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 THE RESPONDENT

TEAM NUMBER 4

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

1. Under 11 U.S.C. § 362 and related judicial code provisions, is the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*., impliedly repealed when arbitration inherently conflicts with a core bankruptcy proceeding?
2. Under 11 U.S.C. § 362(c)(3)(A), is the termination of the automatic stay limited to actions against the debtor as the text of the statute provides or does it extend to property of the debtor's bankruptcy estate?

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The decision of the Thirteenth Circuit Court of Appeals is reproduced in the record on appeal. The decision of the United States Bankruptcy Court for the District of Moot is unreported.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The relevant statutory provisions are listed below and their pertinent text are reproduced in Appendix A.

11 U.S.C. § 362(a)

11 U.S.C. § 362(c)(1)

11 U.S.C. § 362(c)(3)(A-B)

11 U.S.C. § 362(c)(4)(A)(i)

11 U.S.C. § 521(c)(6)

28 U.S.C. § 157(b)

28 U.S.C. § 1334(e)

STATEMENT OF THE CASE

I. FACTUAL HISTORY

Respondent, Earl Thomas Petty ("Petty"), is a small business owner who turned his hobby of brewing craft beer into a business when he started the Great Wide Open Brewing Company, Inc. ("Great Wide Open"). R. at 3. Petitioner, Wildflowers Community Bank ("Wildflowers"), served as Petty's primary lender. R. at 4. This relationship resulted in the current dispute.

Initially, Great Wide Open began as a craft brewery that only sold its beer to local restaurants and convenience stores. R. at 3. By 2005, Great Wide Open featured a taproom in the City of Royal Rapids, Moot. R. at 3. Petty used his own funds to purchase small batch brewing equipment (the "Equipment") to get the taproom up and running. R. at 3.

Over the next several years, Great Wide Open continued to grow and became one of the state's largest craft breweries. R. at 3. By 2010, Great Wide Open had four additional taprooms in college towns throughout the State of Moot. R. at 4. In 2012, Great Wide Open opened a state-of –the-art brewhouse that had the ability to produce 250,000 barrels of beer per year. R. at 4.

To fund these expansions, Great Wide Open borrowed money from Wildflowers. R. at 4. Great Wide Open and Wildflowers entered into a $35 million credit agreement (the "Credit Agreement"). R. at 4. The Credit Agreement granted Wildflowers a priority lien on the majority of Great Wide Open's assets. R. at 4. Petty also personally entered into an agreement (the "Guaranty") with Wildflowers to guarantee repayment of the business's obligations. R. at 4. As part of the Guaranty, Petty granted Wildflowers a first priority lien on the Equipment. R. at 4.

Both agreements granted Wildflowers the right to enter the premises to repossess any secured collateral. R. at 4. The agreements also contained arbitration clauses that read: "any and all disputes, claims, or controversies of any kind between us arising out of or relating to the

relationship between us will be resolved through mandatory, binding arbitration and each party voluntarily gives up any rights to have such disputes litigated in a court or by jury trial." R. at 4.

In an effort to be more fiscally conscious, Great Wide Open closed three of its taprooms in 2018. R. at 5. Unfortunately, despite Petty's best efforts to keep the business afloat, Petty and Great Wide Open defaulted on their respective agreements in April 2018. R. at 5. Shortly thereafter, Wildflowers initiated arbitration alleging a state law breach of contract claim and seeking $33.2 million in damages. R. at 5. The American Arbitration Association scheduled a conference for July 12, 2018. R. at 5.

Before the arbitration conference, Great Wide Open filed a chapter 7 bankruptcy case and Petty filed a chapter 11 bankruptcy case. R. at 5. Great Wide Open's chapter 7 case was successful. Wildflowers received almost the entire amount owed under the Credit Agreement. R. at 6. On August 27, 2018, Petty's chapter 11 case was dismissed. R. at 5. After hiring a new bankruptcy attorney, Petty filed a second chapter 11 case prior to the arbitration recommencing. R. at 5-6. As part of this chapter 11 case, Petty proposed a plan of reorganization to pay his creditors forty cents on the dollar. R. at 6. Petty negotiated settlements with most of his creditors, but he did not attempt to negotiate a settlement with Wildflowers. R. at 6. Wildflowers filed a proof of claim in Petty's chapter 11 case for $2.1 million which was the amount owed under the Guaranty.

To fund his plan for reorganization, Petty reopened his original Royal Rapids taproom in December 2018 as "Full Moon Fever Brewing," a sole proprietorship. R. at 6. Petty used the Equipment from Great Wide Open, which was never taken from the Royal Rapids taproom, to produce beer. R. at 6. Full Moon Fever Brewing enjoyed immediate success with Great Wide Open's customers, who were eager to sample the new product. R. at 6.

Unfortunately, Petty failed to file a motion to extend the automatic stay under section 362(c)(3)(B). R. at 6. After the expiration of the thirty-day period prescribed in section 362(c)(3)(A) Wildflowers did not request an order from the bankruptcy court, under 362(j), to confirm that the automatic stay had been terminated with respect to the property. R. at 6. Instead on the thirty-second day after the filing of the case, Wildflowers repossessed the Equipment from the taproom. R. at 6. Wildflowers's actions had a devastating effect on Full Moon Fever Brewing. With no Equipment, the company was forced to close its doors, ceasing operations, five days later on February 17, 2019. R. at 7.

II. PROCEDURAL HISTORY

On the same day, Petty filed a motion under section 362(k) seeking $500,000 in damages for Wildflowers's alleged violation of the automatic stay. R. at 6. In response, Wildflowers argued that the stay was completely terminated on the thirtieth day following the commencement of the case. R. at 7. Wildflowers also asserted that Petty was required to bring his claims to arbitration. However, due to the bankruptcy cases, the preexisting arbitration proceeding was stayed. R. at 7. The bankruptcy court agreed with Petty and denied Wildflowers's request for arbitration because it inherently conflicted with the Bankruptcy Code. R. at 7. The court also held that Wildflowers willfully violated the automatic stay when it repossessed the Equipment, because creditors are not allowed to take action against property of the estate, regardless of whether the automatic stay was extended. R. at 7. The court awarded Petty $200,000 in compensatory damages for this willful violation. R. at 7. Wildflowers appealed directly to the Thirteenth Circuit Court of Appeals, which affirmed the bankruptcy court's findings on both issues. R. at 7.

SUMMARY OF THE ARGUMENT

Section 362 of the Bankruptcy Code is the cornerstone of creditor and debtor protections in a bankruptcy proceeding. As expressly enumerated in section 157, issues that relate to the automatic stay constitute core proceedings that the bankruptcy court has the authority to resolve and issue a final ruling. Further, the automatic stay is a legal concept that is distinctive to a bankruptcy case, and thus should be resolved by the courts that were specifically designed to hear such issues. Congress's intent as well as the overall purpose of the Bankruptcy Code make it definitively clear that violations of the automatic stay are core proceedings.

Because violations of the automatic stay arise to that of a core proceeding, the bankruptcy court has the discretion to preclude arbitration if it would inherently conflict with the purposes of the Bankruptcy Code. One of the purposes of the Bankruptcy Code is to give the honest but unfortunate debtor a fresh start and streamline creditors' into one bankruptcy proceeding. This causes most bankruptcy cases to be multi-party proceedings. The benefits of arbitration, which is typically a two-party dispute, do not translate to the multi-party nature of bankruptcy proceedings.

One of the fundamental benefits of chapter 11 proceedings is the reorganization process. The plan of reorganization is crucial to a debtor's fresh start. In Petty's case, arbitration inherently conflicts with his reorganization plan. Petty plans to use the damages from the automatic stay violation to fund his plan. Arbitration would affect this plan and in turn would affect his creditors.

