No. 20-1004

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE EARL THOMAS PETTY, DEBTOR,

WILDFLOWERS COMMUNITY BANK,
Petitioner,

V.

EARL THOMAS PETTY,
Respondent.

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

BRIEF FOR THE PETITIONER

JANUARY 19, 2021

TEAM NUMBER 33
COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. Whether 11 U.S.C. § 362 implicitly repeals the Federal Arbitration Act, invalidating a pre-existing arbitration agreement between parties.

II. Whether 11 U.S.C. § 362(c)(3)(A) exempts property of the bankruptcy estate from the termination of the automatic stay when the debtor failed to file a motion to extend the automatic stay under 11 U.S.C. § 362(c)(3)(B).

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The Bankruptcy Court for the District of Moot found for the Debtor on both questions, and the Thirteenth Circuit Court of Appeals affirmed. R. at 3.

STATEMENT OF JURISDICTION

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

STATUTES INVOLVED

The statutes at issue in this case are 9 U.S.C. § 2 and 11 U.S.C. § 362. The relevant provisions are reproduced in Appendix A.

STATEMENT OF FACTS

Tom Petty is a lawyer that decided to invest in a beer company. R. at 3. Wildflowers Community Bank gathered funds on multiple occasions to loan funds for Tom Petty's expanding business, Great Wide Open Brewing Company. R. at 4. Eventually, as the local beer business aggressively expanded, it became one of the largest credits in the community bank's portfolio. R. at 4. The small home-operation that Wildflowers financed also evolved into one of the largest breweries in the State of Moot. R. at 3-4. Great Wide Open continued to expand into new areas. R. at 4. The business acquired four new taprooms in college towns and established a state-of-the-art brewhouse. R. at 4.

Great Wide Open continued to seek financial help from Wildflowers Community Bank. R. at 4. In September 2011, Wildflowers Community Bank decided to enter into a $35 million revolving credit agreement with Great Wide Open. R. at 4. Great Wide Open's debt was secured by a first priority lien on the company's assets and a personal guaranty from Mr. Petty. Mr. Petty unconditionally guaranteed the repayment of the debt. R. at 4. To ease the risk of the transaction, Wildflowers also negotiated clauses that specified the remedies upon default as granting "Wildflowers the right to enter any premises where Collateral may be located for the purpose of repossessing Collateral without the need for a prior judicial action." R. at 4. Additionally, Mr. Petty agreed to arbitration clauses that applied to "any and all disputes, claims or controversies of any kind between us arising out of or relating to the relationship." R. at 4.

Unfortunately, the aggressive growth strategy did not sustain Great Wide Open's long-term success as market trends began to change. R. at 5. In addition to Great Wide Open's significant

debt, Mr. Petty agreed to above-market lease obligations which created a dire liquidity issue for the business in 2017. R. at 5. Great Wide Open's financial strategy and unfavorable market trends led to the business closing three of the four taprooms in March of 2018. R. at 5. Mr. Petty did not notify Wildflowers whatsoever. R. at 5. Wildflowers only became aware of the taprooms closing after its loan officer saw a sign at the Royal Rapids taproom. R. at 5.

Great Wide Open and Mr. Petty defaulted in 2018 with an outstanding balance of $33.2 million. R. at 5. Wildflowers sent a demand letter first for the remaining balance. R. at 5. After no resolution from the demand letter, Wildflowers had no choice but to file a demand for arbitration, as specified in the credit agreement, for a breach of contract. R. at 5. The parties scheduled an initial conference with the American Arbitration Association for July 12, 2018 to resolve the matter. R. at 5.

One day before the scheduled initial conferences, Great Wide Open ceased all operations. R. at 5. On July 12, 2018, Great Wide Open then proceeded to file a Chapter 7 bankruptcy case and Mr. Petty filed a Chapter 11 petition. R. at 5. The initial bankruptcy case was dismissed in August because Mr. Petty did not comply with all court requirements for filing. R. at 5. Mr. Petty then hired a new bankruptcy lawyer to file a second petition on January 11, 2019. R. at 6. The petition included a plan to repay creditors 40 cents on the dollar for the next five years, including Wildflowers. R. at 6. The income would come from a second similar business, named "Full Moon Fever Brewing," that Mr. Petty planned to begin with the Equipment purchased by his failed business. R. at 6. He even negotiated with the Royal Rapids taproom landlord for another lease while attempting to undergo the bankruptcy process for his first business. R. at 6.

Mr. Petty never filed a motion to extend the automatic stay for the second bankruptcy case. R. at 6. Wildflowers took this opportunity to recoup some losses and sent a repossession company take the Equipment subject to the lien. R. at 6. After Wildflowers took the Equipment, Mr. Petty filed a motion in February of 2019 stating that Wildflowers violated the automatic stay. R. at 6. The motion argued for $500,000 in damages as the repossession made it difficult for Mr. Petty to begin a similar business. R. at 6. Wildflowers argued to the contrary and also alleged that this claim was subject to the arbitration clause in the original loan agreements. R. at 7.

The bankruptcy court ruled in favor of Mr. Petty, holding that enforcing the arbitration agreement would conflict with section 362 of the Bankruptcy Code and that a creditor cannot take action regardless of whether the automatic stay is extended. R. at 7. The bankruptcy court awarded Mr. Petty $200,000 in compensatory damages for Wildflowers willfully violating the automatic stay. R. at 7. Wildflowers appealed to the Thirteenth Circuit. However, the Thirteenth Circuit affirmed the lower court's decision on both issues. R. at 7. Now Wildflowers respectfully request this Court to reverse the lower courts erred findings and find in favor for Wildflowers. R. at 7.

