Team 32R

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 Number 32R
Counsel for Respondent

QUESTIONS PRESENTED

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 Are 11 U.S.C. § 362 and related judicial code provisions impliedly repealed by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*?

2. Does 11 U.S.C. § 362(c)(3)(A) apply to property of a debtor's bankruptcy estate?

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OPINIONS BELOW

The Thirteenth Circuit Court of Appeals' decision is available at No. 19-0805 and reprinted at Record 2. The Bankruptcy Court for the District of Moot decided in favor of Petty on both issues. On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed the Bankruptcy Court's decision on both issues.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

11 U.S.C. Section 362

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

- **(1)** the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
- **(2)** the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
- **(3)** any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
- **(4)** any act to create, perfect, or enforce any lien against property of the estate;
- **(5)** any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
- **(6)** any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
- **(7)** the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
- **(8)** the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a

debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) [omitted]

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

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

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

(A) the time the case is closed;

(B) the time the case is dismissed; or

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

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

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

(B) 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) – (ii) [omitted]

(4) [omitted]

(d) – (o) [omitted]

STATEMENT OF FACTS

Great Wide Open entered into a credit agreement with Wildflowers. Respondent Earl Thomas Petty ("Petty" or "Respondent") founded Great Wide Open Brewing Company, Inc. ("Great Wide Open") in 2002. R. at 3. In 2005, Petty opened a taproom in the City of Royal Rapids, Moot that included equipment purchased with his own money (the "Equipment"). R. at 3. Due to the success of his business, Petty planned to expand. R. at 3-4. To secure needed capital, Petty reached out to Petitioner Wildflowers Community Bank ("Wildflowers" or "Petitioner"). R. at 4. In September 2011, Great Wide Open signed a $35 million revolving credit agreement with Wildflowers (the "Credit Agreement"). R. at 3. Petty further agreed to personally guaranty the repayment (the "Guaranty"). R. at 4.

In the Credit Agreement, the two parties agreed that Great Wide Open will grant Wildflowers a first priority lien on substantially all of its assets and Petty will execute a personal guaranty on the business's repayment obligations. R. at 4. Additionally, the Credit Agreement and Guaranty contained "Remedies" and "Arbitration" clauses upon which both parties agreed. R. at 4. The "Remedies" clauses provide that upon Great Wide Open's default, "Obligor grants to Wildflowers the right to enter any premises where Collateral may be located for the purpose of repossessing Collateral without the need for any prior judicial action." The "Arbitration" clauses provide that all disputes between two parties should be resolved through mandatory, binding arbitration. R. at 4.

Great Wide Open Defaulted and Petty Filed the Initial Bankruptcy Case. Great Wide Open started to have liquidity problems in 2017 and closed three taprooms in 2018. R. at 5. On April 2018, Great Wide Open and Petty failed to meet their payment obligations under the Credit Agreement and the Guaranty. R. at 5. Consequently, Petitioner sought to file a general state law

breach of contract claim against Petty and to request an arbitration. R. at 5. An initial conference was set for July 12, 2018 by the American Arbitration Association, and on that day, Great Wide Open commenced a Chapter 7 bankruptcy case in the Bankruptcy Court for the District of Moot. R. at 5. Petty also filed a personal Chapter 11 case ("Initial Bankruptcy Case") on the same day in the Bankruptcy Court for the District of Moot. R. at 5. Petty's Initial Bankruptcy Case was dismissed by the bankruptcy court on August 27, 2018 due to his failure to timely file requisite documents. R. at 5.

Petty Filed the Second Bankruptcy Case. Petty commenced his second Chapter 11 case ("Second Bankruptcy Case") on January 11, 2019. R. at 5. He prepared all requested documents and filed a plan of reorganization which proposed to pay his creditors over a period of five years. R. at 6. In hearings for the Second Bankruptcy Case, Petty informed the court that he had reopened one of his taprooms in the City of Royal Rapids in December 2018 under the name "Full Moon Fever Brewing" after negotiating a lease with the landlord. R. at 6. After reopening his taproom, Petty saw a return of Great Wide Open's loyal customers and soon saw profits. R. at 6. While Petty was seeing financial success in his new business and was more prepared in filing the Second Bankruptcy Case, Petty failed to timely file a motion to extend the automatic stay under Section 362(c)(3)(B) of the Bankruptcy Code.[1] R. at 6.

