis added). "In the bankruptcy setting, congressional intent to permit a bankruptcy court to enjoin arbitration is sufficiently clear to override even international arbitration agreements." *Id*. It is the epitome of dissonance to suggest that an arbitrator, faithfully adhering to the letter of the FAA, could by force of authority divest the bankruptcy court of its original jurisdiction in the face of 28 U.S.C. 1334(b)'s preclusive language—clear evidence that Congress intended to repeal exclusive jurisdiction conferred by "*any* [other] *Act of Congress* [including the FAA]." *Id*. Admittedly, "a finding of jurisdiction does not in itself demonstrate that the FAA inherently conflicts with the Bankruptcy Code." *In re Elec. Mach.*, 479 F.3d at 796. But one cannot deny that the text of the FAA and Title 28 reveals that when it comes to the issue whether a bankruptcy court *may* or *must* refer a stay-violation proceeding to arbitration, the statutes

are at loggerheads. This Court should not overlook the irreconcilable conflict and clearly preclusive language in Congress's grant of bankruptcy jurisdiction.

2. The Bankruptcy Code's Legislative History Also Evidences Congressional Intent to Expand Bankruptcy Court Jurisdiction to All Bankruptcy-Related Matters.

Legislative history also shows congressional intent for the bankruptcy courts to assume jurisdictional priority, and lends insight into the underlying purposes of the Code. The Court in *Celotex* examined the history surrounding enactment of the Bankruptcy Code. Describing the statute as a broad expansion of bankruptcy court jurisdiction, it concluded that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (citing S. Rep. No. 95-989, 2nd Sess., pt.1 at 153-54, 1978; *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (1984)). The House Report also addresses legislators' desire to forestall expensive litigation "over whether the bankruptcy court has jurisdiction," which threatened to unfairly prejudice negotiations between the trustee and other parties to the bankruptcy proceedings. *See* 93 St. John's L. Rev. at 653 (discussing H.R. REP. No. 95-595, xv, at 45-46 (1978).

The legislative history and the statutory text confirm that in conferring broad jurisdiction, Congress had a unique purpose in mind when it enacted the Bankruptcy Code. The inherent conflicts between the underlying policies of bankruptcy and arbitration, as well as the stark jurisdictional tensions between the respective statutes demonstrate that Congress intended to impliedly repeal the FAA. Therefore this Court should affirm the ruling of the Thirteenth Circuit.

II. PLAIN LANGUAGE AND FAIR POLICY WARRANT SENSIBLE CONSTRUCTION OF 11 U.S.C. § 362(c)(3)(A) TO MEAN THE AUTOMATIC STAY TERMINATES "WITH RESPECT TO THE DEBTOR"—NOT PROPERTY OF THE ESTATE.

The Thirteenth Circuit correctly held the automatic stay continued to protect Petty's Equipment because, based on a plain reading of the unambiguous language of 11 U.S.C. § 362(c)(3)(A), the stay did not terminate with respect to property of the estate.[1]

The statute at issue before the Court was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")[2]. As the name implies, there were perceived abuses of the bankruptcy system that Congress sought to curb. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 231 (2010). Of importance to the provision at issue were so-called "bad faith repeat filers." These were not the "honest but unfortunate" debtors the bankruptcy system is designed to protect. Congress even referred to them by that name in the title of the relevant section of BAPCPA.[3] The first provision of this new section was 11 U.S.C. § 362(c)(3)(A), which set up a system of progressively harsher penalties to deter repeat-filers. The harshest penalty is found in § 362(c)(4)(A)(i), which totally denies the benefit of the automatic stay to persons who filed three bankruptcy cases in the same year. One tier lower on the scale of deterrence is § 362(c)(3)(A).