Finally, Congress enacted the Bankruptcy Code so judges with the relevant knowledge and expertise could decide issues such as this. Bankruptcy proceedings exist so that debtors and creditors can avoid both piece meal litigation and unnecessary time adjudicating their claims. By allowing the arbitration to proceed, Petty's bankruptcy case would be split between two forums. Further, bankruptcy judges deal with automatic stay violations on a regular basis and are better

equipped to decide this issue than an arbitrator who likely has no experience in the matter. Therefore, enforcing arbitration would inherently conflict with the purposes of the Bankruptcy Code.

Section 362(c)(3)(A) of the Bankruptcy Code terminates the automatic stay on the thirtieth day after the petition date of the bankruptcy case if the debtor had a prior case pending and dismissed in the previous year. A majority of courts read this section to terminate the stay only as to the debtor. A minority of courts interpret this section to completely terminate the stay.

The Thirteenth Circuit correctly adopted the majority interpretation of section 362(c)(3)(A) for several reasons. First, the text of the statute is unambiguous. Section 362(c)(3)(A) explicitly provides that the stay is terminated only "with respect to the debtor." The plain language of the statute does not include any reference to property of the debtor's bankruptcy estate. Thus, any reading that construes this section to terminate the entire stay reads words into the statute.

Second, any ambiguity is resolved by reading this provision in conjunction with section 362 as a whole. Congress demonstrated its ability to differentiate between the debtor, the debtor's property, and property of the estate in 11 U.S.C. § 362(a)(1-8). This section sets forth different protections for each of the preceding categories. Congress's choice to only include the debtor in section 362(c)(3)(A) illustrates that it only intended for the stay to terminate as to actions against the debtor. Congress also knew how to completely terminate the stay. For debtors who have had more than two cases pending in the previous year 11 U.S.C. § 362(c)(4)(A)(i) provides that the stay does not come into effect at all. Congress used different language in section 362(c)(3)(A) which evidences an intent for this section to have a different effect. Additionally, the minority view conflicts with 11 U.S.C. § 362(c)(1). This section provides that the stay protects property of

the estate until the bankruptcy case is resolved. By reading section 362(c)(3)(A) to terminate the stay in its entirety, the minority creates an inconsistency in the statutory scheme.

Third, the statute's legislative history supports the majority view. Congress enacted this section to deter debtors from abusing the automatic stay by creating a penalty structure for repeat filers. The majority interpretation achieves Congress's goal. It creates an intermediate penalty for second-time filers. The minority view on the other hand reads section 362(c)(3)(A) to have the same effect as the penalty for excessive filers in section 362(c)(4)(A)(i).

Finally, the majority interpretation helps maximize creditor recovery and ensures an equitable distribution of the debtor's assets. The stay remaining partially intact ensures that the trustee will be able to distribute the debtor's equity in property of the estate to unsecured creditors. In reorganization cases the stay allows the debtor to fund his plan by using property of the estate. If the stay was terminated completely then the trustee would be unable to properly administer a debtor's liquidation case and many reorganizations cases would fail.

STANDARD OF REVIEW

The facts as stated in this brief are undisputed by the parties. The issues before this Court are questions of law. The standard of review is *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

ARGUMENT

I. SECTION 362 AND RELATED SECTIONS OF THE BANKRUPTCY CODE INHERENTLY CONFLICT WITH THE FEDERAL ARBITRATION ACT.

Congress elegantly crafted chapter 11 of the Bankruptcy Code to provide corporations and certain individuals a means to reorganize and continue to provide goods and services while also protecting the collective rights of all parties in interest. Nearly four decades ago, this Court acknowledged that "[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). The automatic stay, in conjunction with the broad definition of property of the estate, serves to protect the interests of both creditors and debtors by ensuring creditors are treated equally and that debtors are given the necessary breathing spell required to successfully reorganize. *See generally Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020).

The Federal Arbitration Act ("FAA") was enacted in 1926 to enforce private arbitration agreements and facilitate the efficient resolution of non-judicial disputes. *See* 9 U.S.C. §§ 1 *et seq*. Over the past several decades, a national policy favoring arbitration has developed and courts have consistently held that agreements to arbitrate are generally enforceable against two contracting parties. *See Southland Corp. v. Keating*, 104 S. Ct. 852, 858 (1984). However, in cases that present "an inherent conflict between arbitration and [a] statute's underlying purpose[]" this Court has found that the FAA's mandate may be overridden. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

Discord has arisen across various jurisdictions concerning the conflicting application of the FAA and the Bankruptcy Code. In short, the Third Circuit has generally held that arbitration agreements are valid and enforceable absent a showing of Congressional intent to override the FAA's mandate. *In re Mintze*, 434 F.3d 222, 229 (3d Cir. 2006). On the other hand, the Second Circuit has held that a non-core claim may be arbitrated under the FAA, while arbitration of a core claim is prohibited *Anderson v. Credit One Bank, N.A. (In re Anderson)*, 884 F.3d 382, 387 (2d Cir. 2018). Similarly, there is wide-spread acceptance across numerous federal bankruptcy courts as well as the Fourth, Fifth, Ninth, and Eleventh Circuits that the bankruptcy court has the discretion to refuse to enforce an arbitration agreement in a core proceeding. *See e.g.*, *Phillips v. Congelton, L.L.C. (In re White Mountain Mining Co.)*, 403 F.3d 164, 169 (4th Cir. 2005); *Henry v. Educ. Fin. Serv. (In re Henry)*, 944 F.3d 587, 590 (5th Cir. 2019); C*ontinental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1021 (9th Cir. 2012); W*hiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc., (In re Elec. Mach. Enters., Inc.)*, 479 F.3d 791, 796-97 (11th Cir. 2007); *Kraken Inv. Ltd. v. Jacobs (In re Salander-O'Reilly Galleries, LLC*), 475 B.R. 9, 15 (S.D.N.Y. 2012).

Arbitration and bankruptcy are two separate and distinct means of dispute resolution that occupy different spheres of our legal system. The Bankruptcy Code's plain language, overall purpose, and legislative history require issues that can only arise in the context of bankruptcy must be resolved by the bankruptcy court. First, Wildflowers's willful violation of the automatic stay constitutes a core proceeding as expressly enumerated by the Bankruptcy Code. Second, the FAA and section 362 of the Code inherently conflict and thus require the bankruptcy court to resolve Petty's claim for damages. Permitting a bankruptcy judge to adjudicate all matters solely relating

to bankruptcy protects all parties and fosters, rather than forecloses, a result in conformity with the overarching goals of the Bankruptcy Code.

A. Issues concerning the automatic stay definitively constitute a core proceeding.

The threshold inquiry in the case at bar requires the Court to determine whether the issues presented constitute a core or non-core proceeding. It is relatively undisputed that the proceeding at issue involves the automatic stay and property of the estate. Irrespective of whether the automatic stay was in effect at the time Wildflowers impermissibly confiscated Petty's Equipment, the Bankruptcy Code's express language, overall purpose, and legislative history require that all matters involving the estate constitute a core proceeding.

In a bankruptcy case, the bankruptcy judge must determine whether the proceeding in question constitutes a core or non-core proceeding. 28 U.S.C § 157. This Court has not only recognized the distinction between the two types of proceedings but has also stated, "core proceedings are those that arise in a bankruptcy case or under Title 11." *Stern v. Marshall*, 564 U.S. 462, 476 (2011). Furthermore, "[c]laims that clearly invoke *substantive* rights created by federal bankruptcy law necessarily arise under Title 11 and are deemed core proceedings." *MBNA America Bank, N.A. v. Hill*, 436 F.3d 104, 108-09 (2d Cir. 2006) (emphasis added). On the other hand, a non-core proceeding is one that does not arise to a core matter but is related to a Title 11 case. *See* 28 U.S.C § 157.