Wildflowers Repossessed Petty's Equipment. Thirty-two days after the filing of the Second Bankruptcy Case, Wildflowers hired a repossession company to repossess the Equipment. R. at 6. The company was able to retake the Equipment peaceably. R. at 6. One week after the Equipment was repossessed, Petty filed a motion in the Second Bankruptcy Case against Wildflowers alleging that they violated the automatic stay and seeking $500,000 damages under

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

Section 362(k). R. at 6-7. Wildflowers filed a response to the motion arguing that there is no automatic stay since Petty lost that protection under section 362(c)(3)(A) because he had a prior bankruptcy case dismissed within the year preceding commencement of the Second Bankruptcy Case. R. at 7. Wildflowers also argued that any disputes should be resolved through arbitration, as per the "Arbitration" clause in the Guaranty. R. at 7.

STANDARD OF REVIEW

The facts in this case are not disputed by the parties. R. at 8. This case involves two questions of statutory interpretation. Statutory interpretation is a matter of law. As such, this Court's standard of review is *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

SUMMARY OF THE ARGUMENT

Section 362 is Inherently Inconsistent with the Federal Arbitration Act. The plain meaning, legislative purpose, and legislative history behind the Federal Arbitration Act ("FAA" or "Act") are directly at odds with the plain meaning, legislative purpose, and legislative history of Section 362 of the Bankruptcy Code. In order to achieve an efficient and fair bankruptcy, there are only limited exceptions to the automatic stay provisions. Because the plain language of the text specifically enumerates exceptions to automatic stay, under the principle of *expressio unius* it can be surmised that any exceptions not expressly outlined are intentionally excluded.

A bankruptcy case often involves different parties, whereas an arbitration agreement will only apply to two parties. The purpose of the automatic stay would be defeated if creditors are forced to go through arbitration process. While Congressional intent in passing the Federal Arbitration Act was to alleviate need for expensive and costly litigation, the dual Congressional purpose of Section 362 was to provide relief to a debtor by protecting him against collection attempts from the moment of bankruptcy filing while also providing a methodical opportunity to bring multiple parties from potentially multiple contracts under one court filing. Hence, even if Section 362 does not expressly serve to repeal the Federal Arbitration Act, the plain meaning, legislative purpose, and legislative history of each law make it clear that Section 362 implicitly repeals the Federal Arbitration Act.

Alternatively, even if Section 362 does not conflict with Federal Arbitration Act, in this instant case, the arbitration should be stayed because it involves a core proceeding and therefore should be adjudicated in the Bankruptcy court. Supreme Court precedent set by case law such as *McMahon* and *Epic* work in conjunction to affirm that respecting terms set by arbitration agreements remains the rule rather than the exception. Furthermore, the durability and duration of

the automatic stay should not be altered due to the relationship between Wildflowers and Petty in the case at hand, even if the plain meaning, legislative purpose, and legislative history of the Bankruptcy Code does not result in the direct or implicit repeal of the FAA.

The Automatic Stay Applies to the Debtor's Bankruptcy Estate, Irrespective of 11 U.S.C. § 362(c)(3). Courts are divided on how to interpret Section 362(c)(3) and provide minimal guidance in how to interpret the statute one way other the other. The majority opinion holds that the thirty-day automatic stay does not apply to the bankruptcy estate. Statutory analysis supports this finding.

Canons of statutory construction such as *casus omissus* (nothing is to be added to what the text states or reasonably implies) and *expressio unius* (the expression of one thing implies the exclusion of others) support the conclusion that this exception to the automatic stay does not apply to a bankruptcy estate, only to the debtor. The text of the statute doesn't mention "estate" or "property of the estate." Thus, through applying the *casus omissus* canon, it is clear that such language should not be read into the statute's interpretation. Reading this statute in context will yield the same interpretation through the *expressio unius* canon because other sections of Section 362 make a distinction between debtor and debtor's estate. This indicates that Congress knows how to distinguish between different parties — namely, the debtor, the debtor's property, and the bankruptcy estate. Therefore, the absence of "bankruptcy estate" language in Section 362(c)(3) indicates that Congress intended for the bankruptcy estate to not be subject to this portion of Section 362. Under *expressio unius*, therefore, the bankruptcy estate should not be read into the meaning of this section. The plain meaning of the statute is clear and suggests that the thirty-day automatic stay in Section 362(c)(3) only applies to the debtor.

Legislative history does not need to be reviewed because the plain language of the statute is clear. However, when looking at the legislative history, it does not provide a clear interpretation as to how Section 362(c)(3) should be interpreted. There is minimal legislative history on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), and what little there is does not provide clarity on how Section 362(c)(3) should be interpreted, even though the minority opinion relies on this scant amount of legislative history. Because the legislative history is unclear, the Court should rely on the language of Section 362(c)(3) to interpret its meaning.