Under 11 U.S.C. § 362(c)(3)(A), if a debtor had a bankruptcy case dismissed and then subsequently filed a second case in the same year, the automatic stay terminates after thirty days "with respect to the debtor"—absent a showing of good faith. *See* 11 U.S.C. § 362(c)(3)(B). If a court construes the term "with respect to the debtor" by its plain language, the automatic stay only

[1] The parties do not dispute that Petty's small-batch brewing equipment (the "Equipment") is "property of the estate."
[2] PL 109–8, April 20, 2005, 119 Stat 23
[3] "SEC. 302. DISCOURAGING BAD FAITH REPEAT FILINGS."

terminates with respect to the debtor and the debtor's property, but does not terminate with respect to property of the estate. *In re Rinard*, 451 B.R. 12, 17 (Bankr. C.D. Cal. 2011). The majority of courts agree that the language of § 362(c)(3)(A) is unambiguous, and that the automatic stay protection remains as to property of the estate. *See, e.g.*, *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226, 230 (5th Cir. 2019); *In re Thu Thi Dao*, 616 B.R. 103, 106 (Bankr. E.D. Cal. 2020)(listing cases); *In re Holcomb*, 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008). A substantial minority of courts disagrees, instead interpreting the statute to terminate the stay in its entirety—with respect to the debtor, the debtor's property, and property of the estate. *See, e.g.*, *In re Smith*, 910 F.3d 576, 582 (1st Cir. 2018); *In re Goodrich*, 587 B.R. 829, 842 (Bankr. D. Vt. 2018); *In re Reswick*, 446 B.R. 362, 367 (B.A.P. 9th Cir. 2011) (listing cases).

As discussed above, the automatic stay is a fundamental debtor protection which allows the debtor a breathing spell in order to make a plan, allowing for an orderly, centralized, and fair process of distributing assets of property of the estate among creditors. *See Smith*, 910 F.3d at 580. In Petty's case, the minority approach would terminate the stay in its entirety, thus allowing the Bank, as a first-priority lien holder, to *re*-repossess the Equipment—in effect, jumping the line of creditors. Allowing the Bank to jump the line means that Petty has no hope of reopening his business and there is essentially no estate left to distribute, nor any hope of funding a chapter 11 plan for the benefit of his other creditors. The minority's expansive reading invites unfair and absurd outcomes which run counter to fundamental policy objectives of the bankruptcy system and its administration procedures. Because the text of the statute is clear, and because it promotes outcomes in harmony with the underlying purposes of the Code, this Court should ratify the majority's plain-meaning approach—that the automatic stay under 11 U.S.C. § 362(c)(3)(A) does not terminate as to property of the estate.

A. The Language of § 362(c)(3)(A) Dictates a Common-Sense Construction: The Stay Terminates "With Respect to the Debtor, but Not Property of the Estate.

In correctly holding that the automatic stay terminated only with respect to Petty, and not the Equipment, the Thirteenth Circuit followed the majority's plain-language approach, which derives the readily-ascertainable meaning available from the unambiguous words of the statute, as well as from their wider context in the Code. The most logical reading of 11 U.S.C. § 362(c)(3)(A) derives its meaning from that which is self-evident. This Court should therefore hold that in view of the plain text, and in the wider context of the statute, the term "with respect to the debtor" does not encompass property of the estate.

1. The Meaning of the Words "With Respect to the Debtor" is Plain and Unambiguous.

As the majority of courts have found, the ordinary meaning of § 362(c)(3)(A) and its related provisions is unambiguous. *See, e.g.*, *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226, 230 (5th Cir. 2019); *In re Holcomb*, 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008); *In re Thu Thi Dao*, 616 B.R. 103, 109 (Bankr. E.D. Cal. 2020) (collecting cases). At first blush, the text of § 362(c)(3)(A) would seem facially uncontroversial, yet there persists a difference of opinion regarding its interpretation. This Court's "interpretation of the Bankruptcy Code starts 'where all such inquiries must begin: with the language of the statute itself.'" *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). The phrase "with respect to the debtor" in isolation appears utterly unremarkable. "There are no fuzzy words; there are no hanging paragraphs; there are no words requiring a dictionary." *In re Rinard*, 451 B.R. at 20. And "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004); *see also Nat'l Ass'n of Mfrs. v. Dep't of*

Def., 138 S. Ct. 617 (2018) ("because the plain language . . . is unambiguous, our inquiry begins with the statutory text, and ends there as well") (internal quotations omitted).

