



# Examining the Supreme Court's Decision in City of Chicago v. Fulton

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# **Rochelle's Daily Wire**

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# Supreme Court Holds that Merely Holding Property Isn't a Stay Violation

Justices rule that affirmative action is required before withholding property amounts to controlling estate property and results in an automatic stay violation.

Reversing the Seventh Circuit and resolving a split among the circuits, the Supreme Court ruled unanimously today "that mere retention of property does not violate the [automatic stay in] § 362(a)(3)."

Writing for the 8/0 Court in a seven-page opinion, Justice Samuel A. Alito, Jr. said that Section 362(a)(3) "prohibits affirmative acts that would disturb the *status quo* of estate property." He left the door open for a debtor to obtain somewhat similar relief under the turnover provisions of Section 542, although not so quickly.

In a concurring opinion, Justice Sonia Sotomayor wrote separately to explain how a debtor may obtain the same or similar relief under other provisions of the Bankruptcy Code.

Justice Amy Coney Barrett, who had not been appointed when argument was held on October 13, did not take part in the consideration and decision of the case.

The Chicago Parking Ticket Cases

Four cases went to the Seventh Circuit together. The chapter 13 debtors owed between \$4,000 and \$20,000 in unpaid parking fines. Before bankruptcy, the city had impounded their cars. Absent bankruptcy, the city will not release impounded cars unless fines are paid.

After filing their chapter 13 petitions, the debtors demanded the return of their autos. The city refused to release the cars unless the fines and other charges were paid in full.

The debtors mounted contempt proceedings in which four different bankruptcy judges held that the city was violating the automatic stay by refusing to return the autos. After being held in contempt, the city returned the cars but appealed.

The Seventh Circuit upheld the bankruptcy courts, holding "that the City violated the automatic stay . . . by retaining possession . . . after [the debtors] declared bankruptcy." The city, the appeals court said, "was not passively abiding by the bankruptcy rules but actively resisting Section 542(a) to exercise control over the debtors' vehicles." *In re Fulton*, 926 F.3d 916 (7th Cir. June 19, 2019). To read ABI's report on the *Fulton* decision in the circuit court, **click here**.

# The Circuit Split

The Second, Seventh, Eighth, Ninth and Eleventh Circuits impose an affirmative duty on creditors to turn over repossessed property after a bankruptcy filing.

The Third, Tenth and District of Columbia Circuits held that the retention of property only maintains the *status quo*. For those circuits, a stay violation requires an affirmative action. Simply holding property is not an affirmative act, in their view.

The City of Chicago filed a *certiorari* petition in September 2019. To resolve the circuit split, the Supreme Court granted *certiorari* in December 2019. Argument was originally scheduled to be held in April 2020 but was postponed until October as a result of the coronavirus pandemic.

### The Statute Demanded the Result

Justice Alito laid out the pertinent statutes. Primarily, Section 362(a)(3) stays "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." In the lower courts, the debtors relied on that section, but not exclusively.

With some exceptions, Section 542(a) provides that "an entity . . . in possession . . . of property that the trustee may use, sell, or lease under section 363 of this title . . . , shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate."

Justice Alito said that the case turned on the "prohibition [in Section 362(a)(3)] against exercising control over estate property." He said the language "suggests that merely retaining possession of estate property does not violate the automatic stay."

To Justice Alito, "the most natural reading" of the words "stay," "act" and "exercise control" mean that Section 362(a)(3) "prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed." He found a "suggestion" in the "combination" of the words "that §362(a)(3) halts any affirmative act that would alter the status quo as of the time of the filing of a bankruptcy petition."

Justice Alito said that words in Section 362(a)(3) by themselves did not "definitively rule out" the result reached in the Seventh Circuit.

"Any ambiguity" in that section, he said, "is resolved decidedly in" Chicago's favor by Section 542.

In view of Section 542, Justice Alito said that reading Section 362(a)(3) to proscribe "mere retention of property" would create two problems.

First, a broad reading of Section 362(a)(3) would "largely" render Section 542 "superfluous." Second, it would make the two sections contradictory. Where Section 542 has exceptions, Section 362(a)(3) has none.

Justice Alito observed that the prohibition against "control" over estate property was added to Section 362 in the 1984 amendments. "But transforming the stay in §362 into an affirmative turnover obligation would have constituted an important change," he said.

It "would have been odd for Congress to accomplish that change by simply adding the phrase 'exercise control,' a phrase that does not naturally comprehend the mere retention of property and that does not admit of the exceptions set out in §542," Justice Alito said.

Justice Alito interpreted the 1984 amendment to mean that it "simply extended the stay to acts that would change the *status quo* with respect to intangible property and acts that would change the *status quo* with respect to tangible property without 'obtain[ing]' such property."

Justice Alito ended his decision by noting what the opinion did not decide. The ruling did not "settle the meaning of other subsections of §362(a)" and did "not decide how the turnover obligation in §542 operates."

"We hold only that mere retention of estate property after the filing of a bankruptcy petition does not violate §362(a)(3) of the Bankruptcy

Code." Justice Alito vacated the Seventh Circuit's judgment and remanded for further proceedings.

# **Justice Sotomayor's Concurrence**

Justice Sotomayor said she wrote "separately to emphasize that the Court has not decided whether and when §362(a)'s other provisions may require a creditor to return a debtor's property." She said that the "the City's conduct may very well violate one or both of these other provisions," referring to subsections 362(a)(4) and (6).

In her six-page concurrence, Justice Sotomayor noted that the Court had not "addressed how bankruptcy courts should go about enforcing creditors' separate obligation to 'deliver' estate property to the trustee or debtor under §542(a)."

Although Chicago's conduct may have satisfied "the letter of the Code," she said that the city's policy "hardly comports with its spirit." She went on to explain why returning a car quickly is important so a debtor can commute to work and make earnings to pay creditors under a chapter 13 plan.

"The trouble" with Section 542, Justice Sotomayor said, is that "turnover proceedings can be quite slow" because they entail commencing an adversary proceeding. She ended her concurrence by saying that either the Advisory Committee on Rules or Congress should consider amendments "that ensure prompt resolution of debtors' requests for turnover under §542(a), especially where debtors' vehicles are concerned."