Wildflowers argues that the majority approach to interpreting Section 362(c)(3) contravenes the intent of BAPCPA. However, this argument is flawed when considering the variety of remedies still available to the creditors if the stay is only lifted with respect to the debtor. Further, the interpretation of Section 362(c)(3) that Wildflowers is advancing, the minority approach, is flawed because it works against the presumption of consistent usage canon as well as other statutory interpretation canons discussed above.

In light of goals of the Bankruptcy Code, the majority approach's interpretation of Section 362(c)(3) is optimal because it protects the interests of all parties involved in a bankruptcy proceeding. While the minority's approach would go against the Bankruptcy Code's important goal of equitable distribution and favor a few creditors and their interests, the majority approach considers all parties in interest and protects the bankruptcy estate from being distributed piecemeal in an unorganized and unequitable manner.

ARGUMENT

I. The Plain Meaning, Legislative Purpose, and Legislative History of the Federal Arbitration Act are Directly at Odds with the Plain Meaning, Legislative Purpose, and Legislative History of Section 362.

The plain meaning, legislative purpose, and legislative history behind the Federal Arbitration Act[2] are directly at odds with the plain meaning, legislative purpose, and legislative history of Section 362 of the Bankruptcy Code. As such, Section 362 implicitly repeals the scope of the Federal Arbitration Act. However, even if Section 362 is interpreted to not implicitly repeal the scope of the Federal Arbitration Act, the automatic stay should continue to be in effect for Petty because the facts focus on a core bankruptcy proceeding which indicate an inherent conflict between bankruptcy and arbitration.

a. Section 362 of the Bankruptcy Code Implicitly Repeals the FAA as a Result of Each Respective Federal Statute's Distinct Plain Meaning, Legislative Purpose, and Legislative History.

To understand a statute, one must first look at the language of that statute. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself."); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over [the interpretation of a statute] begins where all such inquiries must begin; with the language of the statute itself."). Further, "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." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal citations and quotations omitted). The plain meaning of the FAA is clearly expressed in its statutory text. The Act applies to all "maritime transaction" and "commerce" agreements as defined in Section 1 of the Act. 9

[2] The FAA is set forth in 9 U.S.C. §§ 1 *et seq.*

U.S.C. § 1. The Supreme Court has since ruled that a broad interpretation of "commerce" is correct by stating that the term "involving commerce" signaled that the law is fueled by the fullest extent of the Commerce Clause. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995). Further, the Act plainly holds that any and all arbitration agreements should be enforced as per agreement specifications. 9 U.S.C. § 2. Likewise, the Act expressly notes that if a party apparently refuses to honor an effective arbitration agreement, another party aggrieved by such alleged failure may petition any district court which (barring the arbitration agreement) would hold jurisdiction over the dispute. 9 U.S.C. § 4.

The legislative purpose of the FAA is to expedite resolutions between parties by encouraging "informal, often cheaper" processes. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). Further clarified, the Act can be considered a means by which Congress implemented a method of reversing the longstanding judicial hostility to arbitration agreements, an attitude which originated in English Courts and was inherited by American jurisdictions. *E.E.O.C. v. Waffle House, Inc.*, 122 S. Ct. 754, 837 (2002). Thus, the central purpose of the Act can be interpreted as an ode to ensuring that "private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct., 397, 421 (2010).

The legislative history of the FAA is lengthy and complex but for purposes of the present circumstances can be boiled down to a few noteworthy points. In 1925, President Coolidge signed the Act into law, understanding that while the primary Congressional purpose was for enabling arbitration agreements to be deemed as legitimate as other provisions within contracts, a subtextual Congressional goal was likewise to mitigate the need for expensive and time-consuming litigation that was overwhelming the judicial system at the time. *See, e.g.*, H.R. Rep. No. 96, 68th Cong., 1st

Sess., 1 (1924) (noting that one significant purpose of the FAA was to place arbitration agreements "upon the same footing as other contracts").

Decades later, Section 362 was ushered in during a different era, with a different purpose in mind. Plainly expressed in the Bankruptcy Code's opening text, Section 362 operates "as a stay . . . applicable to *all* entities . . ." regarding ". . . enforcement, against the debtor or against property of estate . . . any act to obtain possession of property . . . any act to create, perfect, or enforce any lien against the property . . . any act to collect, assess, or recover a claim . . ." and so forth. 11 U.S.C. § 362 (emphasis added). The statutory text of Section 362 enunciates protections for the debtor from the moment of filing for bankruptcy against any preexisting claims, debts, or liens. The limited number of exceptions to the automatic stay, including commencement of particular criminal actions against debtor and collection of domestic support obligations, are specifically enumerated within the statutory text of the Bankruptcy Code. 11 U.S.C. § 362(b). Because the plain language of the Bankruptcy Code text specifically enumerates exceptions to the automatic stay, under the principle of *expressio unius est exclusio alterius* it can be surmised that any exceptions not expressly outlined are intentionally excluded. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* xi-xii (2012).