2. Examined in the Wider Context of the Statute, the Majority Approach Confirms the Plain Meaning

Section 362(c)(3)(A) does not exist in a vacuum, however. It derives meaning not only from its plain language, but from its use in the context of neighboring sections, as well as the Code in general. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Of particular relevance is the first of the Code's automatic stay provisions, § 362(a), which defines the scope of the automatic stay, and lists three categories of actions it operates to enjoin: actions against the debtor, actions against property of the debtor, and actions against property of the estate. *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226, 230 (5th Cir. 2019). By comparing the language in § 362(a) to § 362(c)(3)(A), the salient nature of the phrase "with respect to the debtor" becomes apparent. In other words, it means what it says, and nothing more. *Id*.

The minority's policy-based approach would graft additional meaning onto the statute by adding "and with respect to property of the estate," which "requires one to read into the statute words which are not there." *In re Bender*, 562 B.R. 578, 583 (Bankr. E.D.N.Y. 2016). Admittedly, the majority approach has been accused of doing the same thing—adding in unwritten words to suit its preferred interpretation. *Id*. (citing *Reswick v. Reswick (In re Reswick)*, 446 B.R. 362, 366 (B.A.P. 9th Cir. 2011)). There is, however, textual support for reading the term "with respect to the debtor" to encompass both the debtor and the debtor's property. 11 U.S.C. § 102 lays out the rules of construction which apply generally throughout the Bankruptcy Code.[4] Section 102(2)

[4] S. REP. 95-989, 27, 1978 U.S.C.C.A.N. 5787, 5811.

instructs the reader to construe "claim against the debtor" to include "claim[5] against property of the debtor." This provision suggests that when the automatic stay is terminated under § 362(c)(3)(A), those creditors who pursue collections actions "with respect to the debtor" are pursuing claims against the debtor *and/or* his property. Not only is it therefore permissible to treat the debtor and the debtor's property as one and the same, but the concept is also a general rule of construction. *See In re Jones*, 339 B.R. 360, 365 (Bankr. E.D.N.C. 2006). To be clear, this is not to say that property of the debtor cannot *become* property of the estate, or vice versa, or that § 102(2) has any bearing on that distinction. *See, e.g.,* 11. U.S.C. §§ 541(a), 521(a)(2). Section 102(2) is silent as to property of the estate. It does, however, suggest that as a statutorily prescribed rule of construction, the language "with respect to the debtor" should be inclusive of "property of the debtor." *But see In re Daniel*, 404 B.R. 318, 324 (Bankr. N.D. Ill. 2009).

Support for a reading of "with respect to the debtor" that is inclusive of the debtor's property can also be found in the legislative history surrounding § 102(2). The Senate Judiciary Committee Report explains that § 102(2) covers "nonrecourse loan agreements where the creditor's only rights are against property of the debtor, and not against the debtor personally." S. REP. 95-989, 1978 U.S.C.C.A.N. 5787, 5814. Under this instruction, a nonrecourse loan agreement "would give rise to a claim that would be treated as a claim against the debtor personally, for the purposes of the bankruptcy code." *Id.* It is therefore readily apparent that, at least in some instances, the term "with respect to the debtor" was intended to include property of the debtor.

[5] A claim is a right to payment. The dispute before this Court arises at the intersection of the automatic stay and creditors, who are pursuing their various rights to payment. Therefore, in this context, it is appropriate to construe "claim against the debtor" as inclusive of "claim against property of the debtor." *See* §§ 101(5), 362(a), 102(2).