SUMMARY OF THE ARGUMENT

This Court should not allow Mr. Petty the opportunity to evade contractual obligations about resolving claims that he freely entered into pre-bankruptcy. As to the first issue, the pre-existing agreement to arbitrate between Wildflowers and Mr. Petty is valid and should be enforced, regardless of whether Mr. Petty filed a bankruptcy petition. First, the core nature of a proceeding is not dispositive and cannot solely displace the Federal Arbitration Act. Even if the proceeding is found to be core, the arbitration remains the agreed and default forum for dispute.

Second, the Bankruptcy Code and Federal Arbitration Act are not in conflict. Ultimately, the only way to override the Federal Arbitration Act is if it is in clear and manifest conflict with

the Bankruptcy Code and produces an absurd result. Here, Section 362 does not prevent repossession, as arbitration was the proper forum for the dispute as there is no implicit repeal of the Federal Arbitration Act. Both Federal statutes coexist in application and should be enforced.

Third, arbitration does not strip any ability of Mr. Petty to raise claims against Wildflowers. Instead, arbitration is simply an effective alternative forum. Mr. Petty loses no rights to argue against Wildflower's repossession, leaving no reason for this Court to not enforce the pre-existing agreement between Mr. Petty and Wildflowers.

Additionally, this Court should not allow Mr. Petty, a former lawyer, to weaponize the automatic stay and leave a community bank without the protections it negotiated in the free market. First, the plain text of the statute and multiple other provisions in the Bankruptcy Code support the reading that "with respect to the debtor" includes property of the bankruptcy estate when referring to the termination of the automatic stay. Further, the phrase "with respect to the debtor" uses different language not because the automatic stay is not terminated in its entirety but because it is not terminated as to all debtors in the case.

Second, even if this Court were to find the text of § 362(c)(3)(A) ambiguous, legislative history supports the interpretation that the automatic stay lifts for both the serial-filing debtor and the debtor's estate property. Both the evolution of the statute's text and Congress's clearly articulated goals of discouraging abusive and artfully timed filings support this interpretation.

Third, the interpretation that supports § 362(c)(3)(A) lifting the automatic stay reflects the reality of actual bankruptcy practice. Without a termination of the automatic stay, creditors are left with a delayed and functionally impractical judicial remedy of a § 362(d) motion. Overall, an alternative interpretation leaves creditors vulnerable to abusive bankruptcy practices, unable to protect any interest in property and at the debtor's whim of when they want to refile a petition.

STANDARD OF REVIEW

The facts of this case are undisputed. R. at 8. This appeal presents only questions of law, which are reviewed de novo. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007).

ARGUMENT

This Court should reverse the Thirteenth Circuit Court of Appeals' finding, and hold that 11 U.S.C. § 362 does not conflict with the Federal Arbitration Act. Additionally, this Court should reverse the Thirteenth Circuit Court of Appeals' finding that 11 U.S.C. § 362(c)(3)(A) does not terminate the automatic stay as to property of the bankruptcy estate.

I. The Thirteenth Circuit erred in finding that 11 U.S.C. § 362 implicitly repeals the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. as the core nature of the proceeding does not alone grant judges discretion to displace arbitration, 11 U.S.C. § 362 contains no clear and manifest intent to displace arbitration, and Respondent may effectively vindicate his rights within arbitration.

The Federal Arbitration Act (FAA) requires courts to rigorously enforce arbitration agreements according to the agreement's terms, including terms that specify with whom alone--and on what terms--the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted. 9 U.S.C.A. § 1 et seq. Not only is the FAA an instruction from Congress to "respect and enforce agreements to arbitrate," it commands courts to "specifically [direct parties] to respect and enforce the parties' chosen arbitration procedures." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). Through the FAA, Congress has created a presumption for courts that an arbitration agreement is "valid, irrevocable, and enforceable." *See* 9 U.S.C. § 2. To overcome this presumption in the context of a bankruptcy proceeding, a court must first find that the proceeding is itself core in nature to Bankruptcy Code, then find that the code and the FAA have a "clear and manifest conflict" under the *McMahon* standard, then find that Respondent's rights could not be effectively be vindicated in the originally selected forum. In *Epic* this Court

points out that "[i]n many cases over many years, this Court has heard . . . efforts to conjure conflicts between the [FAA] and other federal statutes," and that every attempt thus far has failed. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018). This case should be no exception.

A. The core nature of a proceeding does not, alone, displace the FAA.

In the analysis of inherent conflict, some courts look to the proceeding as "core" or "non-core" to the functions and goals of the court. As the Thirteenth Circuit Court of Appeals points out, in non-core proceedings, the bankruptcy court generally does not have discretion to deny enforcement of a valid prepetition arbitration agreement. *See, e.g.*, *Anderson v. Credit One Bank, N.A.*, 884 F.3d 382, 387 (2d Cir. 2018); *see also Cont'l Ins. Co. v. Thorpe Insulation Co.* (*In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1021 (9th Cir. 2012). Additionally, even if the proceeding is core, it is not necessarily "premised on provisions of the Code that 'inherently conflict' with the Federal Arbitration Act." While the core/non-core distinction is relevant, it is "not alone dispositive." *In re Thorpe Insulation Co.*, 671 F.3d at, 1021 (quoting *In re Nat'l Gypsum Co.*, 118 F.3d1056, 1067–68 (5th Cir. 1997)).