While the primary legislative purpose of the automatic stay is to provide essential protections to the debtor by giving them reprieve against seizure of assets, its secondary effects are likewise noteworthy. *In re Divine Ripe, LLC.*, 538 B.R. 300, 303 (Bankr. S.D. Tex. 2015). Secondary effects of the automatic stay include promoting orderliness by preventing a race among creditors to decide which creditor will be able to recover assets from the debtor. *In re McLean*, 794 F.3d 1313, 1317 (11th Cir. 2015). While arbitration agreements are usually decided between two parties, a debtor may have multiple creditors regarding the same property. The automatic stay,

under the Bankruptcy Code, promotes fairness by ensuring that even parties outside of a given arbitration agreement may have hope of recovering assets. Furthermore, because bankruptcy filings bring all the affected parties together under one proceeding, it prevents uneven or bizarre distribution of the debtor's assets. In this way, the largest, hungriest, or most powerful creditor will not be the only party who may be successfully repaid.

The legislative history of the Bankruptcy Code illustrates its sparring nature with the FAA. In 1978, Congress passed Section 362, spelling out its purpose in doing so as the need to "[give] the debtor a breathing spell from his creditors . . . [, to] stop[] all collection efforts, all harassment, and all foreclosure actions . . . [, and to] permit[] the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy…" S. Rep. No. 95-989, 95th Cong., 2d Sess. (1978). *See also* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 95 Stat. 2549 (Nov. 6, 1978). The Bankruptcy Code allowed unprecedented protections to debtors while simultaneously encouraging a streamlined method of debt repayment.

The Congressional intent in passing the FAA was to alleviate need for expensive and costly litigation. However, the dual Congressional purpose of Section 362 was to provide relief to the debtor by protecting him against collection attempts from the moment of bankruptcy filing while also providing a methodical opportunity to bring multiple parties from potentially multiple contracts under one court filing. The plain language and legislative history of the FAA and the Bankruptcy Code drive home each respective law's purpose. Hence, even if Section 362 does not expressly serve to repeal the FAA the plain meaning, legislative purpose, and legislative history of each law make it clear that the Section 362 of the Bankruptcy Code implicitly repeals the Federal Arbitration Act.

b. Even If the Plain Meaning, Legislative Purpose, and Legislative History of the FAA and of Section 362 of the Bankruptcy Code Do Not Directly Conflict, the Automatic Stay Should Still Be in Effect Because the Facts Focus on Core Bankruptcy Proceedings.

The prior section articulates how the plain meaning, legislative purpose, and legislative history of the FAA and the Bankruptcy Code make it such that Section 362 of the Bankruptcy Code implicitly repeals the FAA, even if the above-mentioned canons of construction do not result in interpreting the implicit repeal of the FAA. However, even if the above argument fails, the automatic stay should still be in effect because it is a core bankruptcy proceeding and foments an inherent conflict between bankruptcy and arbitration. Bankruptcy judges may hear and determine all "core proceedings," non-exhaustively listed to include "motions to terminate, annul, or modify the automatic stay," "determinations of the validity, extent, or priority of liens," and "orders to turn over property of the estate." 28 U.S.C. § 157(b)(2).

Supreme Court precedent set by case law such as *McMahon* and *Epic* work in conjunction to affirm that respecting terms set by arbitration agreements remains the rule rather than the exception. *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Epic,* 138 S. Ct. 1612, 1614 (2018). *Epic* focused on maintaining that the Congressional intent of the Federal Arbitration Act was to ensure that federal courts respected arbitration agreements per their terms as written. *McMahon* added nuance to this perspective. The court in that case held that even though arbitration agreements were important and the Bankruptcy Code did not preclude arbitration, certain proceedings under the Bankruptcy Code were so fundamental ("core") that if at issue in a given case, then the inherent conflict between arbitration and bankruptcy would emerge. In such cases, it was important to note that the burden to demonstrate an inherent conflict fell upon the party who asserted such a conflict existed. If such a burden was not met, then the provisions of the FAA would be followed by default and arbitration agreements enacted. Hence, though both

defining cases resulted in significantly different outcomes, neither case disputes the other and therefore neither case obviates the other. Two sister circuits likewise affirm the latter point by expressly determining that *Epic* did not overturn *McMahon*. *See Belton v. GE Capital Retail Bank* (*In re Belton*), 961 F.3d 612, 617 (2d Cir. 2020) (holding that the creditor cannot enforce an arbitration clause in a credit card agreement in a contempt proceeding the debtor brought against the creditor for violation of the discharge injunction).