Additional contextual evidence that Congress did not intend "with respect to the debtor" to encompass property of the estate can be found in §§ 362(c)(4)(A)(i) and 362(h). These sections were enacted contemporaneously with § 362(c)(3)(A) as part of the BAPCPA amendments and further support the proposition that Congress knew how to terminate the automatic stay with respect to property of the estate when it wanted to. Section 362(c)(4)(A)(i) immediately follows § 362(c)(3)(a) in the statutory scheme, and succinctly provides that for a debtor with two previously dismissed cases within the last year, "the stay shall not go into effect upon the filing of the later case"—effectively terminating the stay in its entirety from the get-go. If, as the minority approach would urge, § 362(c)(3)(A) is to be construed to terminate the stay not only "with respect to the debtor," but also "with respect to property of the estate," then absent a showing of good faith, the stay is also terminated in its entirety after thirty days. Such a reading would render "with respect to the debtor" meaningless surplusage because removing the phrase would have no effect on the meaning of the statute. A better reading would recognize that not only did Congress know how to terminate the stay in its entirety, it knew how *not* to terminate the stay in its entirety. *See In re Paschal*, 337 B.R. 274, 279 (Bankr. E.D.N.C. 2006).

Finally, a plain reading of §362(h) supports the majority's interpretation of the scope of property interests encompassed by the phrase "with respect to the debtor." As with § 362(c)(3)(A), § 362(h) distinguishes claims against the debtor from claims against property of the debtor and property of the estate. The text of § 362(h) reinforces this distinction, and crucially, the ability to separate the property of the estate "bundle of sticks" from the others. As mentioned above, § 362(h) was also added as part of the BAPCPA amendments. This provision motivates individual debtors whose schedules include debts which are secured by "personal property of the estate or of the debtor" to timely file their statements of intention as to that collateral and perform, lest (1) the

automatic stay terminates as to the collateral, and (2) the collateral cease to be property of the estate (for such collateral that was property of the estate to begin with). Should these consequences transpire, the collateral becomes merely unprotected "personal property of the debtor." Creditors would then be free to pursue their legal rights and remedies against the debtor's non-estate property as provided for under applicable non-bankruptcy law.

Section 362(h) targets three categories of personal property interests: (1) personal property of the estate securing a claim; (2) personal property of the debtor securing a claim; and (3) personal property subject to an unexpired lease. If a debtor fails to state their intentions and perform, the stay is terminated "and *such personal property* [securing a claim] shall no longer be property of the estate." Section 362(h), enacted at the same time as § 362(c)(3)(A) therefore provides further evidence that Congress knew lift the stay as to specific, discrete categories of property interests, and that absent such specific language in § 362(c)(3)(A), the automatic stay should not be construed to lift as to property of the estate.

In sum, up-close examination of the various sections of § 362, as well as consideration of its broader statutory context reveals that each provision has a part to play within the context of the statutory scheme. To curb perceived abuses of one of the most powerful sections of the Bankruptcy Code, Congress curated custom applications of the automatic stay based on debtor conduct. And as this Court has stated, "where Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). This Court should reject the minority's attempt to re-write the statute, and hold that the plain language of § 362(c)(3)(A) limited termination of the automatic stay to Petty, but not the estate Equipment.

B. Reading § 362(c)(3)(A) to Protect Property of the Estate Promotes the Fundamental Bankruptcy Policies and Avoids Absurd Outcomes.

The majority approach to interpreting § 362(c)(3)(A) gives the text of the statute its plain-language meaning, leads to more fairness to creditors and debtors, and provides meaningful deterrence to "bad faith" serial filers in line with Congress's stated intent, all while avoiding the absurd and inequitable results that flow from the minority approach. Rather than confronting the plain text of the statue, the minority looks to scant legislative history[6] to rationalize its policy preferences. This court should therefore affirm the lower courts, who adopt the majority's more sensible construction.

1. The Minority's Policy Opinions are Based on Scant Legislative History, and Do Not Override the Clear Text of § 362(c)(3)(A).