The provisions that relate to the automatic stay and property of the estate help to construct the bedrock of the Bankruptcy Code, and thus constitute core proceedings. "[T]he filing of a bankruptcy petition automatically halts all efforts to collect prepetition debts from the bankrupt debtor *outside the bankruptcy forum*." *Ritzen Grp., Inc.*, 140 S. Ct. at 589 (citing 11 U.S.C. §

362(a) (emphasis added)). Furthermore, "[t]he scope of the automatic stay is broad and covers all proceedings against a debtor, including arbitration." *Acands, Inc. v. Travelers Cas. & Sur. Co.*, 435 F.3d 252, 259 (3d Cir. 2006) (citing *Ass'n. of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 448 (3d Cir. 1982)). While the automatic stay halts all judicial and non-judicial proceedings, section 541 of the Bankruptcy Code broadly defines property of the estate and concentrates "all legal or equitable interests of the debtor" into one bankruptcy estate. 11 U.S.C. § 541. Upon the debtor's filing of a bankruptcy petition, all matters relating to the estate come within the exclusive jurisdiction of the district court which may then refer cases brought under its original jurisdiction to the bankruptcy court. *See* 28 U.S.C. § 1334(e); *see also* 28 U.S.C. § 157(b). Violations of the automatic stay and resulting damages are core proceedings that the bankruptcy court has the authority to ascertain notwithstanding a private prepetition arbitration agreement.

i. The automatic stay is a critical facet of the Bankruptcy Code's foundation to which the bankruptcy court has the statutory and constitutional authority to issue final determination.

The automatic stay is an integral facet of the Bankruptcy Code that provides debtors with substantive rights unique to a bankruptcy proceeding. Upon the filing of Petty's bankruptcy petition, the automatic stay, by operation of law, categorically prohibited all attempts to collect a prepetition debt. Petty is entitled to prosecute Wildflowers for unlawfully repossessing Petty's Equipment because a violation of the automatic stay is a core proceeding that the bankruptcy court has the constitutional and statutory authority to adjudicate.

The jurisdiction of the bankruptcy courts is not absolute and is limited by statute to core proceedings. *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). This Court has recognized that the bankruptcy court has the constitutional and statutory authority to issue a final ruling on claims

which derive directly from the Bankruptcy Code and can be brought only in the context of a bankruptcy case. *Stern v. Marshall*, 564 U.S. 462, 475 (2011).

First, determining whether a proceeding is core or non-core is not a matter of judicial construct, but instead, is expressly enumerated by federal statute. Section 157(b), in relevant part, states:

> (2) Core proceedings include, but are not limited to—
>
> > (A) *matters concerning the administration of the estate*;
> >
> > (B) *allowance or disallowance of claims against the estate* or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11. . .
> >
> > (C) *counterclaims by the estate* against persons filing claims against the estate; . . .
> >
> > (E) orders to turn over property of the estate; . . .
> >
> > (G) *motions to terminate, annul, or modify the automatic stay*;
> >
> > (H) proceedings to determine, avoid, or recover fraudulent conveyances; . . .
> >
> > (K) determinations of the validity, extent, or priority of liens;
> >
> > (L) confirmations of plans; . . . [and]
> >
> > (O) *other proceedings affecting the liquidation of the assets of the estate* or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims . . . .

28 U.S.C. § 157 (emphasis added). Furthermore, such determination is not permissive and is mandated by the Bankruptcy Code. The Code states, "[t]he bankruptcy judge *shall* determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding . . . or is a proceeding that is otherwise related to a case under title 11." 28 U.S.C. § 157(b)(3) (emphasis added).

The bankruptcy court has the statutory authority to resolve issues arising from a violation of the automatic stay. For example, in *Budget Serv. Co. v. Better Homes*, the debtor filed a petition

for reorganization under chapter 11 of the Bankruptcy Code and subsequently brought a claim alleging that the creditor's attempt to repossess its vehicles was a violation of the automatic stay. *Budget Serv. Co. v. Better Homes*, 804 F.2d 289, 291 (4th Cir. 1986). After recognizing that the Code empowers bankruptcy judges to hear all core proceedings, the Fourth Circuit held that a claim for violation of the automatic stay pursuant to section 157(b)(2)(A), (2)(E), and (2)(G) is a core proceeding because it involves an "integral part of the federal rights created under the Bankruptcy Code" that the bankruptcy court "clearly had the power" to hear and issue a judgment. *Id*. at 292.

Next, the automatic stay is a legal construct unique to the Bankruptcy Code; thus, all issues relating to the automatic stay constitute a core proceeding that the bankruptcy court has the constitutional authority to adjudicate. For example, in *In re Cowen*, the Tenth Circuit found that a claim for damages under section 362(k)(1) for a violation of an automatic stay is a core proceeding because the claim necessarily stemmed from the Bankruptcy Code itself. *WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943, 948 (10th Cir. 2017); *see also Johnson v. Smith (In re Johnson)*, 575 F.3d 1079, 1083 (10th Cir. 2009).

On the other hand, in bankruptcy cases where a party brings a claim that arises under a non-bankruptcy law or statute, the bankruptcy court may lack the constitutional authority to resolve the dispute. In *Stern v. Marshall*, the debtor brought a counterclaim against the creditor alleging tortious interference with the administration of a decedent's estate. *Stern*, 564 U.S. at 465. After recognizing that the bankruptcy court has the statutory authority to enter a judgment on the debtor's counterclaim, this Court held that because the counterclaim arose under state common law and did not involve an issue arising under the Code, the bankruptcy court lacked the constitutional authority to issue a final judgment. *Id*. at 469.

Turning to the case at hand, Wildflowers, in direct violation of the automatic stay, illegally repossessed Petty's Equipment. Pursuant to section 157(b)(2), matters concerning the estate, the automatic stay, and counterclaims by the estate all constitute core proceedings. Parallel to *In re Cowen* and *Better Homes*, Petty's damages claim is a statutory remedy expressly prescribed by and through the Bankruptcy Code. Furthermore, as alluded to by this Court in *Stern*, a bankruptcy-specific claim that can only be brought through the Bankruptcy Code is a core proceeding that the bankruptcy court has the constitutional authority to issue a final judgment. In summation, Petty's claim for damages alleging Wildflowers violated the automatic stay would lack standing but for the Bankruptcy Code, and thus constitutes the quintessence of a core proceeding.

ii. A claim that arises from a violation of the automatic stay constitutes the epitome of a core proceeding because the claim affects not only the debtor but also all parties in interest.

Petty's claim is a core proceeding that the bankruptcy must resolve because Wildflowers's repossession of the Equipment not only impairs Petty's ability to reorganize but also forecloses upon all other creditors' right to an equitable share of the estate. Disallowing the bankruptcy court from exercising discretion to adjudicate Petty's claim will jeopardize two of the most sacred objectives of the Bankruptcy Code. First, it will extinguish Petty's right to a "fresh start." Second, it will destroy all parties in interest's right to a "centralized" resolution to disputes concerning the estate. *See MBNA*, 436 F.3d at 108.

The automatic stay is a fundamental debtor protection and strikes a delicate and carefully crafted balance between the rights of debtors and creditors alike. *See H & H Beverage Distribs. v. Dep't of Revenue*, 850 F.2d 165, 166 (3d Cir. 1988). This Court, as well as the leading bankruptcy commentator, has recognized that the stay not only protects the debtor's interest by preserving the status quo but also protects the collective interests of all creditors by preventing "dismemberment

of the estate." *Ritzen Grp., Inc.*, 140 S. Ct. at 589; *see also 1 Collier on Bankruptcy* § 362.03 [1][b][iii] (16th ed. 2019). The dual protections afforded by the automatic stay, the collective interests of creditors, and the necessity of adjudicating violations of the Bankruptcy Code all require that issues related to the automatic stay are deemed core proceedings. *See generally In re Trang*, 58 B.R. 183 (Bankr. S.D. Tex. 1985).