Circuits differ in how much weight to place on the core and non-core distinguishment. For example, some Circuits do not even engage in the core and non-core analysis, simply holding that: "[w]here an otherwise applicable arbitration clause exists, a bankruptcy court lacks the authority and discretion to deny its enforcement, unless the party opposing arbitration can establish congressional intent, under the *McMahon* standard, to preclude waiver of judicial remedies for the statutory rights at issue." *Mintze v. Am. Fin. Servs., Inc. (In re Mintze)*, 434 F.3d 222, 231 (3d Cir. 2006) (citing *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 239 (1987)). Other circuits have found that while bankruptcy courts retain significant discretion to assess whether arbitration would be consistent with the purpose of the Code, they may only engage in the analysis the cause of

action at issue is derived entirely from the federal rights conferred by the Bankruptcy Code, rather than the pre-petition legal or equitable rights possessed by a debtor. *In re National Gypsum Co.*, 118 F.3d 1056, 1069 (5th Cir. 1997). To put simply--the wide majority of circuits, including the Thirteenth Circuit below, do not see the "core" nature as a dispositive factor, but rather a threshold that must be met to even engage in further analysis. R. at 11.

This Court has also found that neither policy concerns alone, nor cost to a party, overcome the command to enforce arbitration agreements. *See Am. Exp. Co. v. Italian Colors Rest*., 570 U.S. 228, 236 (2013) (finding a judge-made exception insufficient to create an exception to the FAA where merchants' contractual waiver of class arbitration was in question, because no contrary congressional command overrode the overarching principle that arbitration was a matter of contract); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 633 (1985) (rejecting the argument that the "fundamental importance" of antitrust laws displaced the FAA, "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum").

As in *Italian Colors,* there is no judge-made exception that allows a contractual arbitration provision to be ignored just because there may be good cause to do so in specific circumstances. While the Thirteenth Circuit expresses concerns about the policy implications about extending an automatic stay to allow Respondent to recuperate for the restructuring, mere policy implications, as the Supreme Court has pointed out, have no bearing on the creation of an "irreconcilable conflict." If the parties that agreed to the provision saw benefit in waiving it, they would do so, as nothing prevents a party from excluding statutory claims from the scope of an agreement to arbitrate. Any importance of the automatic stay within the reorganization of the debtor does not make it so sacrosanct as to be impervious towards congressional commands. Just as in *Mitsubishi*

Motors Corp., where the FAA presented a challenge towards the "fundamental importance" in the public interest of antitrust claims being able to be heard outside of arbitration and having access to treble-damages, the FAA still commands that those agreements, despite the challenge being to a "core" proceeding, to be enforced. This Court has never found the core and non-core distinction as dispositive for any other application of the FAA, and the Court should not do so here.

B. There is no clear and manifest conflict between Section 362 and the FAA which produces an absurd result.

Generally, this Court has adopted "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24 (1983). The Court employs the "plain meaning" rule, which provides that courts must enforce a statute's language, however awkward, "at least where the disposition required by the text is not absurd." *Smith v. Me. Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576, 583 (1st Cir. 2018) (citing *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004)).

The two statutes which Respondent claims cannot be harmonized are 9 U.S.C. §§ 1 et seq. of the FAA and 11 U.S.C. § 362 of the Bankruptcy Code. The FAA states that, when faced with an aggrieved party requirestng enforcement of an arbitration agreement, "[t]he court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court *shall* make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4 (emphasis added). Section 362 states that "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." 11 U.S.C. § 362(c)(3)(B).

These two statutes do no not produce an "absurd result" when read together in their plain language. Any conflict that may arise between them is not so clear and manifest to override a congressional command to enforce the existing arbitration agreement.

Courts may find that later statutes override portions of the FAA that demand arbitration only if there is a "clear and manifest" conflict with the FAA. *Epic*, 138 S. Ct. at 1624. Any party that hopes to show this conflict "bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow." *Id.* As pointed out by this Court "if Congress intended the substantive protection afforded [by the section in question] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." *Mitsubishi*, 473 U.S. at 628. Yet there is no such text or even legislative history to support such congressional intent, and there is no "hierarchy of congressional concerns that places the bankruptcy law in a position of superiority over [the Arbitration] Act." *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 885 F.2d 1149, 1155, 1161 (3d Cir. 1989).

However, courts are not without any avenue to override unjust arbitration agreements. For example, the final phrase of § 2 of the FAA (known as the "saving clause"), "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.' *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). As such arbitration clauses can be invalidated by "'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.*

Here, Respondent, a former lawyer himself, never raised any argument about the existence of fraud or duress during formation of the arbitration agreement, nor any argument that the arbitration agreement itself is unconscionable. R. at 10 n. 9. Thus, the only avenue for Respondent

to escape the arbitration clause, which is mandated to be enforced by the FAA, is to prove a "clear and manifest" conflict with the FAA and Section 362 sufficient to rob Respondent of his ability to effectively vindicate his statutory cause of action in the arbitral forum.