The minority has planted its flag on a tumbleweed. Embarking on an ex post end-run around the plain text of the statute, the minority strains to ascribe causation to the seven years of pendency prior to enactment of BAPCPA, wherein the language "with respect to the debtor" was consistently included in various drafts, and there is no record of anyone suggesting the phrase *not* include property of the estate. *In re Daniel*, 404 B.R. 318, 329 (Bankr. N.D. Ill. 2009). Although it is true that during the years leading up to BAPCPA, some sections of the Act were not edited or discussed, the House Report—the culmination of years of not editing and discussing—is a "mere regurgitation of the statute's language." *See In re Scott-Hood*, 473 B.R. 133, 140 n.2 (Bankr. W.D. Tex. 2012). The legislative record's conference reports, senate reports, and floor reports amount to a grand sum total of zilch, zero, and nada respectively. *Id*. It is especially unwise, considering

[6] House Judiciary Committee Report: BAPCPA "amends section 362(c) of the Bankruptcy Code to terminate the automatic stay within 30 days in a chapter 7, 11, or 13 case filed by or against an individual if such individual was a debtor in a previously dismissed case pending within the preceding one-year period." H.R. Rep. No. 109-31, pt. 1, at 69 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 138.

the span of years involved, to ascribe intentions of the latter enacting legislature to those of former legislatures. *Id*. Acknowledged, BAPCPA was enacted to deter abuses, but Congress's intent is not vindicated by judges making policy choices in the face of clear text. *See King v. Burwell*, 576 U.S. 473, 498 (2015); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring). ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent").

Courts subscribing to the minority approach often trivialize the consequences of stay termination, pointing to "meaningless" results that are of "no utility" as justification for inferring a Congressional intent which is contrary to the plain text of § 362(c)(3)(A). *See, e.g., In re Jupiter*, 344 B.R. 754, 760 (Bankr. D.S.C. 2006). But in reality, this paper tiger has teeth. The majority's interpretation of § 362(c)(3)(A) offers meaningful deterrence to "bad faith" repeat filers. For example, Chapter 11 debtors like Petty, who are simultaneously trying to keep their businesses running, get a plan confirmed in bankruptcy court, and defend themselves outside of bankruptcy court would likely disagree with many of the minority-view courts' nominalizations.

In the instant case, Petty is a sole proprietor in chapter 11 with a pending breach of contract arbitration action against him as guarantor for the Bank loan. Considering the outcomes under § 362(c)(3)(A) of the termination of the automatic stay with respect to the debtor and his property, § 362(a) lists all the available acts and actions available to Petty's creditors:

362(a)(1): Prepetition suits against the debtor can resume. The Bank could resume its state-law breach of contract claim against Petty in arbitration.

362(a)(2): Enforcement of prepetition judgments against the debtor can resume. Petty is personally liable for any prepetition judgments.

362(a)(5): Acts to create, perfect, or enforce prepetition liens against property of the debtor can resume. Petty's non-estate property is subject to repossession.

362(a)(6): Acts to collect, assess, or recover prepetition claims against the debtor can resume. Petty is allowed no respite from all manner of legal collections attempts.

The majority approach offers meaningful consequences for repeat-filers subject to § 362(c)(3)(A), while adhering to the text of the statute with appropriate fidelity. In light of the ephemeral quality of the legislative history, an approach which gives full meaning to the language of the statute without engaging in normative suppositions is the better path.

2. The Minority's Atextual Construction Imposes Unfair and Absurd Outcomes Upon Non-Debtors

Given a chapter 7 trustee's procedural responsibilities, the minority approach to section 362(c)(3)(B) imposes "impossible" deadlines and evidentiary burdens. *In re Dao*, 616 B.R. at 112–13. The chapter 7 trustee is tasked with collecting and liquidating property of the estate. 11 U.S.C § 704(a)(1). A central duty of the trustee is to "maximize the value of the estate." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 532 (1985). Essential to the trustee's work is the protection of the automatic stay, which not only gives the debtor a "breathing spell," but guards against attrition of the estate while the trustee fulfills his or her duties. This ultimately allows for an equitable distribution of the liquidated estate among creditors. Additionally, trustee compensation comes mostly from a percentage-based commission of the distribution. 11 U.S.C. § 330. Thus, in "no-asset" cases, where the debtor has no property of meaningful value to add to the estate, not only do creditors receive a zero-cents-on-the-dollar distribution, but the trustee is also paid little to nothing.