To determine whether an inherent conflict exists and whether the facts of the case render the case to be tried under the domain of the Bankruptcy Code rather than under terms set by an arbitration agreement, a crucial differentiator is whether an issue is a core issue or a non-core issue as outlined in a non-exhaustive list under 28 U.S.C. 157(b). If an issue is considered "non-core," then a bankruptcy court will likely not be able to prevent enforcement of arbitration agreements. However, it is generally accepted that bankruptcy courts have the power to prevent enforcement of arbitration agreements regarding "core" issues. *See, e.g.*, *In re Thorpe Insulation Co.*, 671 F.3d 1011, 1021 (9th Cir. 2012) (listing a number of cases that held that bankruptcy courts had the discretion in core proceedings to deny enforcement of arbitration agreements). While determination of an issue as a "core" proceeding is not considered dispositive and a bankruptcy court must further analyze whether an inherent conflict exists, it is considered an essential point in favor of precluding arbitration agreements. The automatic stay, the proverbial "breathing ground" for debtors that grants them certain protections and reliefs against powerful and motivated creditors, is undisputedly a core issue. As indicated in relevant legislative history that suggests Congressional intent, "the automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws." H.R. Rep. No. 95-595, at 340-41 (1977).

Taken together, the automatic stay should still be in effect for Petty because the automatic stay is indisputably a core issue and because, as discussed above, there are inherent difference in the nature and purpose of the Bankruptcy Code versus the nature and purpose of the FAA. Furthermore, the durability and duration of the automatic stay should not be altered due to the relationship between Wildflowers and Petty in the case at hand, even if the plain meaning, legislative purpose, and legislative history of the Bankruptcy Code does not result in the direct or implicit repeal of the FAA.

II. The Automatic Stay Applies to the Debtor's Bankruptcy Estate, Irrespective of Section 362(c)(3).

One of the questions before this Court revolves around the "with respect to the debtor" language found in Section 362(c)(3) of the Bankruptcy Code. Specifically, whether the exception to the automatic stay within Section 362(c)(3) applies to the bankruptcy estate or whether it applies to just the debtor. As the Bankruptcy Court of the District of Moot and the Thirteenth Circuit Court of Appeals in this case have held, we argue that Section 362(c)(3) applies only to the debtor, which means that the automatic stay continues to apply to the bankruptcy estate beyond the thirty-day period outlined in this section of the Bankruptcy Code. This conclusion is supported by statutory analysis and public policy. Case law and legislative history are inconclusive on this matter.

a. Case Law is Inconclusive on How to Interpret Section 362(c)(3).

Courts are divided on this issue of interpreting Section 362(c)(3). The majority of courts are of the opinion that the bankruptcy estate is still protected by the automatic stay beyond the thirty-day period described in Section 362(c)(3). *See, e.g.*, *Rose v. Select Portfolio Serv'g. Inc.*, 945 F.3d 226 (5th Cir. 2019), *cert. denied*, (U.S. June 29, 2020) (No. 19-1035); *Witkowski v. Knight*, 523 B.R. 291 (1st Cir. BAP 2014), *abrogated by Smith v. State of Maine Bureau of*

Revenue Servs. (In re Smith), 910 F.3d 576 (1st Cir. 2018); *In re Holcomb*, 380 B.R. 813 (10th Cir. BAP 2008); *In re Jumpp*, 356 B.R. 789 (1st Cir. BAP 2006), *abrogated by In re Smith*, 910 F.3d 576 (1st Cir. 2018); *In re Rinard*, 451 B.R. 12 (Bankr. C.D. Cal. 2011); *In re Thu Thi Dao*, 616 B.R. 103 (Bankr. E.D. Cal. 2020). A minority of courts adopt the view that the bankruptcy estate is subject to the automatic stay exception under Section 362(c)(3). *See, e.g.*, *In re Smith*, 910 F.3d 576 (1st Cir. 2018); *In re Reswick*, 446 B.R. 362 (9th Cir. BAP 2011). Given the split in how courts interpret Section 362(c)(3), they provide no clear answer as to whether the exception applies to the bankruptcy estate. However, for the reasons discussed in the sections that follow, the majority approach should be adopted by this Court.

b. Statutory Interpretation Supports the Conclusion that Section 362(c)(3) Applies Only to the Debtor — Not the Bankruptcy Estate — and Weakens the Minority Approach Interpretation.