C. There is no right that cannot be vindicated within the forum of arbitration.

Bankruptcy is a complex proceeding, but—just as the Court pointed out in *Mitsubishi* and reinforced in *McMahon*—so are international antitrust matters and RICO claims, and the "potential complexity should not suffice to ward off arbitration."[1] *McMahon*, 482 U.S. at 239 (quoting *Mitsubishi*, 473 U.S. at 633). Social and policies goals ought to be acknowledged and recognized, but the Court makes clear that "even claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [their] statutory cause of action in the arbitral forum,' the statute serves its functions." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90–91 (2000). The purpose and benefit of arbitration is to allow the parties means to effectively and efficiently vindicate their rights in an agreed forum. As the Court points out in *Gilmer* points out, "arbitration agreements . . . serve to advance the objective of allowing claimants a broader right to select the forum for resolving disputes, whether it be judicial or otherwise." *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 29 (1991). It is Respondent's heavy burden to pinpoint what rights cannot be effectively vindicated within an arbitration, and at no point did Respondent meet this burden.

The majority below seeks to distinguish this case from *Hill*, where a woman filing chapter 7 bankruptcy brought a claim against a bank for willfully violating an automatic stay by withdrawing money from her account. *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 104–06 (2d

[1] There has been some dispute over exactly considerations to take into account as "[i]nterpretation [of McMahon] has not been uniform . . . and the circuit courts interpreting the Supreme Court holding have emphasized the importance of different considerations and have reached different outcomes." Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 Am. Bankr. Inst. L. Rev. 503, 517 (2009)

Cir. 2006). The majority states that Respondent's recovery now is "critical to his ability to reorganize under [Chapter 11 of] the Bankruptcy Code, discharge his debts, and obtain a fresh start[,]" but the "the assets of Great Wide Open [the Respondent's original business] were liquidated by the chapter 7 trustee in its bankruptcy case" and that the outstanding balance still owed was to the tune of $2.1 million. R. at 6, 13. Respondent even acknowledges that once the equipment was repossessed, the attempted reopening was doomed and no goodwill for the business remained. R. at 7. The compensatory payment of $200,000 from Wildflowers to Respondent does not serve to aid in his "fresh start," but rather just lessens the debt he already owes. Like in *Hill*, this recovery "cannot affect an ongoing reorganization, and arbitration would not conflict with the objectives of the automatic stay."[2] *Hill*, 436 F.3d at 110.

Respondent may argue for a stay on collections in arbitration with the same level of articulation and grace as he would in front of a bankruptcy judge. In arbitration, Respondent may point out the same wisdom of allowing him a chance to reopen his taprooms and earn revenue as the Thirteenth Circuit mentioned. The arbitration proceedings were pending and stayed due to Respondent's bankruptcy filings, and Respondent could have turned and argued an extension of that stay in those proceedings. But Respondent failed to argue for an extension in either the arbitration or under Section 362(c)(3)(B). Additionally, no other creditor requested an extension of the stay under Section 362(c)(3)(B).

Even if this Court finds that 11 U.S.C. § 362 implicitly repeals the Federal Arbitration Act, Respondent would still not have had relief under 11 U.S.C. § 362(c)(3)(A). However, the inquiry should end here, as 11 U.S.C. § 362 does not contain a "clear and manifest" intent to displace

[2] Part of the court's reasoning was that "[b]ecause this was a liquidating Chapter 7 case, there was no reorganization and Hill's bankruptcy estate included only property in which she had an interest as of the commencement of her bankruptcy case. 11 U.S.C. § 541(a)(1)." *Hill*, 436 F.3d at 110. Thus, any damages that might be awarded on the § 362(h) claim would be Hill's personal property and would not be part of her bankruptcy estate.

arbitration, and Respondent may effectively vindicate his rights within arbitration. Thus, this Court should honor the congressional command to treat the arbitration agreement as "valid, irrevocable, and enforceable." 9 U.S.C. § 2.

II. The Thirteenth Circuit erred in finding § 362(c)(3)(A) excludes property of the bankruptcy estate, because the statute's plain meaning and legislative history indicate that "with respect to the debtor" limits the termination only to serial filers.

Wildflowers did not violate the automatic stay when it exercised its contractual right to repossess secured assets before they deteriorated, because pursuant to 11 U.S.C. § 362(c)(3)(A), the automatic stay terminated thirty days after Respondent filed his second petition. When a bankruptcy court dismisses a debtor's case, an additional filing by that debtor within a year of the prior dismissal is subject to § 362(c)(3)(A).[3] 11 U.S.C. § 362(c)(3). The statute provides that "the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case[.]"11 U.S.C. § 362(c)(3). Like all serially filing debtors to whom this statute applies, Respondent could have filed a motion to extend the automatic stay. 11 U.S.C. § 362(c)(3)(B). He failed to do so, and he now asks this Court to force Wildflowers to bear the consequences of his two sloppily litigated bankruptcy cases.

The purpose of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) is "to correct perceived abuses of the bankruptcy system." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 231-32 (2010). Nevertheless, the phrase "with respect to the debtor" has divided courts. *Smith v. Me. Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576, 581 (1st Cir. 2018). For some, "with respect to the debtor" limits the relief to only the repeat debtor, extending the benefit of the automatic stay to the innocent joint debtor. *Reswick v.*

[3] A debtor that refiles under a chapter other than chapter 7 following a 707(b) dismissal is exempt. 11 U.S.C. § 362(c)(3). Respondent's re-filing was not the result of a 707(b) dismissal and is therefore not exempt. R. at 5.