### **Observations**

Prof. Ralph Brubaker agreed with the opinion of the Court. He told ABI that the "Court emphatically confirms the fundamental principle that the text of the automatic stay provision must be interpreted

consistent with its most basic and limited purpose of simply maintaining the petition-date status quo. As Judge McKay put it in his *Cowen* opinion for the Tenth Circuit, 'Stay means stay, not go.' That guiding principle should also prove determinative in resolving the potential applicability of § 362(a)(4) and (a)(6), which the Court expressly refused to address."

Prof. Brubaker is the Carl L. Vacketta Professor of Law at the University of Illinois College of Law.

Rudy J. Cerone agreed. He told ABI that Justice Alito reached "the correct result under the history and structure of sections 362(a) and 542." He noted that the ABI Consumer Commission recommended speeding up turnover proceedings. Mr. Cerone is a partner with McGlinchey Stafford PLLC in New Orleans.

Significantly, the Court did not rule on whether debtors could achieve the same result under subsections (4) and (6) of Section 362(a), which prohibit an act to enforce a lien on property and an act to recover a claim.

In one of the cases before the Supreme Court, the bankruptcy court had relied on those other subjections in ruling for the debtor. The Supreme Court did not address subsections (4) and (6) because the Seventh Circuit did not reach those issues.

Consequently, debtors might resurrect a victory either through speedy procedures under Section 542 or a favorable interpretation of subsections (4) and (6). Reliance on the other subsections may not prevail given how Justice Alito would not permit Section 362 to perform all of the work of Section 542.

It is noteworthy how Justice Alito was skeptical that Congress would make major changes in a statute by using only a few words. At the same time, the Supreme Court has been reluctant in recent years to give importance to legislative history. Since legislative history might not succeed in altering the Supreme Court's view of the law, Congress evidently needs to attach bells and whistles to an amendment meant to change the law.

Case Citation: City of Chicago v. Fulton, 19-357 (Sup. Ct.)

### Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

### SUPREME COURT OF THE UNITED STATES

### Syllabus

### CITY OF CHICAGO, ILLINOIS v. FULTON ET AL.

# CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 19-357. Argued October 13, 2020—Decided January 14, 2021

The filing of a petition under the Bankruptcy Code automatically "creates an estate" that, with some exceptions, comprises "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a). Section 541 is intended to include within the estate any property made available by other provisions of the Bankruptcy Code. Section 542 is one such provision, as it provides that an entity in possession of property of the bankruptcy estate "shall deliver to the trustee, and account for" that property. The filing of a petition also automatically "operates as a stay, applicable to all entities," of efforts to collect prepetition debts outside the bankruptcy forum, §362(a), including "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," §362(a)(3). Here, each respondent filed a bankruptcy petition and requested that the city of Chicago (City) return his or her vehicle, which had been impounded for failure to pay fines for motor vehicle infractions. In each case, the City's refusal was held by a bankruptcy court to violate the automatic stay. The Seventh Circuit affirmed, concluding that by retaining possession of the vehicles the City had acted "to exercise control over" respondents' property in violation of §362(a)(3).

Held: The mere retention of estate property after the filing of a bankruptcy petition does not violate §362(a)(3) of the Bankruptcy Code. Under that provision, the filing of a bankruptcy petition operates as a "stay" of "any act" to "exercise control" over the property of the estate. Taken together, the most natural reading of these terms is that §362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was

### Syllabus

filed. Respondents' alternative reading would create at least two serious problems. First, reading §362(a)(3) to cover mere retention of property would render §542's central command—that an entity in possession of certain estate property "shall deliver to the trustee . . . such property"—largely superfluous, even though §542 appears to be the provision governing the turnover of estate property. Second, respondents' reading would render the commands of §362(a)(3) and §542 contradictory. Section 542 carves out exceptions to the turnover command. Under respondents' reading, an entity would be required to turn over property under §362(a)(3) even if that property were exempt from turnover under §542. The history of the Bankruptcy Code confirms the better reading. The Code originally included both §362(a)(3) and §542(a), but the former provision lacked the phrase "or to exercise control over property of the estate." When that phrase was later added by amendment, Congress made no mention of transforming §362(a)(3) into an affirmative turnover obligation. It is unlikely that Congress would have made such an important change simply by adding the phrase "exercise control," rather than by adding a cross-reference to §542(a) or some other indication that it was so transforming §362(a)(3). Pp. 3-7.

926 F. 3d 916, vacated and remanded.

ALITO, J., delivered the opinion of the Court, in which all other Members joined, except BARRETT, J., who took no part in the consideration or decision of the case. SOTOMAYOR, J., filed a concurring opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

### SUPREME COURT OF THE UNITED STATES

No. 19-357

# CITY OF CHICAGO, ILLINOIS, PETITIONER v. ROBBIN L. FULTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[January 14, 2021]

JUSTICE ALITO delivered the opinion of the Court.

When a debtor files a petition for bankruptcy, the Bankruptcy Code protects the debtor's interests by imposing an automatic stay on efforts to collect prepetition debts outside the bankruptcy forum. *Ritzen Group, Inc.* v. *Jackson Masonry, LLC*, 589 U. S. \_\_\_, \_\_\_\_\_ (2020) (slip op., at 6–7). Those prohibited efforts include "any act... to exercise control over property" of the bankruptcy estate. 11 U. S. C. §362(a)(3). The question in this case is whether an entity violates that prohibition by retaining possession of a debtor's property after a bankruptcy petition is filed. We hold that mere retention of property does not violate §362(a)(3).

T

Under the Bankruptcy Code, the filing of a bankruptcy petition has certain immediate consequences. For one thing, a petition "creates an estate" that, with some exceptions, comprises "all legal or equitable interests of the debtor in property as of the commencement of the case." §541(a)(1). Section 541 "is intended to include in the estate

any property made available to the estate by other provisions of the Bankruptcy Code." *United States* v. *Whiting Pools, Inc.*, 462 U. S. 198, 205 (1983). One such provision, §542, is important for present purposes. Titled "Turnover of property to the estate," §542 provides, with just a few exceptions, that an entity (other than a custodian) in possession of property of the bankruptcy estate "shall deliver to the trustee, and account for" that property.