Upon a debtor's filing of a bankruptcy case, several sections of the Bankruptcy Code come into effect. One such section is Section 541, which governs the bankruptcy estate. The bankruptcy estate is created upon filing a bankruptcy petition. 11 U.S.C. § 541(a). "All legal or equitable interests of the debtor in property as of the commencement of the case" are property of the bankruptcy estate, with a few exceptions. 11 U.S.C. § 541(a)(1).

Another section of the Bankruptcy Code that comes into effect upon filing is Section 362, which governs the automatic stay. The automatic stay halts post-petition actions against the debtor, the debtor's property, or the property of the estate. 11 U.S.C. § 362(a). The stay arises automatically upon filing. *Id.* There are some exceptions to the automatic stay. *See* 11 U.S.C. § 362(b)-(c). Once such exception was created when Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") with the goal of "correct[ing] perceived abuses of the bankruptcy system." *Milavetz, Gallop & Milavetz, P.A. v. United States*,

559 U.S. 229, 231-32 (2010). Section 362(c)(3) allows for debtors to file multiple bankruptcies within a one-year period but limits the extent of the automatic stay. 11 U.S.C. § 362(c)(3)(A). Under Section 362(c)(3)(A), the stay in a second-filed proceeding will only be in effect for thirty days after filing, but the stay period can be extended by the bankruptcy court if a party in interest moves to continue the automatic stay "as to any or all creditors . . . after notice and a hearing completed before the expiration of the 30-day period." 11 U.S.C. § 362(c)(3)(B). In these motions, the party in interest must demonstrate that the subsequent filing was made in good faith as to the stayed creditor(s) through clear and convincing evidence. 11 U.S.C. § 362(c)(3)(B)-(C). The presumption is that the latter-filed case was not filed in good faith. *Id.*

A reading of Section 362(c)(3) itself provides some guidance on how it should be interpreted. Following the statutory analysis principles discussed in Section I (a), the first step in interpreting a statute is to look that that statute's language. Section 362(c)(3)(A) states that the automatic stay "shall terminate *with respect to the debtor* on the 30th day after the filing of the later case." (emphasis added). 11 U.S.C. § 362(c)(3)(A). There is no mention of "estate" or "property of the estate" in this section of the statute. There are two canons of statutory construction that are on point for interpreting this section, both in isolation and within the broader context of the Bankruptcy Code: *casus omissus pro omisso habendus est* ("[n]othing is to be added to what the text states or reasonably implies") and *expressio unius est exclusio alterius* ("[t]he expression of one thing implies the exclusion of others"). Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* xi-xii (2012).

When interpreted in isolation, the *casus omissus* canon supports the conclusion that the exception to the automatic stay in Section 362(c)(3) does not apply to a bankruptcy estate, only to the debtor. This section of the Bankruptcy Code does not include language relating to the

bankruptcy estate; according to the *casus omissus* canon, no language should be added to the statute. Therefore, interpreting Section 362(c)(3) to include the bankruptcy estate is improper. As the Court of Appeals for the Thirteenth Circuit wrote, "[v]iewed in isolation, the language of the statute is plain and unambiguous." R. at 16.

While the language of the statute may provide a clear interpretation, the statute must be read and interpreted holistically. *See, e.g., King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[A] statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." (internal citations omitted)); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 364, 371 (1988) ("[S]tatutory construction . . . is a holistic endeavor."). In the language of Section 362, particularly in Section 362(a), a distinction is made between debtor, bankruptcy estate, and even property of the debtor. *See,* 11 U.S.C. § 362(a)(1)-(8). Other portions of Section 362 differentiate stays relating to the debtor from stays relating to property of the estate. *See, e.g.*, 11 U.S.C. §§ 362(b)(2)(B), (c)(1), (c)(2). From the repeated distinction between a debtor, the debtor's property, and the bankruptcy estate, it is clear that Congress knows how to distinguish between different parties; Congress knows how to include or exclude the debtor, the debtor's property, or the bankruptcy estate from a statute as it sees fit. Additionally, "Congress [knows] how to terminate the entire stay, and in fact did so in the very next section of the statute." *In re Williford*, No. 13-31738, 2013 WL 3772840, at *3 (Bankr. N.D. Tex. July 17, 2013). Section 362(c)(4)(A)(i) addresses debtors that had at least two cases pending in the previous year and "does not include the limiting language in [Section] 362(c)(3)(A)." *Rose*, 945 F.3d at 231.