Reswick (In re Reswick), 446 B.R. 362, 367-68 (9th Cir. B.A.P. 2011). For others, the phrase limits the scope of the relief granted to creditors in § 362(c)(3)(A) to only the debtor as an individual and the debtor's property outside of the bankruptcy estate, leaving the automatic stay intact as to any property that is part of the bankruptcy estate. *Id.* at 368. The Thirteenth Circuit court erred in adopting the latter interpretation of the statute, one that abandons canons of statutory construction by ignoring the provision's context within the statute, rejects Congress's well-documented intention to have the statute apply to property of the estate, and renders the statute an ineffectual curiosity within a series of abusive filing deterrents enacted to prevent conduct exactly like Respondent's.

A. The plain meaning of "with respect to the debtor" limits the stay termination to the serial debtor.

The interpretation of any statute begins first with the plain language of the statute. *United States. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The fair meaning of a text is not limited to "the hyperliteral meaning of each word in the text." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 268 (2012). Instead, statutes are to be read as a whole, with context informing the court's interpretation. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

1. Reading "with respect to the debtor" to exclude property of the bankruptcy estate conflicts with the precedent and improperly relies on post-hoc judicial analysis.

An interpretation that excludes property of the estate from termination conflicts with existing interpretations of the Bankruptcy Code. The statutorily enacted Rules of Construction for the Bankruptcy Code specify that any claim against the debtor includes property of the debtor, which this Court has held to mean that a claim against property of the debtor that is also property of the estate is a claim against the debtor. 11 U.S.C. § 102(2); *Johnson v. Home State Bank*, 501 U.S. 78, 85-87 (1991).

The exclusionary interpretation of "with respect to the debtor" also produces absurd results when applied to the phrase's appearances elsewhere in the Code. Consider 11 U.S.C. § 1520: "Upon recognition of a foreign proceeding that is a foreign main proceeding—sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States . . . ." 11 U.S.C. § 1520(a)-(a)(1) (emphasis added). This statute expressly provides that the § 362 automatic stay provision apply with respect to the debtor and the property of the debtor. Under the majority approach, "with respect to the debtor" limits the termination of § 362(a) to the only the debtor. Does "with respect to the debtor and the property of the debtor" (two of the three categories) likewise limit the application of § 362(a) to only the international debtor's person and property outside of the bankruptcy estate, leaving property that is part of the estate devoid of the protection of the automatic stay? Such an interpretation would be absurd as it would isolate the property subject to redistribution amongst creditors with no protection as a matter of course.

The phrase "with respect to the debtor" cannot logically exclude property of the bankruptcy estate while also including the debtor's non-estate property. Although § 362(a) stays eight different types of actions, courts often read these provisions to protect three sources of creditor recovery: the debtor, the debtor's property, and the property of the bankruptcy estate. *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226, 230 (5th Cir. 2019); *In re Williams*, 346 B.R. 361, 367 (Bankr. E.D. Pa. 2006). The presence of these three categories form the basis for the Respondent's argument that "with respect to the debtor" is a reference to the category of actions against the debtor. *Rose*, 945 F.3d at 230. This approach rests almost entirely on the proposition that the provision intentionally fails to mention property of the estate because the estate is excluded from the stay termination. *Rose*, 945 F.3d at 230. Under the exclusionary approach, "the phrase 'with respect to

the debtor' would most naturally be read to terminate the stay only for actions against the debtor, and not . . . for actions against both the debtor and the debtor's property." *In re Smith*, 910 F.3d at 582; *see also In re Bender*, 562 B.R. 578, 583 (Bankr. E.D.N.Y. 2016); *In re Daniel*, 404 B.R. 318, 323 (Bankr. N.D. Ill. 2009). In the phrase "with respect to the debtor," "'the debtor' cannot reasonably be read to include the 'debtor's non-estate property.'" *In re Daniel*, 404 B.R. at 324. In practice, however, courts adopting this interpretation still terminate the automatic stay as to the debtor's non-estate property, even though it too comprises one of the three categories of actions and like "property of the bankruptcy estate" is not explicitly referenced. *In re Smith*, 910 F.3d at 582 (observing that neither courts nor debtors promote an interpretation that also excludes the debtor's property apart from the bankruptcy estate).

Ultimately, the meaning of "with respect to the debtor" is not so plain as Respondent would suggest. This approach to statutory interpretation requires the interpreter to make several leaps. The first is that Congress expected courts to assign a different meaning to the phrase "with respect to the debtor" in this one provision than in its sixteen other appearances in the Act. The second leap is that Congress knew courts would synthesize the eight enumerated categories of stay in § 362(a) into three categories. The third leap is that Congress intended for courts to connect the text of "with respect to the debtor" back to the three judicially-invented categories of the automatic stay. And lastly, Congress must have expected that courts would understand this reference to one of the three categories not to limit the stay termination to one of those categories but to limit it to *two*, with the second category being that of "property of the debtor." Had Congress intended for the plain meaning of the statute's text to reveal itself only following a series of post-hoc judicial inventions, it truly would have been "hid[ing] elephants in mouseholes." *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

2. The plain meaning of "with respect to the debtor" limits the termination to only the serial debtor, consistent with its use throughout the statute and § 362(c)(3)'s deterrence system.