A second automatic consequence of the filing of a bankruptcy petition is that, with certain exceptions, the petition "operates as a stay, applicable to all entities," of efforts to collect from the debtor outside of the bankruptcy forum. §362(a). The automatic stay serves the debtor's interests by protecting the estate from dismemberment, and it also benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others. Under the Code, an individual injured by any willful violation of the stay "shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages." §362(k)(1).

Among the many collection efforts prohibited by the stay is "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." §362(a)(3) (emphasis added). The prohibition against exercising control over estate property is the subject of the present dispute.

In the case before us, the city of Chicago (City) impounded each respondent's vehicle for failure to pay fines for motor vehicle infractions. Each respondent filed a Chapter 13 bankruptcy petition and requested that the City return his or her vehicle. The City refused, and in each case a bankruptcy court held that the City's refusal violated the automatic stay. The Court of Appeals affirmed all of the judgments in a consolidated opinion. *In re Fulton*, 926 F. 3d 916 (CA7 2019). The court concluded that "by retaining possession of the debtors' vehicles after they declared

bankruptcy," the City had acted "to exercise control over" respondents' property in violation of §362(a)(3). *Id.*, at 924–925. We granted certiorari to resolve a split in the Courts of Appeals over whether an entity that retains possession of the property of a bankruptcy estate violates §362(a)(3). 589 U. S. \_\_\_ (2019). We now vacate the judgment below.

П

The language used in §362(a)(3) suggests that merely retaining possession of estate property does not violate the automatic stay. Under that provision, the filing of a bankruptcy petition operates as a "stay" of "any act" to "exercise control" over the property of the estate. Taken together, the most natural reading of these terms—"stay," "act," and "exercise control"—is that §362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed.

Taking the provision's operative words in turn, the term "stay" is commonly used to describe an order that "suspend[s] judicial alteration of the status quo." *Nken* v. *Holder*, 556 U. S. 418, 429 (2009) (brackets in original; internal quotation marks omitted). An "act" is "[s]omething done or performed . . . ; a deed." Black's Law Dictionary 30 (11th ed. 2019); see also Webster's New International Dictionary 25 (2d ed. 1934) ("that which is done," "the exercise of power," "a deed"). To "exercise" in the sense relevant here means "to bring into play" or "make effective in action." Webster's Third New International Dictionary 795 (1993). And to "exercise" something like control is "to put in practice or carry out in action." Webster's New International

 $<sup>^1\</sup>mathrm{Compare}\ In\ re\ Fulton,\ 926\ \mathrm{F.\ 3d}\ 916,\ 924\ (\mathrm{CA7}\ 2019),\ In\ re\ Weber,\ 719\ \mathrm{F.\ 3d}\ 72,\ 81\ (\mathrm{CA2}\ 2013),\ In\ re\ Del\ Mission\ Ltd.,\ 98\ \mathrm{F.\ 3d}\ 1147,\ 1151-1152\ (\mathrm{CA9}\ 1996),\ and\ In\ re\ Knaus,\ 889\ \mathrm{F.\ 2d}\ 773,\ 774-775\ (\mathrm{CA8}\ 1989),\ with\ In\ re\ Denby-Peterson,\ 941\ \mathrm{F.\ 3d}\ 115,\ 132\ (\mathrm{CA3}\ 2019),\ and\ In\ re\ Cowen,\ 849\ \mathrm{F.\ 3d}\ 943,\ 950\ (\mathrm{CA10}\ 2017).$ 

Dictionary, at 892. The suggestion conveyed by the combination of these terms is that §362(a)(3) halts any affirmative act that would alter the status quo as of the time of the filing of a bankruptcy petition.

We do not maintain that these terms definitively rule out the alternative interpretation adopted by the court below and advocated by respondents. As respondents point out, omissions can qualify as "acts" in certain contexts, and the term "control" can mean "to have power over." *Thompson* v. *General Motors Acceptance Corp.*, 566 F. 3d 699, 702 (CA7 2009) (quoting Merriam-Webster's Collegiate Dictionary 272 (11th ed. 2003)). But saying that a person engages in an "act" to "exercise" his or her power over a thing communicates more than merely "having" that power. Thus the language of §362(a)(3) implies that something more than merely retaining power is required to violate the disputed provision.

Any ambiguity in the text of §362(a)(3) is resolved decidedly in the City's favor by the existence of a separate provision, §542, that expressly governs the turnover of estate property. Section 542(a), with two exceptions, provides as follows:

"[A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate."

The exceptions to §542(a) shield (1) transfers of estate property made from one entity to another in good faith without notice or knowledge of the bankruptcy petition and (2) goodfaith transfers to satisfy certain life insurance obligations.

See §§542(c), (d). Reading §362(a)(3) to cover mere retention of property, as respondents advocate, would create at least two serious problems.

First, it would render the central command of §542 "The canon against surplusage is largely superfluous. strongest when an interpretation would render superfluous another part of the same statutory scheme." Yates v. *United States*, 574 U. S. 528, 543 (2015) (plurality opinion; internal quotation marks and brackets omitted). Reading "any act ... to exercise control" in §362(a)(3) to include merely retaining possession of a debtor's property would make that section a blanket turnover provision. But as noted, §542 expressly governs "[t]urnover of property to the estate," and subsection (a) describes the broad range of property that an entity "shall deliver to the trustee." That mandate would be surplusage if §362(a)(3) already required an entity affirmatively to relinquish control of the debtor's property at the moment a bankruptcy petition is filed.

Respondents and their *amici* contend that §542(a) would still perform some work by specifying the party to whom the property in question must be turned over and by requiring that an entity "account for . . . the value of" the debtor's property if the property is damaged or lost. But that is a small amount of work for a large amount of text in a section that appears to be the Code provision that is designed to govern the turnover of estate property. Under this alternative interpretation, §362(a)(3), not §542, would be the chief provision governing turnover—even though §362(a)(3) says nothing expressly on that question. And §542 would be reduced to a footnote—even though it appears on its face to be the governing provision. The better account of the two provisions is that §362(a)(3) prohibits collection efforts outside the bankruptcy proceeding that would change the status quo, while §542(a) works within the bankruptcy process to draw far-flung estate property back into the hands of the debtor or trustee.