The absence of "the bankruptcy estate" or similar language in Section 362(c)(3) implies that Congress did not intend for it to be included in that exception to the automatic stay. This interpretation is further supported by the *expressio unius* canon. The fact that other portions of the

same section of the Bankruptcy Code include distinctions between a debtor and the bankruptcy estate, it is clear that the absence of estate language in Section 362(c)(3) implies that the bankruptcy estate should not be included in that section's interpretation. *See id.* at 231 (noting that Congress's decision to "use a qualifier in § 362(c)(3)(A) . . . can only be interpreted as 'impl[ying] a limitation upon the scope of the termination of the automatic stay.'" (quoting *In re Williford*, 2013 WL 3772840, at *3)).

Wildflowers argues that this interpretation, the majority approach, is inconsistent with BAPCPA's goal of preventing abusive repeat bankruptcy filings. R. at 17. The Dissent to the Thirteenth Circuit Court of Appeals opinion argues that excluding the bankruptcy estate from the interpretation of Section 362(c)(3) would provide possible bad faith filers with the benefit of the automatic stay, particularly when considering that in many cases, "substantially all of a debtor's assets will be property of the estate." R. at 29 (Tench, J., dissenting). Essentially, there would be no "meaningful consequence" for a repeat filer. *Id.* However, when looking again at Section 362(a), it becomes clear that creditors still have a number of avenues for seeking restitution if the automatic stay is lifted after thirty days with respect to only the debtor and the debtor's property and not the bankruptcy estate. *See In re Williams*, 346 B.R. 361, 368-70 (Bankr. E.D. Pa. 2006) (writing that creditors still have the ability to commence or continue suits, enforce judgments, proceed collection actions, and create, perfect, and enforce liens against debtor); *accord Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. St. 582, 589 (2020). Thus, reading Section 362(c)(3) to exclude the bankruptcy estate would not contravene the intent of BAPCPA.

It is important to note that some courts that have adopted the majority approach have also acknowledged that the plain meaning of the words may contradict Congress's intent. *See, e.g.*, *In re Williford*, 2013 WL 3772840, at *3 ("[D]espite this Court's concern that the plain meaning of

the words Congress chose are at odds with its intent, this Court will join the majority of courts which conclude that the plain meaning of the phrase 'with respect to the debtor' limits the termination of the automatic stay to the debtor and property of the debtor."). However, it is Congress's responsibility to resolve any statutory conflicts or defects; it is not the responsibility of courts. *See In re Johnson-Allen*, 871 F.2d 421, 428 (3d Cir. 1989) ("[I]t is not the function of this court to cure any perceived 'defects' in that legislation. That authority is granted to Congress alone."). *See also City of Chicago v. Fulton*, No. 19-357, 2021 U.S. LEXIS 496, at *18 (Jan. 14, 2021) (Sotomayor, J., concurring) ("[A]ny gap left by the Court's ruling today is best addressed by rule drafters and policymakers, not bankruptcy judges."); *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules Congress has affirmatively and specifically enacted." (citing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978))). Therefore, while there may be inconsistency between the intent of a statute and the language of a statute, it is the responsibility of legislation to rectify those inconsistencies when the plain meaning of the statute is clear. It is the court's responsibility to adhere to the plain meaning and language of the statute.

The Dissent in the Court of Appeals for the Thirteenth Circuit also argues that the majority approach is flawed in that it "requires one read into the statute words that are not there . . . [by] expand[ing] the phrase 'with respect to the debtor' to say 'with respect to the debtor and the debtor's property.'" R. at 29 (Tench, J., dissenting) (internal citations omitted). This may appear to contradict the *casus omissus* canon because it adds to what the text states. However, the *casus omissus* canon allows for the additions that the text reasonably implies. When viewing Section 362(c)(3)(A) within the broader context of Section 362(a) and other sections of the Bankruptcy Code as well as with other canons in mind, it becomes clear that adding "and the debtor's property"

into the interpretation is reasonable and apt as both the debtor and the debtor's property are distinct from the bankruptcy estate, a legal construct created at the time of filing a bankruptcy petition under Section 541.

The minority approach prefers an interpretation of Section 362(c)(3) which suggests that "the phrase 'with respect to the debtor' is a direct reference to the serially filing spouse, thereby protecting the newly-filed spouse's person and property from the limitations on the automatic stay occasioned by Section 362(c)(3)(A)." R. at 30 (Tench, J., dissenting). However, this is a flawed interpretation. "Generally, identical words used in different parts of the same statute are . . . presumed to have the same meaning." *Robers v. United States*, 134 S. Ct. 1854, 1857 (2014) (internal quotations and citations omitted). This concept is also known as the presumption of consistent usage canon. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012).