The phrase "with respect to the debtor" was intended to differentiate the serial debtor from the innocent joint debtor. Under this approach, if a debtor whose case is dismissed re-files within a year with a spouse with no prior bankruptcy filing, after 30 days the automatic stay would terminate as to the "serially-filing" spouse but not as to the "newly-filing" spouse. *In re Daniel*, 404 B.R. at 326. This meaning is consistent with the phrase's use throughout BAPCPA. "There is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). The phrases "with respect to the debtor" or "with respect to a debtor" appear 17 times in BAPCPA and appear nowhere else in the bankruptcy code.[4] These other provisions do not use "with respect to the debtor" to differentiate between a debtor and the bankruptcy estate. Rather, when not superfluous, they merely identify characteristics of the party filing the petition. § 109(h)(2) ("with respect to a debtor who resides in a district . . ."); § 109(h)(3)(A) ("with respect to a debtor who submits to the court . . ."); § 1328(g)(2) ("with respect to a debtor who is a person described . . ."). The purpose of the phrase would thus be "to reemphasize that a provision applied to the debtor rather than to add new information about the meaning or scope of a provision." *In re Smith*, 910 F.3d at 585. This usage is at odds with Respondent's contention that "with respect to the debtor" textually excludes estate property.

Interpreting "with respect to the debtor" to differentiate between the serial and joint filer is also consistent with the deterrence scheme in § 362(c). Courts should not "deviate from the result

[4] The phrases appear in the following statutes: § 109(h)(2), § 109(h)(3)(A), § 109(h)(3)(B), § 109(h)(4), § 111(g)(2), § 308(a), § 362(c)(3)(A), § 704(a)(10), § 704(b)(1), § 704(b)(2)(D), § 727(a)(11), § 1106(a)(8), § 1202(b)(6), § 1302(b)(6), § 1328(g)(2) and § 1520(a).

suggested by the structure of the statute itself." *Jeffers v. United States*, 432 U.S. 137, 156 57 & n. 26 (1977).Together with § 362(c)(4), § 362(c)(3) creates a "system of progressive protections." *In re Smith*, 910 F.3d at 586. The bankruptcy stay for first-time filers is "automatic and permanent" until the case closes or a party successfully moves to modify the stay. *Id.* Third-time filers receive no stay at all. *Id.*; 11 U.S.C. § 362(c)(4). For second-time filers, a time limitation on the automatic stay, requiring action to preserve the benefit of the stay, falls squarely in the middle. *In re Smith*, 910 F.3d at 586.

The automatic stay termination provision in § 362(c)(4) provides that when a debtor has had two pending bankruptcy cases dismissed in the prior year, "the stay under subsection (a) shall not go into effect upon the filing of the later case." 11 U.S.C. § 362(c)(4)(A)(i). Courts have taken notice of the difference in language between § 362(c)(3) and § 362(c)(4) and interpreted this difference as proof that had Congress intended for § 362(c)(3) to terminate the automatic stay in full, as it unambiguously did in § 362(c)(4), it could have used the same language. *Rose*, 945 F.3d at 230-31. However, if "with respect to the debtor" singles out the serial filer from the joint debtor, the difference in language is non-negligible. Because § 362(c)(4)(A)(i) prevents the automatic stay from going into effect as to the entire case, it necessarily would affect the joint debtor. Thus, the phrase "with respect to the debtor" uses different language not because the automatic stay is not terminated in its entirety but because it is not terminated as to all debtors in the case.

B. BAPCPA's legislative history supports an interpretation that § 362(c)(3)(A) lifts the automatic stay as to the serial-filing debtor and the debtor's property, regardless of whether it is part of the estate.

This Court should consider BAPCPA's purpose when reading the statute. *See Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 71 (2011). When a statute's meaning is ambiguous, as it is here, legislative history provides guidance. *In re Paschal*, 337 B.R. 274, 278 (Bankr. E.D.N.C.

2006). For over a century, legislative history has aided this Court in interpreting statutes. *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 (1991) (citing *Wallace v. Parker*, 31 U.S. 680, 687-690 (1832)). Statutory interpretation inquiries "benefit[] from reviewing additional information rather than ignoring it." *Id.*

1. The phrase "with respect to the debtor" is ambiguous.

Statutory terms are not unambiguous merely because of the "dictionary definitions of its component words." *Yates v. United States*, 574 U.S. 528, 537 (2015). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). As one court noted, "Dictionary definitions of the terms are certainly no help in determining whether, or to what extent, "with respect to the debtor" is intended to limit stay termination." *In re Daniel*, 404 B.R. at 321; *see also Robinson*, 519 U.S. at 341-43 (observing that although easily defined, the word "employee" did not unambiguously indicate the scope of who was considered an employee).

The question is posed: could the text of § 362(c)(3)(A) be any clearer? *In re Jones*, 339 B.R. 360, 363 (Bankr. E.D.N.C. 2006). Courts and scholars alike have responded with a resounding yes. *In re Goodrich*, 587 B.R. 829, 834 n.3 (Bankr. D. Vt. 2018) (comparing the statute to "a Rubik's Cube that arrived with a manufacturing defect"); *St. Anne's Credit Union v. Ackell*, 490 B.R. 141, 144 n.1 (D. Mass. 2013) (calling the text of § 362(c)(3) "at best, particularly difficult to parse and, at worse, virtually incoherent"); *In re Steinhaus*, 349 B.R. 694, 706 (Bankr. D. Idaho 2006) (observing that the statute is riddled with "loose and imprecise language"); Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005"*, 79 Am. Bankr. L.J. 191, 191-92 (2005)

(blaming BAPCPA's "atrocious drafting" on "arrogan[t]" drafters who "steadfastly resisted even the smallest technical corrections" in their "mission of defacing the [bankruptcy] Code"). "In an Act in which head-scratching opportunities abound for both attorneys and judges alike, § 362(c)(3)(A) stands out." *In re Paschal*, 337 B.R. at 277; *see also In re Daniel*, 404 B.R. 318, 321 (Bankr. N.D. Ill. 2009) (observing that this provision alone uses the phrase "with respect to" four times in a row).