Second, respondents' reading would render the commands of §362(a)(3) and §542 contradictory. Section 542 carves out exceptions to the turnover command, and §542(a) by its terms does not mandate turnover of property that is "of inconsequential value or benefit to the estate." Under respondents' reading, in cases where those exceptions to turnover under §542 would apply, §362(a)(3) would command turnover all the same. But it would be "an odd construction" of §362(a)(3) to require a creditor to do immediately what §542 specifically excuses. *Citizens Bank of Md.* v. *Strumpf*, 516 U. S. 16, 20 (1995). Respondents would have us resolve the conflicting commands by engrafting §542's exceptions onto §362(a)(3), but there is no textual basis for doing so.

The history of the Bankruptcy Code confirms what its text and structure convey. Both §362(a)(3) and §542(a) were included in the original Bankruptcy Code in 1978. See Bankruptcy Reform Act of 1978, 92 Stat. 2570, 2595. At the time, §362(a)(3) applied the stay only to "any act to obtain possession of property of the estate or of property from the estate." *Id.*, at 2570. The phrase "or to exercise control over property of the estate" was not added until 1984. Bankruptcy Amendments and Federal Judgeship Act of 1984, 98 Stat. 371.

Respondents do not seriously dispute that §362(a)(3) imposed no turnover obligation prior to the 1984 amendment. But transforming the stay in §362 into an affirmative turnover obligation would have constituted an important change. And it would have been odd for Congress to accomplish that change by simply adding the phrase "exercise control," a phrase that does not naturally comprehend the mere retention of property and that does not admit of the exceptions set out in §542. Had Congress wanted to make §362(a)(3) an enforcement arm of sorts for §542(a), the least one would expect would be a cross-reference to the latter provision, but Congress did not include such a cross-

reference or provide any other indication that it was transforming §362(a)(3). The better account of the statutory history is that the 1984 amendment, by adding the phrase regarding the exercise of control, simply extended the stay to acts that would change the status quo with respect to intangible property and acts that would change the status quo with respect to tangible property without "obtain[ing]" such property.

\* \* \*

Though the parties debate the issue at some length, we need not decide how the turnover obligation in §542 operates. Nor do we settle the meaning of other subsections of §362(a).<sup>2</sup> We hold only that mere retention of estate property after the filing of a bankruptcy petition does not violate §362(a)(3) of the Bankruptcy Code. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BARRETT took no part in the consideration or decision of this case.

 $<sup>^2</sup>$ In respondent Shannon's case, the Bankruptcy Court determined that by retaining Shannon's vehicle and demanding payment, the City also had violated §§362(a)(4) and (a)(6). Shannon presented those theories to the Court of Appeals, but the court did not reach them. 926 F. 3d, at 926, n. 1. Neither do we.

### SUPREME COURT OF THE UNITED STATES

No. 19-357

# CITY OF CHICAGO, ILLINOIS, PETITIONER v. ROBBIN L. FULTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[January 14, 2021]

JUSTICE SOTOMAYOR, concurring.

Section 362(a)(3) of the Bankruptcy Code provides that the filing of a bankruptcy petition "operates as a stay" of "any act... to exercise control over property of the [bankruptcy] estate." 11 U. S. C. §362(a)(3). I join the Court's opinion because I agree that, as used in §362(a)(3), the phrase "exercise control over" does not cover a creditor's passive retention of property lawfully seized prebankruptcy. Hence, when a creditor has taken possession of a debtor's property, §362(a)(3) does not require the creditor to return the property upon the filing of a bankruptcy petition.

I write separately to emphasize that the Court has not decided whether and when §362(a)'s other provisions may require a creditor to return a debtor's property. Those provisions stay, among other things, "any act to create, perfect, or enforce any lien against property of the estate" and "any act to collect, assess, or recover a claim against [a] debtor" that arose prior to bankruptcy proceedings. §\$362(a)(4), (6); see, e.g., In re Kuehn, 563 F. 3d 289, 294 (CA7 2009) (holding that a university's refusal to provide a transcript to a student-debtor "was an act to collect a debt" that violated the automatic stay). Nor has the Court addressed how bankruptcy courts should go about enforcing creditors' separate obligation to "deliver" estate property to the trustee or debtor under §542(a). The City's conduct may very well

violate one or both of these other provisions. The Court does not decide one way or the other.

Regardless of whether the City's policy of refusing to return impounded vehicles satisfies the letter of the Code, it hardly comports with its spirit. "The principal purpose of the Bankruptcy Code is to grant a "fresh start"" to debtors. *Marrama* v. *Citizens Bank of Mass.*, 549 U. S. 365, 367 (2007) (quoting *Grogan* v. *Garner*, 498 U. S. 279, 286 (1991)). When a debtor files for Chapter 13 bankruptcy, as respondents did here, "the debtor retains possession of his property" and works toward completing a court-approved repayment plan. 549 U. S., at 367. For a Chapter 13 bankruptcy to succeed, therefore, the debtor must continue earning an income so he can pay his creditors. Indeed, Chapter 13 bankruptcy is available only to "individual[s] with regular income." 11 U. S. C. §109(e).

For many, having a car is essential to maintaining employment. Take, for example, respondent George Peake. Before the City seized his car, Peake relied on his 200,000mile 2007 Lincoln MKZ to travel 45 miles each day from his home on the South Side of Chicago to his job in Joliet, Illinois. In June 2018, when the City impounded Peake's car for unpaid parking and red-light tickets, the vehicle was worth just around \$4,300 (and was already serving as collateral for a roughly \$7,300 debt). Without his car, Peake had to pay for rides to Joliet. He filed for bankruptcy, hoping to recover his vehicle and repay his \$5,393.27 debt to the City through a Chapter 13 plan. The City, however, refused to return the car until either Peake paid \$1,250 upfront or after the court confirmed Peake's bankruptcy plan. As a result, Peake's car remained in the City's possession for months. By denying Peake access to the vehicle he needed to commute to work, the City jeopardized Peake's ability to make payments to all his creditors, the City included. Surely, Peake's vehicle would have been more valuable in the hands of its owner than parked in the City's

impound lot.<sup>1</sup>

Peake's situation is far too common.<sup>2</sup> Drivers in low-income communities across the country face similar vicious cycles: A driver is assessed a fine she cannot immediately pay; the balance balloons as late fees accrue; the local government seizes the driver's vehicle, adding impounding and storage fees to the growing debt; and the driver, now without reliable transportation to and from work, finds it all but impossible to repay her debt and recover her vehicle. See Brief for American Civil Liberties Union et al. as Amici Curiae 11–16, 31–32. Such drivers may turn to Chapter 13 bankruptcy for a "fresh start." Marrama, 549 U.S., at 367 (internal quotation marks omitted).<sup>3</sup> But without their vehicles, many debtors quickly find themselves unable to make their Chapter 13 payments. The cycle thus continues, disproportionately burdening communities of color, see Brief for American Civil Liberties Union et al. as Amici Curiae 17, and interfering not only with debtors' ability to earn an income and pay their creditors but also with their access to childcare, groceries, medical appointments, and other necessities.