First, the automatic stay is a "mandatory" protection that is "applicable to all entities" and cannot be unilaterally limited by the debtor or the creditor. *Mar. Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1206 (3d Cir. 1991) (citing *Boynton v. Ball*, 121 U.S. 457, 466-67 (1887)). For example, the Third Circuit has found that "because the automatic stay serves the interests of both debtors and creditors, it may not be waived, and its scope may not be limited by a debtor." *Id*. at 1204; *see also Commerzanstalt v. Telewide Sys*., 790 F.2d 206, 207 (2d Cir. 1986).

With respect to debtor protections, a violation of the automatic stay is a core proceeding because such claims directly affect the debtor's ability to reorganize. In *United States v. Whiting Pools*, this Court noted that in order to facilitate reorganization, "all of the debtor's property must be included in the . . . estate" because reorganization "would have [a] small chance of success . . . if property essential to running the business were excluded from the estate." 462 U.S. 198, 203 (1983). Further, in *In re White Mountain Mining Co*., the Fourth Circuit found that claims which involve a question of the debtor's equity are core proceedings because the "resolution of . . . debt-equity issues [is] critical to the debtor's ability to formulate a plan of reorganization." 403 F.3d at 170.

Next, a violation of the automatic stay constitutes a core proceeding because it not only impedes the debtor's ability to reorganize but also impermissibly violates all other law-abiding creditors' right to a centralized resolution of claims. "Consolidating all pre-petition claims against

the debtor in one collective proceeding before a bankruptcy court is the essence of bankruptcy." *Mar. Elec. Co.,* 959 F.2d at 1207 (citing Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 7-19 (1986)). As explained by the Fifth Circuit, the automatic stay serves the creditor's interests by enabling the bankruptcy court to centralize all valid claims and prevent a "chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts." *Hunt v. Bankers Tr. Co.,* 799 F.2d 1060, 1069 (5th Cir. 1986) (quoting *In re Holtkamp,* 669 F.2d 505, 508 (7th Cir. 1982)). A finding that permits one creditor to contract around the centralization of claims directly conflicts with the automatic stays purpose "to protect creditors in a manner consistent with the bankruptcy goal of equal treatment." *Id*.

Third, because the automatic stay is "the central provision" of the Bankruptcy Code, "[a] court must have the power to compensate victims of violations of the automatic stay and punish the violators." *In re Johnson,* 575 F.3d at 1083. Furthermore, the dismissal or termination of the bankruptcy case does not extinguish the bankruptcy court's ability to hear claims and impose sanctions for violations of the automatic stay. *See Jones v. Bos. Gas Co. (In re Jones),* 369 B.R. 745, 748 (B.A.P. 1st Cir. 2007) (collecting cases). Similarly, the Tenth Circuit has eloquently explained, "when Congress listed the effects of dismissing a bankruptcy case, it included nothing about automatically terminating the court's jurisdiction over all adversary proceedings or mooting questions regarding § 362(k)(1) sanctions." *Id*. at 1084 (internal quotations and citations omitted).

Turning to the case at hand, Petty is entitled to have his claim resolved by the bankruptcy court because his claim constitutes a core dispute that must be reconciled prior to reorganizing. Parallel to *Whiting Pools*, Petty's Equipment is property of the estate that is essential to his reorganization plan. Irrespective of the arbitration agreement, the Equipment's estate-property status at the time of repossession entitles Petty not only to prosecute Wildflowers for violating the

automatic stay but also to air his grievances before the bankruptcy court. Similar to *In re White Mountain Mining Co.*, Petty's claim for damages directly impacts his debt-equity ratio which affects his overall ability to reorganize, discharge his debts, and obtain a fresh start. R. at 13. Pursuant to Petty's plan, the proceeds he receives from his claim against Wildflowers will be used to fund the reorganization of his business and constitute a crucial element of his ability to reorganize. R. at 7. Unfortunately, the effect of Wildflowers's unlawful and unjustified action is widespread and does not stop at the door of statutory violation. Wildflowers's repossession effectively destroyed all of the goodwill Petty's business generated since opening its doors and forced it to cease operations a mere five days after the repossession took place. R. at 7.

Furthermore, as noted in *Hunt* and *Maritime Elec. Co*., Petty's right to a fresh start must be balanced with the creditors' right to a maximum, centralized, and equitable distribution of the estate. As alluded to in *In re Johnson*, irrespective of whether the automatic stay was in effect at the time of repossession, Wildflowers's violation of the stay should be adjudicated by the bankruptcy court to ensure that each creditor is afforded the opportunity to have their claims resolved in a centralized manner. Additionally, a finding that permits Wildflowers to violate the automatic stay without punishment tramples on the principles of fairness and equity encapsulated in the Bankruptcy Code and provides a dangerous precedent that a party may willingly violate a statute without fear of retribution. In summation, Petty's dispute is a core proceeding because his ability to reorganize and the rights of all creditors involved hinges on its resolution.

iii. The legislative history of section 362 articulates that Congress intended for issues involving the automatic stay to be a core proceeding.

Permitting the bankruptcy court to adjudicate Petty's core claim seeking damages for violation of the automatic stay is directly in accordance with the Congressional intent behind the

statute and harmonizes the rights of all parties involved with traditional principles of justice and equity that the Bankruptcy Code serves to promote.

The legislative history of section 362 expressly acknowledges that the automatic stay is paramount to the overall purpose and goal of the Bankruptcy Code:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 95-595, at 340-41 (1977); *see also* S. Rep. No. 95-989 at 54-55 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97. In light of Congress's declaration that issues relating to the automatic stay are "fundamental," Petty's claim is a core proceeding.

In summation, the resolution of Petty's claim is paramount to his ability to fund a successful reorganization plan and must be resolved as prescribed by the Bankruptcy Code in a centralized manner that respects all parties in interest. Section 157, in conjunction with section 362, expressly enumerates that issues relating to the automatic stay are core proceedings. The automatic stay is one of the Code's cardinal provisions that provides both debtors and creditors with substantive rights of preeminent importance only available in the context of a bankruptcy proceeding. As recognized by this Court in *Stern*, the bankruptcy court maintains both statutory and constitutional authority to resolve claims that are unique to the Bankruptcy Code. Furthermore, permitting the bankruptcy court to resolve Petty's core claim harmonizes the purposes of the FAA and the Bankruptcy Code by ensuring an equitable and efficient resolution to the dispute. Congressional intent is clear, an issue relating to the stay constitutes the epitome of a core proceeding and should be adjudicated by the bankruptcy court—the court our legal system uniquely constructed and designed specifically to hear and resolve bankruptcy disputes.

Notwithstanding an arbitration agreement, a finding that permits a party to willfully violate a statute and contract themselves out of the watchful eye of our judicial system is contrary to public policy and will result in a terminal outcome in all future chapter 11 proceedings. This case stands to resolve decades of conflicting precedent, and this Court should find that Petty's claim is a core proceeding that must be resolved by the bankruptcy court. Accordingly, this Court should affirm the decision of the Thirteenth Circuit.