The provision at issue has three possible interpretations. The first, promoted by Respondent, renders the statute ineffective, attributes meaning to text that assumes the court's post hoc interpretation of other text, and requires the court to interpret a phrase to mean something different than how it appears elsewhere in the Bankruptcy Code. *In re Paschal*, 337 B.R. at 277 ("[I]f read literally, [§ 362(c)(3)(A)] would apply to virtually no cases at all."); Peter E. Meltzer, *Won't You Stay a Little Longer? Rejecting the Majority Interpretation of Bankruptcy Code § 362(C)(3)(A)*, 86 Am. Bankr. L.J. 407, 430-31 (2012). The second interpretation, promoted by Wildflowers, increases the circumstances in which the statute would apply, adopts the meaning used throughout the rest of the statute, and aligns the provision within the statutory deterrent scheme. The third interpretation is that the phrase has no real meaning, an unappealing result but not one barred by canons of construction. *See United States v. Atlantic Research Corp.*, 551 U.S. 128, 137 (2007); *Ransom*, 562 U.S. at 81 (Scalia, J., dissenting) (noting that "[t]he canon against superfluity is not a canon against verbosity"). Even if this court is not persuaded that the second interpretation better satisfies existing canons of statutory construction, the phrase is at minimum ambiguous.

2. The legislative history of the evolution of the statutory text shows Congress's intent that § 362(c)(3) lift the automatic stay as to property of the estate.

Congress's first attempt at bankruptcy reform was The Consumer Bankruptcy Reform Act of 1998, a precursor to BAPCPA that included a provision that "[t]erminate[d] the automatic stay 30 days after filing of a petition if a chapter 7, 11, or 13 petition was pending and dismissed the previous year, unless the subsequent filing is in good faith." H.R. 3150, 105th Cong. § 119 (1998); *see also* H.R. Rep. No. 105-540, at 80 (1998). Much like the rest of the bankruptcy code existing at that time, the proposed legislation did not include the problematic phrase "with respect to the debtor" that plagues courts today. *See* H.R. 3150, 105th Cong.; Meltzer, *Won't You Stay*, *supra*, at 430.

The phrase was added throughout the statute as part of "technical amendments," that transformed the provision into what is now § 362(c)(3)(A). S. Rep. No. 105-253, at 39 (1998); 11 U.S.C. § 362(c)(3); *see, e.g., In re Smith*, 910 F.3d at 590. Most importantly, the House Report attached to the enacted statute describes § 362(c)(3)(A) as "terminat[ing] 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." *In re Daniel*, 404 B.R. at 328; H.R. Rep. No. 105-540, at 80.

Throughout the statute's evolution, the § 362(c)(3) exploding-stay provision was analogous to the § 362(c)(4) provision preventing the automatic stay from going into effect. The 30-day provision in § 362(c)(3) was originally intended to apply to debtors who had one case *or more* pending in the preceding year. S. Rep. No. 105-253, at 39 (applying the provisions presumption of bad faith when "more than one previous case" was pending during the prior year). This coupling further suggests that the two were intended to be steps within a progression of

deterrents, differentiated primarily by the timing of the stay termination. *In re Smith*, 910 F.3d at 586.

3. Congress's policy goals of preventing abusive bankruptcy filings support an interpretation that addresses abusive filings.

The 30-day automatic stay termination is part of the BAPCPA section titled "Discouraging Bankruptcy Abuse." *In re Smith*, 910 F.3d at 590. A major motivating factor in instigating bankruptcy reform was the use of bankruptcy filings to forestall creditor's remedies. *In re Reswick*, 446 B.R. at 371. A Congressionally commissioned review of the state of bankruptcy proceedings prepared for the precursor legislation to BAPCA, observed that "[s]ome debtors file for chapter 13 . . . on the eve of a foreclosure or eviction for the sole purpose of delaying the state legal process. When the threat passes, they dismiss their cases, only to file again when the mortgagee or landlord brings another legal action to seize control of the property." Nat'l Bankr. Review Comm'n, Report of the National Bankruptcy Review Commission § 1.5.5, p. 279 n. 733 (Oct. 20, 1997), available at http://govinfo.library.unt.edu/nbrc/reportcont.html; *In re Reswick*, 446 B.R. at 371. These debtors used the automatic stay "as a sword rather than as a shield." *In re Charles*, 334 B.R. 207, 219 (Bankr. S.D. Tex. 2005).

Respondent's artfully timed filings are what Congress intended bankruptcy reform to address. Respondent has twice timed his bankruptcy filings to coincide with the commencement of arbitration proceedings. Respondent has made clear his desire to avoid arbitration. R. at 7. Much like a debtor filing bankruptcy "on the eve of a foreclosure," Respondent filed his first bankruptcy case the same day the initial conference of arbitration proceedings were to take place and again "just as the arbitration proceeding was about to recommence." R. at 5-6. However, this Court need not go so far as to find that Respondent willfully abused the bankruptcy stay in filing these cases. Instead, the parallels between Respondent's behavior and the problematic behavior that Congress

sought to eradicate with § 362(c)(3) ought to guide this Court as it considers which of the interpretations Congress intended. Courts reading the statute to exempt estate property already concede that their approach may not best serve the statute's policy goals. *Rose*, 945 F.3d at 231. The legislative history overwhelmingly points this Court to an interpretation that would terminate the stay as to all property, including property of the estate.