Although the Court today holds that §362(a)(3) does not

 $<sup>^1</sup>$ Even though §362(a)(3) does not require turnover, whether and when the City may sell impounded cars is an entirely different matter. See, *e.g.*, *In re Cowen*, 849 F. 3d 943, 950 (CA10 2017) ("It's not hard to come up with examples of . . . 'acts' that 'exercise control' over, but do not 'obtain possession of,' the estate's property, e.g., a creditor in possession who improperly sells property belonging to the estate").

<sup>&</sup>lt;sup>2</sup>See, *e.g.*, Ramos, Chicago Seized and Sold Nearly 50,000 Cars Over Tickets Since 2011, Sticking Owners With Debt, WBEZ News (Jan. 7, 2019) (online source archived at www.supremecourt.gov).

<sup>&</sup>lt;sup>3</sup>The 10-year period from 2007 to 2017, for instance, saw a tenfold increase in the number of Chicagoans filing Chapter 13 bankruptcies that involved debt to the City. See Sanchez & Kambhampati, Driven Into Debt: How Chicago Ticket Debt Sends Black Motorists Into Bankruptcy, ProPublica Illinois (Feb. 27, 2018) (online source archived at www.supremecourt.gov).

require creditors to turn over impounded vehicles, bankruptcy courts are not powerless to facilitate the return of debtors' vehicles to their owners. Most obviously, the Court leaves open the possibility of relief under §542(a). That section requires any "entity," subject to some exceptions, to turn over "property" belonging to the bankruptcy estate. 11 U. S. C. §542(a). The debtor, in turn, must be able to provide the creditor with "adequate protection" of its interest in the returned property, §363(e); for example, the debtor may need to demonstrate that her car is sufficiently insured. In this way, §542(a) maximizes value for all parties involved in a bankruptcy: The debtor is able to use her asset, which makes it easier to earn an income; the debtor's unsecured creditors, in turn, receive timely payments from the debtor; and the debtor's secured creditor, for its part, receives "adequate protection [to] replace the protection afforded by possession." United States v. Whiting Pools, Inc., 462 U. S. 198, 207 (1983). Secured creditors cannot opt out of this arrangement. As even the City acknowledges, §542(a) "impose[s] a duty of turnover that is mandatory when the statute's conditions . . . are met." Brief for Petitioner 37.

The trouble with §542(a), however, is that turnover proceedings can be quite slow. The Federal Rules of Bankruptcy Procedure treat most "proceeding[s] to recover . . . property" as "adversary proceedings." Rule 7001(1). Such actions are, in simplified terms, "essentially full civil lawsuits carried out under the umbrella of [a] bankruptcy case." Bullard v. Blue Hills Bank, 575 U. S. 496, 505 (2015). Because adversary proceedings require more process, they take more time. Of the turnover proceedings filed after July 2019 and concluding before June 2020, the average case was pending for over 100 days. See Administrative Office of the United States Courts, Time Intervals in Months From Filing to Closing of Adversary Proceedings Filed Under 11 U. S. C. §542 for the 12-Month Period Ending June

30, 2020, Washington, DC: Sept. 25, 2020.

One hundred days is a long time to wait for a creditor to return your car, especially when you need that car to get to work so you can earn an income and make your bankruptcyplan payments. To address this problem, some courts have adopted strategies to hurry things along. At least one bankruptcy court has held that §542(a)'s turnover obligation is automatic even absent a court order. See In re Larimer, 27 B. R. 514, 516 (Idaho 1983). Other courts apparently will permit debtors to seek turnover by simple motion, in lieu of filing a full adversary proceeding, at least where the creditor has received adequate notice. See Tr. of Oral Arg. 81 (counsel for the City stating that "[i]n most bankruptcy courts, if a creditor responds to a motion [for turnover] by" arguing that the debtor should have instituted an adversary proceeding, the bankruptcy judge will ask whether the creditor received "actual notice"); Brief for United States as Amicus Curiae 32 (reporting that "some courts have granted [turnover] orders based solely on a motion"); but see, e.g., In re Denby-Peterson, 941 F. 3d 115, 128–131 (CA3 2019) (holding that debtors must seek turnover through adversary proceedings). Similarly, even when a turnover request does take the form of an adversary proceeding, bankruptcy courts may find it prudent to expedite proceedings or order preliminary relief requiring temporary turnover. See, e.g., In re Reid, 423 B. R. 726, 727–728 (Bkrtcy. Ct. ED Pa. 2010); see generally 10 Collier on Bankruptcy ¶ 7065.02 (16th ed. 2019).

Ultimately, however, any gap left by the Court's ruling today is best addressed by rule drafters and policymakers, not bankruptcy judges. It is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under §542(a), especially where debtors' vehicles are concerned. Congress, too, could offer a statu-

tory fix, either by ensuring that expedited review is available for §542(a) proceedings seeking turnover of a vehicle or by enacting entirely new statutory mechanisms that require creditors to return cars to debtors in a timely manner.

Nothing in today's opinion forecloses these alternative solutions. With that understanding, I concur.

### IN THE

# Supreme Court of the United States

CITY OF CHICAGO, ILLINOIS,

Petitioner,

—v.—

ROBBIN L. FULTON, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICI CURIAE PROFESSORS
RALPH BRUBAKER, RONALD J. MANN,
CHARLES W. MOONEY, JR., THOMAS E. PLANK
AND CHARLES J. TABB IN SUPPORT OF PETITIONER

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### INTEREST OF AMICI CURIAE1

Amici curiae are professors who have devoted their careers to teaching, studying and writing about bankruptcy and commercial law. Each of these nationally and internationally recognized scholars has participated as an amicus in this Court in prior cases involving foundational issues of bankruptcy law. Amici have a strong interest in the correct interpretation of the Bankruptcy Code and in its effective implementation.