B. Arbitration inherently conflicts with the purposes of the Bankruptcy Code.

Once a court determines that it has the discretion to stay arbitration, the next inquiry is whether arbitration inherently conflicts with the purposes of the Bankruptcy Code. *McMahon*, 482 U.S. at 227. Some courts have indeed enforced pre-dispute arbitration agreements. *See e.g.*, *MBNA*, 436 F.3d 104; *In re Mintze*, 434 F.3d 222; *In re Electric Machinery Enter.*, 479 F.3d 791. However, this Court in *McMahon* noted that the FAA can be overridden if the party seeking to avoid arbitration could show congressional intent. 482 U.S. at 226. This Court articulated that congressional intent "will be deducible from [the statute's] text or legislative history . . . or from an inherent conflict between arbitration and the statute's underlying purposes." *Id.* at 227. Further, courts have historically had concerns over the enforcement of arbitration agreements in bankruptcy proceedings. *See In re Tre Scalini, Inc.*, 178 B.R. 237, 39 (Bankr. C.D. Cal. 1995). The Fourth Circuit Court of Appeals, the Ninth Circuit Court of Appeals, and the United States District Court for the District of Columbia have all consistently held that arbitration inherently conflicts with the purposes of the Bankruptcy Code. *See In re White Mountain Mining Co., LLC*, 403 F.3d 164; *Moses v. CashCall, Inc.*, 781 F.3d 63 (4th Cir. 2015); *In re Thorpe Insulation Co.*, 671 F.3d 1011 (9th Cir. 2012); *In re Bailey*, 306 B.R. 391 (Bankr. D. D.C. 2004); *In re BHI Intern., Inc.*, No. 12-00039, 2012 WL 2847829 (Bankr. D. D.C. July 11, 2012). Due to the multi-party nature of

bankruptcy proceedings, the importance of reorganization, and the expertise of bankruptcy courts, arbitration inherently conflicts with the automatic stay, and this Court should affirm the decision of the Thirteenth Circuit.

i. Arbitration inherently conflicts with the multi-party nature of bankruptcy proceedings.

Congress enacted the Bankruptcy Code to "centralize disputes about a debtor's assets and legal obligation in the bankruptcy courts." *In re White Mountain Mining Co.*, 403 F.3d at 169. Arbitration can be beneficial in two-party disputes because it can "expedite resolution of the claim while reducing litigation costs" and in some instances "arbitrators may bring a special expertise to resolving the claim." *In re Wade,* 523 B.R. 594, 606 (Bankr. W.D. Tenn. 2014). These benefits do not extend to the "multi-party nature of bankruptcy cases." *Id.* "There will be occasions where a dispute involving both the Bankruptcy Code and the [FAA] presents a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution." *Id.* at 606-07 (quoting *In re United States Lines, Inc.*, 197 F.3d 631, 640 (2d Cir. 1999)). "Parties are not required to arbitrate when they have not agreed to." *In re Salander-O'Reilly Galleries, LLC*, 475 B.R. 9, 21 (S.D.N.Y. 2012) (quoting *Clarendon Nat'l Ins. Co. v. Lan*, 152 F.Supp.2d 506, 514 (S.D.N.Y. 2001)).

Petty and Wildflowers entered into a private contract to arbitrate. In a two-party dispute, arbitration agreements may help expedite proceedings. However, Petty's bankruptcy case involves multiple creditors, who are not a party to the arbitration agreement. R. at 6. Permitting arbitration would have a detrimental impact on Petty's other creditors. While one of the pillars of the Bankruptcy Code is to give debtors a fresh start, it is also important for creditors to recoup some of their debt. Although most creditors in a bankruptcy proceeding end up taking a haircut, the centralization of all claims ensures that all creditors receive a maximum pro rata distribution of the

bankruptcy estate. Bankruptcy proceedings also ensure that creditors are paid in an orderly fashion, thus, preventing the chaotic rush to the courthouse. Furthermore, private arbitration stalls the bankruptcy process and precludes collective bargaining for other creditors. In sum, arbitration inherently conflicts with various goals of the Bankruptcy Code.

ii. Arbitration inherently conflicts with a debtor's ability to reorganize.

By enacting 28 U.S.C. §§ 1334 and 157, Congress deliberately gave the bankruptcy court "broad well-established powers . . . to preserve the integrity of the reorganization process." *In re U.S. Lines, Inc.*, 197 F.3d 631, 639 (2d Cir. 1999). This includes the authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *In re Salander-O'Reilly Galleries, LLC*, 475 B.R. at 25 (quoting *In re U.S. Lines*, 197 F.3d at 640 (emphasis in original)). Chapter 11 allows a debtor to rehabilitate and attempt to avoid liquidation "with an attendant loss of jobs and possible misuse of economic resources." *Bildisco*, 465 U.S. at 528. The automatic stay is an essential aspect of the reorganization process "by immediately providing the debtor relief and protecting the estate from being looted by creditors." *In re Walker*, 551 B.R. 679, 688-89 (Bankr. M.D. Ga. 2016). The automatic stay is imperative to the purposes of the Bankruptcy Code because it allows the debtor to carry out a reorganization plan. *St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533, 540 (5th Cir. 2009).

The automatic stay is crucial to a debtor's fresh start. In Petty's case, a fresh start involves a plan of reorganization. As the Thirteenth Circuit noted in its opinion, "Petty's motion to enforce the automatic stay and recover damages from Wildflowers is critical to his ability to reorganize under the Bankruptcy Code, discharge his debts, and obtain a fresh start." R. at 13. Petty plans to use the damages recovered from Wildflowers's violation to fund his reorganization plan. R. at 13. Therefore, if this Court enforces Wildflowers's arbitration suit, it will directly affect both Petty

and his creditors. While reorganization is important to the creditors, who are hoping to recoup as much of their money as possible, it is equally important to the debtor who is seeking a fresh start. The more money the creditors will receive under Petty's plan of reorganization, the more likely the plan will be confirmed. Section 362 is arguably one of the most important provisions of the Bankruptcy Code because it allows the debtor a "breathing spell" and a chance to "attempt a . . . reorganization plan." *Labuzan*, 579 F.3d at 540. If this Court were to enforce the arbitration agreement, Petty's reorganization plan would suffer, and in turn, his creditors would suffer. Arbitration inherently conflicts with Petty's ability to reorganize, which frustrates one of the purposes of the Bankruptcy Code.

iii. The Bankruptcy Court is best suited to adjudicate violations of the automatic stay.

When Congress enacted the Bankruptcy Code, it "intended to centralize disputes about a debtor's assets and legal obligations in the bankruptcy courts." *In re White Mountain Mining Co.*, 403 F.3d at 169. This centralization helps protect both debtors and creditors from "piecemeal litigation." *Id.* at 170. Arbitration goes against this intent. *Id.* at 169. "[P]ermitting an arbitrator to decide a core issue would make debtor-creditor rights 'contingent upon an arbitrator's ruling' rather than the ruling of the bankruptcy judge assigned to hear the debtor's case." *Id.* at 169-70 (quoting Note, *Jurisdiction in Bankruptcy Proceedings: A Test Case for Implied Repeal of the Federal Arbitration Act*, 117 Harv. L. Rev. 2296, 2307 (2004)). Bankruptcy judges deal with automatic stay violations on a regular basis and are better suited to adjudicate these issues. *In re Walker*, 551 B.R. at 694. Allowing an arbitrator to decide an automatic stay violation "would leave nonjudicial third parties to punish abuse of the judicial system." *In re Grant*, 281 B.R. 721, 725 (Bankr. S.D. Ala. 2000).

The centralization of bankruptcy proceedings is one of the most elegant facets of the Bankruptcy Code. It allows a multitude of disputes to be decided in one case by one judge. If this Court enforces the arbitration agreement, Petty's bankruptcy case would be split allowing an arbitrator to decide one issue while a bankruptcy judge decides the majority of the proceedings. Bankruptcy judges have experience handling violations of the automatic stay, but an arbitrator likely does not. The automatic stay is one of the most important provisions of the Bankruptcy Code and as such violations should be strictly enforced. Wildflowers's willful violation of the automatic stay should be decided by a Bankruptcy judge to ensure that they are adequately punished. Arbitrating this issue would force Petty and his creditors into piecemeal litigation and would allow an arbitrator who is not experienced with violations of the automatic stay to decide Petty's fate. Therefore, this Court should not enforce the arbitration agreement.

Arbitration inherently conflicts with the purposes of the Bankruptcy Code, and most specifically section 362. Bankruptcy proceedings are typically multi-party disputes, while arbitration is better suited for a two-party dispute. Arbitration conflicts with the collective bargaining nature of bankruptcy proceedings and would effectively permit parties to contract out of the purview of the bankruptcy court through a two-party private agreement. Allowing arbitration would also impede Petty's plan of reorganization, which directly conflicts with the purpose of section 362. Finally, the bankruptcy court is best suited to handle automatic stay violations because bankruptcy judges are well versed on the issue and can avoid piecemeal litigation. Accordingly, this Court should affirm the decision of the Thirteenth Circuit.