C. Interpreting § 362(c)(3)(A) to terminate the automatic stay in its entirety better balances competing interests and protects creditors from abusive filers.

The Bankruptcy Code must balance the competing interest of creditors and debtors. *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 563 (1994) (Souter, J., dissenting). Creditors have much to lose when a debtor files for bankruptcy, and the Code seeks to reduce "the risks creditors face and allow[] creditors to account for the risk that a borrower will fail to repay." *Janvey v. Romero*, 883 F.3d 406, 410 (4th Cir. 2018); *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1693 (2015) (noting that the automatic stay "can cost creditors money"). Courts have recognized that reducing creditors' costs in extending loans benefits the public. *Id.* A creditor's reduced risk redounds to the benefits of its customers via lower interest rates. *Id.* Conversely, creditors' redistribution of the additional costs incurred due to bankruptcy litigation create a "hidden bankruptcy tax" that impacts consumers to the tune of $300 to $400 per household. Report of the Nat'l Bankr. Review Comm'n, *supra*, at 1133 (as of 1997).

Adopting an interpretation that maintains the automatic stay as to property of the estate does not provide adequate protection for creditors. "[T]here are very few practical situations in which a creditor would take action against a debtor or non-estate property." *In re Reswick*, 446 B.R. at 373. The proposal that creditors merely file a § 362(d) motion notion naively ignores the realities of bankruptcy practice. Although a motion must be heard within 30 days, it need not be decided within that time. *Rose*, 945 F.3d at 231. Hearings are frequently rescheduled, and even if

relief is granted at the very first opportunity, time must be allotted for the administrative entry of the order granting relief and for the additional 14-day stay to elapse. Fed. R. Bankr. P. 4001. Moreover, the presumption of bad faith provided for in § 362(c)(3)(C) is not available to creditors pursuing a 362(d) motion, and the adequate protection required to prevent a creditor from obtaining relief under § 362(d) often comes in the form of a promise as to future behavior. *See* 11 U.S.C. § 361; 3 *Collier on Bankruptcy* ¶ 361.03 (16th ed. 2020). This leaves the creditor, forestalled once more by an abusive filing, with the same remedies available during the debtor's first bankruptcy filing.

On the other hand, requiring parties in interest to file a motion to extend the stay under § 362(c)(3)(B), adequately protects property of the estate. Although debtors are not the only parties affected by the termination of the stay as to property of the estate, § 362(c)(3)(B) provides these additional parties with a recourse. *In re Daniel*, 404 B.R. at 321. A party in interest may move to extend the stay, and if they show the later case was filed "in good faith as to the creditors to be stayed," the court will grant the motion. 11 U.S.C. § 362(c)(3)(B). Although some courts argue that § 362(c)(3)(B) imposes an impossible burden on parties in interest (especially trustees), the American Bankruptcy Institute Commission on Consumer Bankruptcy suggests that in practice this burden is de minimis and does not do *enough* to protect creditor's interests. *In re Thu Thi Dao*, 616 B.R. 103, 106-07 (Bankr. E.D. Cal. 2020); Am. Bankr. Inst. Comm'n on Consumer Bankr., 2017-2019 Final Report and Recommendations 65-70 (2019). A survey of repeat filings showed that judges granted 98 percent of motions to extend the stay, even when the movant offered no evidence of changes in the debtor's circumstances at all. Sara Sternberg Greene, *The Failed Reform: Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers*, 89 Am. Bankr. L.J. 241, 244 (2015). For the concerned chapter 7 trustee, the 30-day deadline to file a motion to extend

the automatic stay falls squarely within the period during which the trustee examines the debtor and the debtor's estate. *In re Thu Thi Dao*, 616 B.R. at 106-07; 11 U.S.C. § 341; Fed. R. Bankr. P. 2003 (ordering the meeting of creditors to be held between 21 and 40 days after filing).

Wildflowers is a local bank, and when it chose to invest, it invested in a small local business. Wildflowers does not have the deep pockets of multinational financial institutions. Its investment in Respondent and Respondent's business, Great Wide Open, represented one of the largest credits in its loan portfolio. Nevertheless, outside the protection of bankruptcy, Respondent closed three taprooms and allowed a lease to expire with no notice to Wildflowers. Now Respondent seeks to reduce Wildflowers' recovery further by using the bankruptcy court to circumvent Wildflowers' contractually negotiated rights and repeatedly stall Wildflowers' attempts at recovery.

CONCLUSION

This Court should abide by the precedent made clear within *Epic* and *McMahon* by finding that there is no clear and manifest conflict between 11 U.S.C. § 362 and the Federal Arbitration Act which would produce an absurd result. This Court should instruct the lower court to abide by the congressional command and make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement so that the parties may efficiently and effectively vindicate their rights. If this Court does find a clear and manifest conflict, then it should find that the automatic stay was not in effect when Wildflowers peaceably repossessed the Equipment. This Court should reject an interpretation of 11 U.S.C. § 362(c)(3)(A) that renders the 30-day stay termination ineffectual by exempting property of the bankruptcy estate.

APPENDIX A

9 U.S.C. § 2 Validity, irrevocability, and enforcement of agreements to arbitrate

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

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11 U.S.C. § 362 Automatic stay

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

(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[.]