Ralph Brubaker is the Carl L. Vacketta Professor of Law at the University of Illinois. He is the author of the following articles addressing the issue before the Court in this case:

- •Ralph Brubaker, Turnover, Adequate Protection, and the Automatic Stay (Part I): Origins and Evolution of the Turnover Power, 33 Bkrtcy. L. Ltr. No. 8 (Aug. 2013) [hereinafter Brubaker, Turnover (Part I)];
- •Ralph Brubaker, Turnover, Adequate Protection, and the Automatic Stay (Part II): Who Is "Exercising Control" Over What?, 33 Bkrtcy. L. Ltr. No. 9 (Sept. 2013) [hereinafter Brubaker, Turnover (Part II)]; and

<sup>&</sup>lt;sup>1</sup> Counsel for the parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no party or their counsel made any monetary contribution toward the preparation or submission of this brief.

•Ralph Brubaker, Turnover, Adequate Protection, and the Automatic Stay: A Reply to Judge Wedoff, 38 Bkrtcy. L. Ltr. No. 11 (Nov. 2018) [hereinafter Brubaker, Turnover (Part III)].

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Charles J. Tabb is the Mildred Van Voorhis Jones Chair in Law Emeritus at the University of Illinois. He discusses the issue before the Court in Charles J. Tabb, Law of Bankruptcy §3.6, at 254-55 & §5.13, at 439 (4th ed. 2016).

#### SUMMARY OF ARGUMENT

The issue before the Court implicates the integrity of a secured creditor's right to adequate protection of its constitutionally protected property rights in its collateral.

When a secured creditor has repossessed its debtor files collateral before a bankruptcy, Bankruptcy Code §542(a), 11 U.S.C. §542(a), authorizes the bankruptcy court to order turnover of that collateral to the trustee.<sup>2</sup> But "there are explicit limitations on the reach of §542(a)," and "[a]t the secured creditor's insistence, the bankruptcy court must place such limits or conditions on the trustee's power to . . . use [the] property as are necessary to protect the creditor." U.S. v. Whiting Pools, 462 U.S. 198, 206, 204 (1983).

The Seventh Circuit, however, held that a secured creditor who retains possession of repossessed collateral, pending entry of a turnover order, violates the automatic stay of Bankruptcy Code §362(a)(3), by purportedly "exercis[ing] control over property of the estate." 11 U.S.C. §362(a)(3). Consequently, it held that the creditor's failure to immediately turn over that collateral to the trustee is punishable as contempt.

The Seventh Circuit's interpretation improperly turns §362(a)(3) into a self-contained and self-

<sup>&</sup>lt;sup>2</sup> References to the trustee (herein and under the Bankruptcy Code) include a chapter 11 or chapter 13 debtor acting as the debtor in possession with the rights and powers of a trustee. *See* 11 U.S.C. §§1107(a), 1303.

executing injunctive turnover order that is inconsistent with and effectively negates the Code's express turnover provision in §542(a).

As the Third and Tenth Circuits have correctly held, the Seventh Circuit misinterpreted the 1984 amendment that added the "exercise control" clause to  $\S362(a)(3)$ . The text of  $\S362(a)(3)$  distinguishes between "possession" of tangible property and nonpossessory "control" of intangible property. As confirmed by the legislative history, Congress added the "exercise control" clause to \$362(a)(3) to prevent interference with the estate's intangible property rights (such as contracts and causes of action) that are incapable of physical possession. Moreover, when a secured creditor, rather than the debtor, validly holds the collateral when the debtor files bankruptcy, possession (as a separate and distinct "interest in property") is *not* "property of the estate." By its terms, then, the stay of §362(a)(3) does not even address the secured creditor's retention of that "interest in property."

Forcing immediate turnover of repossessed collateral without adequate protection, as the Seventh Circuit requires, can eviscerate a secured creditor's statutory right to adequate protection. Section 542(a) permits a secured creditor to retain possession of repossessed collateral pending the court's entry of a turnover order and the trustee's provision of statutorily-mandated court-ordered adequate protection. The Court should "not give §362(a)(3)... an interpretation that would proscribe what" the Code's express turnover provisions "were

plainly intended to permit." Citizens Bank v. Strumpf, 516 U.S. 16, 21 (1995).

A secured creditor's mere retention of its repossessed collateral is "neither a taking of possession of [a debtor]'s property, nor an exercising of control over it, but merely a refusal to" transfer its own property interest (possession) to the debtor. *Id.* The Court should reverse the contrary judgment of the Seventh Circuit below.

#### ARGUMENT

I. Turnover Under Bankruptcy Code §542(a) Requires a Judicial Determination of Necessary Adequate Protection.

#### A. Section 542(a) Codifies Established Pre-Code Turnover Practice.

The seminal case on secured creditor turnover under §542(a) is this Court's 1983 Whiting Pools decision. The Court interpreted §542(a) there "consistent with judicial precedent predating the Bankruptcy Code," pursuant to which "the bankruptcy court could order the turnover of collateral in the hands of a secured creditor." 462 U.S. at 208.

1. The traditional turnover power was a corollary to a bankruptcy court's exclusive *in rem* jurisdiction over a debtor's bankruptcy estate. See Brubaker, Turnover (Part I), supra, at 2-4. Bankruptcy courts "fashioned the summary turnover procedure as one necessary to accomplish their function of administration" of the debtor's bankruptcy estate. Maggio v. Zeitz, 333 U.S. 56, 62-63 (1948).

When an entity (including the debtor) refuses to surrender property to the bankruptcy trustee, an order compelling turnover "has been sustained as an appropriate and necessary step in enforcing the Bankruptcy Act." *Id.* at 63. A turnover order, therefore, is an exercise of a bankruptcy court's

general equity powers, now codified in §105(a) of the Bankruptcy Code, to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. 11 U.S.C. §105(a). The turnover order is an injunction, the violation of which is punishable as a civil contempt. See Maggio v. Zeitz, 333 U.S. at 67-68; Oriel v. Russell, 278 U.S. 358, 363-67 (1929); Mueller v. Nugent, 184 U.S. 1, 13 (1902).