II. SECTION 362(C)(3)(A) ONLY PARTIALLY TERMINATES THE AUTOMATIC STAY.

The automatic stay is ordinarily absolute. However, the stay terminates "with respect to the debtor on the 30th day after the filing of the later case" if the debtor filed a prior bankruptcy case that was pending and dismissed within the previous one-year period. 11 U.S.C. § 362(c)(3)(A). The proper interpretation of this provision has been widely litigated and courts are divided on the extent that the stay is terminated. The Thirteenth Circuit Court of Appeals adopted the majority approach, which follows the plain language of the provision and interprets the statute as only terminating the stay with respect to actions taken against the debtor.

A. The plain language of the provision dictates that this Court adopt the majority interpretation of section 362(c)(3)(A).

Statutory interpretation begins in the only proper place: with the language of the statute itself. Courts must assume "that the ordinary meaning of that language accurately expresses the legislative purpose" of the statute. *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985). If from the language of the statute the court can ascertain its plain and unambiguous meaning, then the court must apply the statute according to its terms. *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Section 362(c)(3)(A) provides that:

> (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 . . .

11 U.S.C. § 362(c)(3)(A) (emphasis added).

i. Section 362(c)(3)(A) read in isolation supports the majority view.

Courts are almost unanimous in failing to sing the praises of section 362(c)(3)(A)'s draftsmanship. *See In re Roach*, 555 B.R. 840, 845 (Bankr. M.D. Ala. 2016) (collecting cases). However poorly written this provision may be, this alone is insufficient to create ambiguity. *Lamie v. U. S. Tr.*, 540 U.S. 526, 534 (2004). In fact, the majority of courts faced with interpreting this provision have held that the text of section 362(c)(3)(A) is unambiguous. *See In re Williford*, No. 13-31738, 2013 WL 3772840, at *2 (Bankr. N.D. Tex. July 17, 2013) (collecting non-exhaustive list of cases). The majority read "with respect to the debtor" to mean exactly what is says: the stay is terminated only as to actions against the debtor, but not as to actions against property of the estate. *In re Weil*, No. 3:12cv462 (SRU), 2013 WL 1798898, at *4 (D. Conn. Apr. 29, 2013). This is the only proper interpretation of this provision. There are no "fuzzy words" or "words requiring a dictionary," nor is there any mention of the bankruptcy estate. *In re Rinard*, 451 B.R. 12, 20 (Bankr. C.D. Cal. 2011). The plain meaning of this provision is "crystal clear"—the stay is terminated only with respect to the debtor. *Id.* at 19.

A minority of courts read section 362(c)(3)(A) to terminate the stay in its entirety, including as to property of the debtor's bankruptcy estate. *In re Jupiter*, 344 B.R. 754, 759-60 (Bankr. D. S.C. 2006). Courts in the minority, generally, read "with respect to the debtor" to refer to the provision's introductory language. *In re Daniel*, 404 B.R. 318, 326 (Bankr. N.D. Ill. 2009). These courts read this phrase to clarify that in a joint case the stay expires for the repeat filer but not for a debtor's non-repeat filing spouse. *In re Parker*, 336 B.R. 678, 680-81 (Bankr. S.D.N.Y. 2006). The flaw in their reading is clarification is not required. Joint bankruptcy petitions are unique in that they are jointly administered. *In re Eichhorn*, 338 B.R. 793, 801 (Bankr. S.D. Ill. 2006). Nonetheless the rights of the individual debtors remain separate. *In re Smith*, 910 F.3d 576, 585

(1st Cir. 2018). As a result, the repeat nature of one debtor's filing would not affect the stay with regard to the non-repeat filing spouse. *Id.* Thus, even without this phrase the non-repeat filing spouse would be entitled to the full effect of the stay under section 362(a). As a result, the minority view fails to "give effect to every word of [the] statute . . . ." *Leocal v. Ashcroft*, 543 U.S. 1,12 (2004). The minority view also renders the phrase "with respect to the debtor" superfluous, because it does nothing more than reiterate that the stay is only terminated with regard to the repeating filing spouse.

Another flaw with the minority's plain language interpretation is that it requires the court to read words into the statute that are not present. This Court has previously rejected an attempt to read absent words into a statute in interpreting another Bankruptcy Code section. *Lamie*, 540 U.S. at 538. The *Lamie* court rejected this argument because it was asked to enlarge the statute beyond its scope. *Id*. The text of section 362(c)(3)(A) does not include any reference to property of the estate. Yet, the minority read "with respect to the debtor" to include property of the estate. This is the exact statutory construction argument that this Court rejected in *Lamie*. The minority's interpretation expands the scope of the provision to include a phrase that was almost certainly omitted on purpose. *See generally Iselin v. U. S.*, 270 U.S. 245, 251 (1926).

ii. When read as a whole section 362 supports the majority view.

Although when viewed in isolation section 362(c)(3)(A) is unambiguous the analysis is not yet finished because statutory interpretation is a "holistic endeavor." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.* 484 U.S. 365, 371 (1988). Courts must examine not only the language of the statute, but also the context in which the language is used in the statutory scheme as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The plain meaning of the phrase "with respect to debtor" not only "makes sense," but it "is entirely consistent with the other

provisions of [section] 362 and the other sections of the Bankruptcy Code." *In re Jones*, 339 B.R. 360, 363 (Bankr. E.D. N.C. 2006). Throughout section 362 Congress has demonstrated the ability to differentiate between the debtor, the debtor's property, and property of the estate. For example, in section 362(a) Congress provided the lists of actions that the stay protects against:

> [S]ection 362(a)(1) stays pre-bankruptcy actions "*against the debtor*." Subparagraph (a)(2) stays enforcement of judgments "*against the debtor or against property of the estate*." Subparagraph (a)(3) stays actions to obtain possession of "*property of the estate.*" Subparagraph (a)(4) enjoins actions to create or perfect liens "*against property of the estate*." Subparagraph (a)(5) enjoins actions involving prepetition liens "*against property of the debtor*." Subparagraph (a)(6) stays collection actions "*against the debtor*." Subparagraph (a)(7) enjoins setoff involving "any claim *against the debtor*." And subparagraph (a)(8) stays Tax Court litigation involving prepetition "tax liability *of a debtor*."

In re Williams, 346 B.R. 361, 367 (Bankr. E.D. Pa. 2006) (emphasis added). Congress explicitly provided different protections for the debtor, the debtor's property, and property of the estate. Congress's ability to differentiate establishes that if it "desired for the automatic termination provision to apply to 'property of the estate', it would have explicitly said so . . ." *In re Mortimore*, No. 11-955 (RMB) 2011 WL 6717680, at *5 (D. N.J. Dec. 21, 2011). Moreover, there is no provision within section 362 wherein Congress used the phrase "with respect to the debtor to incorporate the debtor, the debtor's property, and estate property. *In re Holcomb*, 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008). As such the majority's reading is consistent with Congress's intent to distinguish between these groups.

Another example that reinforces the majority's view appears in section 362(c)(4)(A). Section 362(c)(4)(A) applies when a debtor had two or more prior cases pending and dismissed within the previous year. 11 U.S.C. § 362(c)(4)(A). When applicable "the stay under subsection (a) shall not go into effect upon the filing of the later case." *Id.* Therefore, for debtors who fall under this subsection the stay is completely terminated. *Rose v. Select Portfolio Servicing Inc.*, 945

F.3d 226, 231 (5th Cir. 2018). This subsection demonstrates that Congress was well aware of how to strip away the protections provided by the stay from repeat filers. *In re Tubman*, 364 B.R. 574, 585 (Bankr. D. Md. 2007). If Congress intended to completely terminate the stay in section 362(c)(3)(A) it could have deleted the phrase "with respect to the debtor" altogether. *In re Brandon*, 349 B.R. 130, 132 (Bankr. M.D. N.C. 2006). Alternatively, Congress could have used the same language found in section 362(c)(4)(A). *In re Harris*, 342 B.R. 274, 279 (Bankr. N.D. Ohio 2006). Instead, Congress chose to limit the scope of the termination by inserting a qualifier. The majority view gives effect to Congress's choice by construing this provision to place a limitation on the termination.