In the case of a "serial-filer" subject to § 362(c)(3)(A), if the trustee wishes to extend the automatic stay, he or she must file a motion for continuation of the automatic stay. Notice and a hearing on the motion must take place within thirty days after the commencement of the case in order to prevent termination of the stay. Otherwise, the stay lifts. While this result may be a preferable policy choice as a deterrence for "bad faith" repeat filers, it may have unintended consequences, considering the fact that the trustee must rebut the presumption of bad faith under § 362(c)(3)(B) by "clear and convincing evidence"—and do so under an unrealistic timeline, with inadequate information. For example, the debtor has fourteen days from the commencement of the case in which to file schedules listing their assets, liabilities, and secured creditors. This information is crucial to the trustee's ability to meet the heavy evidentiary burden under the statute. *In re Dao*, 616 B.R. at 113. As one court aptly describes, "trustees take on enormous responsibilities. Yet, trustees are sent into the fray without the most basic of protections." *In re J.F.D. Enters., Inc.*, 223 B.R. 610, 627 (Bankr. D. Mass. 1998).

If, before the expiration of thirty days, the trustee is unable to put on clear and convincing evidence as to the debtor's "good faith" in refiling, the automatic stay terminates. Under the minority approach, this means "open season" for creditors on any debts secured by property of the estate. This can lead to inequitable results. For example, if an oversecured creditor is permitted to lawfully levy judgment or foreclose on property of the estate, they are able to recover more than they otherwise would, as to the other creditors, who now face a reduced (or eliminated) distribution. *See* 11 U.S.C. 506(a); *In re Holcomb*, 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008). This result under the minority approach is inconsistent with the fundamental bankruptcy policy of "obtaining a maximum and equitable distribution for creditors." *Id*. (quoting *BFP v. Resolution Trust Corp.,* 511 U.S. 531, 563 (1994) (Souter, J., dissenting)). Accordingly, a more sensible

approach would adopt the majority interpretation of § 362(c)(3)(A), allowing the stay to lift only "with respect to the debtor." In that situation, creditors are best positioned to realize maximum distribution, because the trustee still has the protection of the automatic stay and can fulfill his or her statutory duties without the burden of impossible deadlines and procedural responsibilities.

One parting illustration of the resulting unfairness that flows from the minority approach to § 362(c)(3)(A) involves a scenario where an "honest but unfortunate" debtor files a bankruptcy petition that is later dismissed, say for not timely filing schedules (unfortunate, but common in the *pro se* context). The debtor falls behind on payments to a creditor and is generally not paying bills as they become due. The creditor files an involuntary case against the debtor in the same year. Even though the debtor is not technically a "serial-filer," because it is the second case in one year, they are still subject to § 362(c)(3)(A) and must come to court and rebut a presumption of bad faith under § 362(c)(3)(B). While this scenario is the same under both majority and minority approaches, under the minority approach, § 362(c) becomes a "thirty-day sword of Damocles," threatening the debtor's property of the estate, despite the fact that they neither initiated the second bankruptcy proceeding, nor fairly deserve to be categorized as a "bad faith" serial filer.

CONCLUSION

Try as it might, the Bank has been so far unsuccessful in sequestering Petty's action for violating the automatic stay. In arbitration, far from the prying eyes of creditors and trustees, the Bank stands to eviscerate any hope of an equitable distribution among Petty's bankruptcy creditors. And though the creditors never signed on to such an agreement, the Bank insists that its arbitration agreement with Petty bind not only the parties to the agreement, but the entire world. Congress envisioned a different outcome in enacting the Bankruptcy Code, and today this Court should affirm that the Code impliedly repeals the FAA.

In interest of the same fairness and equity, this Court should ratify the majority approach to interpreting 11 U.S.C. § 362(c)(3)(A). As this Court has repeated, legislative history is not the law. The minority approach is tilting at tumbleweeds in its attempts to rationalize atextual interpretations of plain statutory text. Because the majority approach respects the role of Congress to legislate, and because it offers meaningful enforcement of the statute's various mechanisms, this Court should endorse its common-sense position.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Court affirm the decision of the Thirteenth Circuit.

Respectfully submitted,

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