2. In *Maggio v. Zeitz*, 333 U.S. at 61-63, this Court explained a traditional turnover order issued against a debtor as an exercise of a bankruptcy court's general equitable powers (under the statutory predecessor to §105(a)) necessary, inter alia, to enforce the debtor's turnover obligation under the statutory predecessor to §521(a)(4) of the Bankruptcy Code, which provides that "the debtor shall... surrender to the trustee all property of the estate." 11 U.S.C. §521(a)(4).

Before 1978, however, there was no express statutory turnover obligation for entities other than the debtor who were subject to turnover. Section 542(a) in the 1978 Bankruptcy Code, therefore, for the first time "gives an explicit statutory basis for the traditional turnover order against persons other than the debtor." Plank, *supra*, at 303 (footnotes omitted). Consequently, bankruptcy courts properly use their §105(a) equitable powers to enter an injunctive turnover order against third parties as "necessary or appropriate to carry out the provisions of" §542(a).

- B. Consistent with Pre-Code Turnover Practice, §542(a) Requires a Judicial Determination of Necessary Adequate Protection as a Condition Precedent to Turnover of Repossessed Collateral.
- 1. The traditional injunctive turnover power developed alongside limitations on bankruptcy courts' powers to entertain actions against so-called "adverse claimants." See Brubaker, Turnover (Part I), supra, at 3-4. And a secured creditor who had taken possession of its collateral before the bankruptcy filing was "the archetypal 'adverse claimant'" who was *not* subject to a turnover order. U.S. v. Whiting Pools, Inc., 674 F.2d 144, 148 (2d Cir. 1982) (Friendly, C.J.), aff'd, 462 U.S. 198 (1983). See Phelps v. U.S., 421 U.S. 330 (1975). "Generally, a creditor in possession of collateral could liquidate the collateral without interference" from the bankruptcy court. Plank, supra, at 266. See U.S. Nat'l Bank v. Chase Nat'l Bank, 331 U.S. 28, 33 (1947) (secured creditor "may disregard the bankruptcy proceeding, decline to file a claim and rely solely upon his security if that security is properly and solely in his possession").
- 2. In Continental Illinois National Bank & Trust Co. v. Chicago, R.I. & P. Ry. Co., 294 U.S. 648 (1935), this Court adopted a more expansive conception of bankruptcy courts' general power to issue injunctions in reorganization cases, under the statutory predecessor to §105(a). Thereafter, and by extending the reasoning of Continental Illinois to turnover orders, the lower courts concluded that in

reorganization cases "a bankruptcy court had broad power to order a secured creditor in possession following a debtor's default to turn over the collateral." *Whiting Pools*, 674 F.2d at 150 (Friendly, C.J.).

The First Circuit's decision in *Reconstruction Finance Corp. v. Kaplan*, 185 F.2d 791 (1st Cir. 1950), is representative of that pre-Code practice whereby "the bankruptcy court could order the turnover of collateral in the hands of a secured creditor." *Whiting Pools*, 462 U.S. at 208 (citing *Kaplan*). In any such turnover proceeding, though, "the bankruptcy court was required to protect the secured creditor from harm before ordering return of the property items." Plank, *supra*, at 291 (footnote omitted). *See*, *e.g.*, *Kaplan*, 185 F.2d at 793; *In re Third Ave. Transit Corp.*, 198 F.2d 703, 706-07 (2d Cir. 1952). *See also* Plank, *supra*, at 281-83 & n.139, 286-87, 291 & nn.180-81 (citing and discussing the pre-Code case law).

3. Congress codified the pre-Code secured-creditor turnover practice in 1978 in §542(a). The Whiting Pools Court "f[ou]nd Judge Friendly's careful analysis of th[e] history" of §542(a) "to be unassailable," 462 U.S. at 207 n.16, and affirmed his decision that the most "natural reading of §542[a] is that it was intended to codify RFC v. Kaplan," 674 F.2d at 155. "[C]onsistent with judicial precedent predating the Bankruptcy Code," this Court held that §542(a) is "a provision authorizing the turnover of property of the debtor in the possession of secured creditors." 462 U.S. at 207-08.

Section 542(a) also codifies the pre-Code practice requiring adequate protection of a secured creditor's lien rights as a condition precedent to turnover of repossessed collateral. Section 542(a) (emphasis added), in relevant part, provides as follows:

(a) ... [A]n entity ... in possession, custody, or control, during the case, of *property that* the trustee may use, sell, or lease under section 363 of this title ... shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

Correlatively, Bankruptcy Code §363(e), 11 U.S.C. §363(e) (emphasis added), in relevant part, provides:

(e) . . . [A]t any time, on request of an entity that has an interest in *property* . . . *proposed* to be used, sold or leased, by the trustee, the court . . . shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. . . . <sup>3</sup>

<sup>&</sup>lt;sup>3</sup> Adequate protection requires, e.g., cash payments to the secured creditor and maintenance of insurance on the collateral. See 11 U.S.C. §361 (providing examples of forms of adequate protection such "as will result in the realization by such entity of the indubitable equivalent of such entity's interest in property"); H.R. Rep. No. 95-595, at 339 (1977) (adequate protection "concept is derived from the fifth amendment protection of property interests").

By its terms, then, "there are explicit limitations on the reach of §542(a)." Whiting Pools, 462 U.S. at 206. Because "[s]ection 542 provides that the property be usable under §363," Whiting Pools also held that the secured creditor, "under section 363(e), remains entitled to adequate protection for its interests." 462 U.S. at 206 n.12, 212-13. "[T]he right to adequate protection . . . replace[s] the protection afforded by possession." Id. at 207. Hence, "[a]t the secured creditor's insistence, the bankruptcy court must place such limits or conditions on the trustee's power to sell, use, or lease property as are necessary to protect the creditor." Id. at 204.

4. Courts adopting the Seventh Circuit's erroneous interpretation of §362(a)(3) purport to merely implement a secured creditor's §542(a) turnover obligation:

The duty to turn over the property is not contingent upon any predicate violation of the stay, any order of the bankruptcy court, or any demand [on] the creditor. Rather, the duty arises upon the filing of the bankruptcy petition.