Under the minority approach, the term "debtor" is used in a way inconsistent with how it is used elsewhere in the Bankruptcy Code and with how it is defined. The Bankruptcy Code defines "debtor" as a "person or municipality concerning which a case under this title has been commenced." 11 U.S.C. § 101(13). The minority approach presumes to read "debtor's spouse" into the use of "debtor" within the interpretation of Section 362(c)(3), which is inappropriate and inconsistent with the presumption of consistent usage canon. Furthermore, it contravenes the *casus omissus* and *expressio unius* canons discussed above because it reads more into the text than is there. Similar to the statutory interpretation arguments above for why the bankruptcy estate should be excluded in the interpretation of Section 362(c)(3), so too should the debtor's spouse be excluded. Congress knows how to distinguish between these two types of entities. *See, e.g.*, 11 U.S.C. 541(a)(2) ("All interests of the debtor *and the debtor's spouse* . . ." (emphasis added)).

Therefore, the absence of a that distinction (or no mention of debtor's spouse), indicates that the "debtor's spouse" language should not be included in the statute's interpretation. There is no indication that the text of the statute — or in the legislative history for that matter — that suggests that "with respect to the debtor" was included to make a distinction between a repeat-filer debtor and their newly-filed spouse.

c. Legislative History Is Immaterial to Interpreting Section 362(c)(3), but Even If It Was Material, the Legislative History of BAPCPA Is Unclear as to How the Statute Should Be Interpreted.

When a statute's language is clear and unambiguous, legislative history is irrelevant. *Lamie v. U.S. Tr.*, 540 U.S. at 534; *see also In re Condor Ins. Ltd.*, 601 F.3d 319, 321 (5th Cir. 2010) ("[W]hen a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." (internal quotations and citation omitted)). As the meaning of Section 362(c)(3) is clear, a look at the legislative history surrounding this section is unnecessary.

The minority opinion relies on legislative history relating to BAPCPA to justify its interpretation that the automatic stay should not apply to the bankruptcy estate under Section 362(c)(3) because these courts hold that the language of Section 362(c)(3) is ambiguous. *See, e.g.*, *In re Reswick*, 446 B.R. at 370-71 (looking at the legislative history during its statutory analysis after finding that section 362(c)(3) was ambiguous). However, as the Supreme Court noted, when legislative history is ambiguous as to a statute's interpretation, a court should read said statute in a way "suggested by the structure of the statute itself." *Jeffers v. United States*, 432 U.S. 137, 156 n.26 (1977).

Here, the legislative history is sparse, in part because the BAPCPA legislation "was placed under a 'no amendment' decree by Congressional leadership" at a time during which a

comprehensive review was expected. *In re Thu Thi Dao*, 616 B.R. at 108 (internal citations omitted). The only salient portion of the legislative history that relates to Section 362(c) states that the legislation "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. Though it aptly describes the changes made to this portion of the bankruptcy Code, this piece of legislative history does not clarify the matter of whether or not the bankruptcy estate is subject to the automatic stay under Section 362(c)(3). Thus, because there is ambiguity in the legislative history, the court should rely on the clear meaning found in the statutory language.

d. The Majority Approach Is Consistent with the Goals of the Bankruptcy Code While the Minority Approach Conflicts with Those Goals.

The Bankruptcy Code affords "honest but unfortunate debtor[s]" a "fresh start." *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (internal citations omitted). Another purpose of the Bankruptcy Code is to "obtain[] a maximum and equitable distribution for creditors" in an organized manner that prevents the mad-dash of creditors described above in Section I of this brief. *In re Thu Thi Dao*, 616 B.R. at 109 (internal citations omitted); *see also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 563 (1994) (Souter, J., dissenting) (internal citations omitted) (noting that the "policies of obtaining a maximum and equitable distribution for creditors and ensuring a 'fresh start' for individual debtors . . . are at the core of federal bankruptcy law."). The majority approach that the Bankruptcy Court of the District of Moot and the Thirteenth Circuit Court of Appeals in this case have adopted is consistent with the goals of the Bankruptcy Code in that it protects the bankruptcy estate from being distributed piecemeal in an unorganized and unequitable manner. By protecting the bankruptcy estate, property such as the Equipment in this case, would be protected

to the benefit of Petty and his creditors. Conversely, the minority approach that Wildflowers promotes would be antithetical to the Bankruptcy Code and would only benefit select creditors to the detriment of others and of Petty. The minority approach prioritizes the needs of few and allows for the piecemeal division of the bankruptcy estate piecemeal while the majority approach protects the bankruptcy estate and all parties in interest in bankruptcy proceedings.

CONCLUSION

For the aforementioned reasons, this Court should affirm the ruling of the Thirteenth Circuit.

Respectfully submitted.

Team 32R

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