Furthermore, this Court has made it emphatically clear that "[w]here Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U. S.*, 464 U.S. 16, 23 (1983) (citation omitted). Both sections were promulgated at the same time as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). As detailed above, there is a significant difference between the language used in section 362(c)(3)(A) and section 362(c)(4)(A). Congress purposely elected to describe the effect on the automatic stay differently based on the number of previous cases. *Harris*, 342 B.R. at 279. In doing so Congress manifested an intention that these sections offer different penalties. *Id*. Any reading of the statute that interprets these sections as having the same effect ignores Congress's intent. The majority view enforces Congress's choice by interpreting section 362(c)(3)(A) to only apply to the debtor, but not to property of the estate.

Section 362(c)(1) is also useful in determining the plainness of section 362(c)(3)(A). Section 362(c)(1) provides that except as detailed in sections 362(d), (e), (f), and (h) "the stay of

an act against *property of the estate* under [section 362(a)] continues until such property is no longer property of the estate." 11 U.S.C. § 362(c)(1)(A) (emphasis added). Under the majority view, there is no conflict between these subsections. *In re Johnson*, 335 B.R. 805, 806 (Bankr. W.D. Tenn. 2006). The stay is only terminated with respect to the debtor, and it continues to protect property of the estate. In contrast, the minority view is in direct conflict with subsection (1). It allows "creditors to move against property of the estate on grounds other than those specified by § 362(c)(1)." *Roach*, 555 B.R. at 846.

iv. The plain language reading of section 362(c)(3)(A) is also consistent with the broader statutory scheme.

Congress has not only differentiated between the debtor and property of the estate in section 362, but also in section 521 of the Bankruptcy Code. *In re Pope*, 351 B.R. 14, 16 (Bankr. D. R.I. 2006). Section 521(a)(6) is applicable when a chapter 7 debtor fails to reaffirm or redeem personal property. 11 U.S.C. § 521(a)(6). As a consequence of this failure "the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected . . ." *Id*. This code section, which was also added by BAPCPA, is further evidence that Congress knew how to distinguish between these two groups. *Jones*, 339 B.R. at 364. If Congress intended for the stay to terminate in its entirety it would have included language similar to section 521(a)(6). *Id*. Instead, Congress intentionally and purposely limited the stay termination in section 362(c)(3)(A).

Although this issue has divided courts since BAPCPA's inception, "with respect to the debtor" plainly indicates that the stay only partially terminates. "How could that be any clearer?" *Jones*, 339 B.R. at 363. The plain language meaning of the provision, along with its consistency with other provisions in section 362 and the Bankruptcy Code all indicate that this provision is

unambiguous. *Id*. As such this Court should adopt the majority interpretation and affirm the bankruptcy court's finding that Wildflowers violated the automatic stay.

B. The legislative history of section 362(c)(3)(A) fails to supersede its plain language meaning.

If the Court finds that the plain language of section 362(c)(3)(A) is unambiguous and "the statutory scheme is coherent and consistent" then the Court's inquiry is complete. *Robinson*, 519 U.S. at 341. If instead the Court finds this section to be ambiguous it may look to the legislative history to aid its interpretation. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985). It takes an "extraordinary showing of contrary [legislative] intentions" to justify placing a limitation on the plain language of a statute. *Garcia v. U. S.*, 469 U.S. 70, 73 (1985). The limited amount of legislative history not only fails to bolster the minority's interpretation, but it also supports the majority's view.

i. The legislative history and the proposed pieces of legislation before BAPCPA fail to clarify the scope of the stay termination in section 362(c)(3)(A).

As discussed above, BAPCPA added section 362(c)(3)(A) to the Bankruptcy Code. BAPCPA is unusual in that there was no joint conference committee report, no Senate Judiciary Report, and no floor statements. *In re Scott-Hood*, 473 B.R. 133, 137 n. 2 (Bankr. S.D. Tex. 2012). The only actual report prepared by Congress, the House Report, is of little help. It merely regurgitates the statute's language. *See* H.R. Rep. No. 109–31 pt.1, at 69 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 138. Courts in the minority don't stop there. They look to the legislative history of the proposed versions of the bill. *See Daniel*, 404 B.R. at 328. First, they examine the National Bankruptcy Review Commission report which first identified the serial filing problem. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103–394, 108 Stat. 4106, §§ 602–03 (Oct. 22, 1994). Next, they look to the House and Senate Judiciary Committee Reports issued in the year

after the Review Commission's report was released. Both offered bills that contain similar language to the current version of section 362(c)(3)(A). *See* H.R. Rep. No. 105–540, at 80 (1998); S. Rep. No. 105–253, at 39 (1998).

All of these sources fail to provide any explanation on the scope of the termination provided for in section 362(c)(3)(A). *In re Moon*, 339 B.R. 668, 672 (Bankr. N.D. Ohio 2006). Yet, the minority relies on inferences from these extrinsic materials to conclude that the stay is terminated with respect to property of the estate. *In re Reswick*, 446 B.R. 362, 371 (B.A.P. 9th Cir. 2011). For example, they infer from the title of the House Report discussing this subsection, "Bad Faith Repeat Filings", that Congress intended for the stay to terminate in its entirety. *In re Curry*, 362 B.R. 394, 402 (Bankr. N.D. Ill. 2007). Another example is the analysis performed by the *Daniel* court. The court concluded that that "with respect to the debtor" included property of the estate, because "none of the several committee reports that discussed the provision . . . drew a distinction between" the debtor, the debtor's property, and property of the estate. *Daniel*, 404 B.R. at 329.

This Court is generally skeptical of legislative history, especially in cases construing BAPCPA. *In re Goodrich*, 587 B.R. 829, 840 (Bankr. D. Ver. 2018) (collecting cases). That skepticism is warranted here where the "long and murky" legislative history merely informs us that the proposed language for this section was implemented by Congress in BAPCPA. Michael Miller, *Untangling the Web of § 362(c)(3)(A) and Its Legislative History*, 39 Am. Bankr. Inst. J. 22 (Apr. 2020). As such this scant amount of legislative evidence cannot overwhelm the plain language meaning of the statute.

ii. Section 362(c)(3)(A) operates as an intermediate penalty for second-time filers.

A review of this legislative history does show that Congress enacted this subsection to deter the abuse caused by successive bankruptcy filings. Congress said as much in the legislation's introductory language. H.R. Rep. No. 109–31 pt.1, at 2. In regard to this specific subsection, Congress sought to discourage abuse of the automatic stay by repeat filers. *Id*. at 69. Congress achieved this purpose by implementing a graduated penalty structure for repeat filers. *In re Rice*, 392 B.R. 35, 38 (Bankr. W.D. N.Y. 2006). For first-time filers there is no presumption of bad faith. *Id*. They enjoy the full benefit of the stay and it remains in place for the entire bankruptcy case. *See* 11 U.S.C. § 362(a), (b), (c). At the other end of the penalty structure the stay never goes into effect. *See* 11 U.S.C. § 362(c)(4)(A). Second- time filers, such as Petty, fall in the middle. *Smith*, 910 F.3d at 586.

The majority view construes "with respect to the debtor" in a manner that fits within the Congress's intended scheme. Under this approach, the debtor receives the full benefit of the stay under (a) for the first 30 days. After that, unless extended, the stay terminates as to the debtor, but not as to property of the estate. *Brandon*, 349 B.R. at 132. The effect of the stay being terminated against the debtor means that creditors are now free to take the actions that were originally prohibited by section 362(a). The court in *Williams* succinctly summarized the effect of the stay termination:

> [S]uits against the debtor can commence or continue postpetition because section 362(a)(1) is no longer applicable; judgments may be enforced against the debtor, in spite of section 362(a)(2); collection actions may proceed against the debtor despite section 362(a)(6); and liens against the debtor's property may be created, perfected and enforced regardless of section 362(a)(5).

Williams, 346 B.R. at 367. This list provides creditors with many options to enforce and collect on their claims against the debtor. As such it is a fitting penalty for second-time filers. Furthermore,

the plain language meaning of the statute is not "demonstrably at odds with the intentions of its drafters. *Ron Pair,* 489 U.S. at 241. A partial stay termination acts as deterrent to prevent abuse of the bankruptcy system which fulfills BAPCPA's purpose.

The criticism from the minority is that a limited termination of the stay would have little impact on the debtor. *In re Jupiter,* 344 B.R. at 761-62. Their argument is that a significant portion of the debtor's property would remain subject to stay. *In re Smith*, 573 B.R. 298, 305 (D. Me. 2017). Even if that assertion is true, Congress enacted section 362(c)(3)(A) as an intermediate form of punishment for repeat bankruptcy filers. *Harris,* 342 B.R. at 279. If "with respect to the debtor" was read to include the property of the estate, then the second-time filer would be subject to the same penalty as a debtor who has filed more frequently. The penalty in section 362(c)(3)(A) would no longer be a middle ground. As the *Reswick* panel noted Congress intended for "the consequences of repeat filings to be different, and potentially more severe, as the number of successive filings increase. *Reswick,* 446 B.R. at 373.

Additionally, the actions no longer stayed can have meaningful consequences. *Williams,* 346 B.R. at 369. For example, a creditor could secure a post-petition judgment and enforce it against property the debtor exempted from the bankruptcy estate. *Id*. A creditor with an unperfected security interest could take this opportunity to perfect their interest and avoid the pitfalls of the trustee's strong-arm power under section 544(a)(1). As such, the majority's interpretation still provides section 362(c)(3)(A) with teeth to bite at debtors who file bankruptcy petitions in bad faith. The relief may be less robust than creditors would prefer, but this reading of the statute is consistent with Congress's purpose of deterring abuse of the automatic stay. *Scott-Hood*, 473 B.R. at 140.

C. Partial termination of the automatic stay is consistent with the core policies underlying the Bankruptcy Code.

The plain language meaning of section 362(c)(3)(a) achieves both micro and macro policy goals. Kimberly Lehnert, *Termination of the Stay For Successive Filers: Interpreting § 362(c)(3)(A),* 29 Emory Bankr. Dev. J. 243, 283 (2012). As discussed above, the partial termination provides a penalty to discourage repeat bankruptcy filers. This fulfills the micro goal of deterring stay abuse. The macro goal is one of the pillars of the bankruptcy code: maximizing, in an equitable fashion, the distribution to creditors. *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918). A limited termination of the stay ensures that the debtor's creditors receive a fair and equal distribution.

The automatic stay prevents "disorderly, piecemeal dismemberment" of the debtor's assets outside the bankruptcy case. *Mann v. Chase Manhattan Mortg. Corp.*, 316 F.3d 1, 3 (1st Cir. 2003). This in turn protects the debtor's creditors. It aids in distributing the debtor's assets in a manner that maximizes the interest of all parties. *In re Briggs Transp. Co.*, 780 F.2d 1339, 1343 (8th Cir. 1985). In chapter 7 cases, the trustee has the duty to "collect and reduce to money property of the estate." 11 U.S.C. § 704(a)(1). The stay allows the trustee to perform this duty by protecting property of the estate from judgment enforcement and acts to obtain possession. *In re Thu Thi Dao*, 616 B.R. 103, 111 (Bankr. E.D. Cal. 2020). The shield provided by the stay enables the trustee to distribute the debtor's equity in secured property to their unsecured creditors thereby increasing their overall recovery. *Holcomb*, 380 B.R. at 816. In reorganization cases, property of the estate is necessary for an effective reorganization. *Jones*, 339 B.R. at 365. For example, without the Equipment Wildflowers seized Petty will almost certainly be unable to fund his chapter 11 plan. A successful reorganization not only benefits the debtor, but also his creditors. *See generally Toibb*

v. Radloff, 501 U.S. 157, 163-64 (1991). As such, the protection provided by the stay is essential to maximizing creditor recovery.

The plain meaning of section 362(c)(3)(A) is consistent with this core bankruptcy policy. *Holcomb*, 380 B.R. at 816. If the stay is terminated only against the debtor, then property of the estate remains protected by the stay. Under this view, the trustee is still able to properly administer the chapter 7 case. *Thu Thi Dao*, 616 B.R. at 111. The debtor also has property of the estate available to consummate its reorganization plan. *Jones*, 339 B.R. at 365. Thus, under this interpretation section 362(c)(3)(A) does not conflict with one of the core bankruptcy principles.

The minority approach, on the other hand, directly conflicts with this policy. If the stay is completely terminated after 30 days, then creditors lose the protection of the stay. This rule would in essence create a race to the courthouse. *In re Rinard*, 451 B.R. at 19. On the thirtieth day after filing the petition, the first creditor who could secure a judgment against property of the estate would win. *Id*. The result would be the exact opposite of equitable distribution. The debtor's remaining creditors would suffer simply because their attorney was not fast enough. In chapter 7 cases, any potential dividend for unsecured creditors would be lost if the secured creditor seized property of the estate. *Holcomb*, 380 B.R. at 816. In reorganization cases, the plan would likely fail without the estate property. For example, if a creditor secured a garnishment order as soon as the stay terminated the reorganization plan would almost certainly fail. *Rinard*, 451 B.R. at 19. Petty's plan is also an example. Petty is attempting to start a new brewing business. Without the brewing equipment, he will lack sufficient income to fund his plan and payoff his remaining creditors. The divide here is clear. The majority approach falls in line with the underlying policies of the Bankruptcy Code. The minority approach undercuts the equitable distribution principle.

Therefore, this Court should adopt the majority approach and affirm the bankruptcy court's decision that Wildflowers violated the automatic stay.

CONCLUSION

For the foregoing reasons, the decision of the Thirteenth Circuit should be affirmed. The plain language of section 362, when read in conjunction with related Code provisions support a finding that a violation of the automatic stay constitutes a core proceeding. Furthermore, the overarching purpose of the Bankruptcy Code supports this Court's holding that the FAA can be overridden in cases that present an inherent conflict between a statute and arbitration. Additionally, the plain language of section 362(c)(3)(A), its legislative history, and the policy goals underlying the Bankruptcy Code all support a reading of this section that only partially terminates the automatic stay. Therefore, Respondent respectfully requests that this Court affirm the decision of the Thirteenth Circuit.

APPENDIX A

11 U.S.C. § 362(a): Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
(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.

11 U.S.C. § 362(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;

(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;

(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal

under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case;

11 U.S.C. 521(a)(6): in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either—

(A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or
(B) redeems such property from the security interest pursuant to section 722;

If the debtor fails to so act within 45-day period referred in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law, unless the court determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee.

28 U.S.C. 157(b):

(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—
(A) matters concerning the administration of the estate;
(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
(C) counterclaims by the estate against persons filing claims against the estate;
(D) orders in respect to obtaining credit;
(E) orders to turn over property of the estate;
(F) proceedings to determine, avoid, or recover preferences;
(G) motions to terminate, annul, or modify the automatic stay;
(H) proceedings to determine, avoid, or recover fraudulent conveyances;
(I) determinations as to the dischargeability of particular debts;
(J) objections to discharges;
(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;
(M) orders approving the use or lease of property, including the use of cash collateral;
(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and
(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.