In re Knaus, 889 F.2d 773, 775 (8th Cir. 1989).

The pre-Code turnover practice that §542(a) codifies, however, contradicts those courts' mistaken belief that §542(a) turnover "is 'self-executing'" and "requires that any entity in possession of property of the estate deliver it to the trustee, without condition

or any further action." In re Weber, 719 F.3d 72, 79 (2d Cir. 2013). "[T]he turnover provision is effectuated by virtue of judicial action." In re Denby-Peterson, 941 F.3d 115, 130 (3d Cir. 2019). Section 542(a) provides an express statutory basis for a bankruptcy court to enter a §105(a) injunction ordering turnover of property properly in the possession of a secured creditor.

Those courts also incorrectly hold that §542(a) mandates a turnover of repossessed collateral without any bankruptcy-court determination of necessary adequate protection. Section 542(a) explicitly cross-references §363, which mandates (in §363(e)) court-ordered adequate protection in conjunction with any "proposed use" of property by a debtor-in-possession. Thus, the required judicial adequate-protection determination must be made in the context of a turnover proceeding (whereby the debtor "proposes" turnover in order to "use" the property), as was the case under the pre-Code practice that §542(a) codifies.

5. The practice of the courts prior to the determinative 1984 amendment to §362(a)(3) confirms that §542(a) codified the pre-Code adequate protection practice. Before that 1984 amendment, "[c]ourts uniformly supported the practice that '[a] secured creditor may insist upon adequate protection as a condition precedent to the turnover of property since the property may not be used, sold, or leased under section 363 without it.' In re Young, 193 B.R. 620, 626 (Bankr. D.D.C. 1996) (emphasis in original) (citing case law and quoting

In re Purbeck & Assocs., 12 B.R. 406, 408 (Bankr. D. Conn. 1981)). See also In re Hall, 502 B.R. 650, 657-58 (Bankr. D.D.C. 2014) (citing additional case law). Indeed, in Whiting Pools itself, the bankruptcy court had ordered turnover "on the condition that [the debtor] provide the [secured creditor] with specified protection," a portion of which had to be paid "before the turnover occurred." 462 U.S. at 201 & n.7.

Before enactment of the 1984 amendment to §362(a)(3), "if a creditor was unwilling to return collateral, the debtor would have to seek a court order requiring turnover under §542(a), and in response the creditor could request adequate protection under §363(e)." Eugene R. Wedoff, *The Automatic Stay Under §362(a)(3)—One More Time*, 38 Bkrtcy. L. Letter No. 7, p. 2 (July 2018). Courts adopting the Seventh Circuit's interpretation of §362(a)(3) have cited no pre-1984 case holding to the contrary. Those courts have misconstrued §542(a) turnover as somehow being self-executing under the influence of their misinterpretation of the 1984 amendment to §362(a)(3).

#### II. The 1984 Amendment to Bankruptcy Code §362(a)(3) Did Not Repeal §542(a).

1. Even before the effective date of the new Bankruptcy Code (enacted into law by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598), Senator DeConcini introduced a technical corrections bill in the Senate (S.658) on March 14, 1979. What was ultimately enacted as the 1984

amendment to §362(a)(3) first appeared in the House amendments to S.658, entitled "An Act to Correct Technical Errors, Clarify and Make Minor Substantive Changes to Public Law 95-598." See H.R. Rep. No. 96-1195, at 1, 52 (1980).

The House accompanying 1980 Report explained that "[e]very effort has been made to maintain existing policy intact" because "it is . . . premature to change a statute that has been in effect for such a short period where it is not really known to what extent [any] concerns are other than transitory." H.R. Rep. No. 96-1195, at 2. See also 126 Cong. Rec. 31,152 (1980) (floor statement of Sen. DeConcini in conjunction with Senate's concurrence in House amendments to S.658) ("The bill before us today is basically one of technical and conforming type amendments that are totally unobjectionable and reflect the congressional intent that may not always have been clear regarding the Code.").

The 1984 amendment to §362(a)(3)—first introduced in 1980 via the technical corrections bill and ultimately included in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §441(a)(2), 98 Stat. 333, 371—added the following italicized language to §362(a)(3), which now provides, in relevant part:

#### §362. Automatic Stay

(a) . . . [A] petition filed under [the Bankruptcy Code] operates as a stay, applicable to all entities, of—

\* \* \* \*

- (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[.]
- 2. According to the Seventh Circuit and other courts, a secured creditor's mere retention of repossessed collateral is a violation of the above-emphasized "exercise control" clause added to §362(a)(3) in 1984. Indeed, in the cases before the Court (and all others relevant to the question before the Court), because the secured creditor "obtain[ed] possession" of its collateral *before* bankruptcy, the secured creditor's mere retention of possession would *not* contravene the pre-1984 version of §362(a)(3).

That result under the pre-1984 version of the §362(a)(3) automatic stay (i.e., no stay violation) is fully consistent with the pre-Code turnover practice codified in §542(a), pursuant to which a secured creditor could retain repossessed collateral pending the statutorily-mandated judicial determination of necessary adequate protection, made in the context of a turnover proceeding. Consequently, the Seventh Circuit's holding—that a secured creditor's mere retention of repossessed collateral violates the "exercise control" clause of §362(a)(3)—necessarily is a decision that the 1984 amendment to §362(a)(3) repealed pre-1984 law.

3. As the Court has "emphasized, repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Hui v. Castaneda*, 559 U.S. 799,

810 (2010) (quoting *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009)). "There is a 'stron[g] presum[ption]' that disfavors repeals by implication and that 'Congress will specifically address' preexisting law before suspending the law's normal operations in a later statute." *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1617 (2018) (quoting *U.S. v. Fausto*, 484 U.S. 439, 452, 453 (1988)).

Court has repeatedly invoked presumption against implied repeal in construing the Bankruptcy Code. The Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." Penn. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 563 (1990). See generally Ronald J. Mann, Bankruptcy and the U.S. Supreme Court 145 (2017) ("The strength of that principle is apparent from the pattern of its use."). If intent to repeal prior law is not clear from the text of the statute itself, the Court looks for at least some "indication of intent to do so in the legislative history," because "it is most improbable that" "a major change in the existing rules" "would have been made without even any mention in the legislative history." United Savs. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 380 (1988).

The 1984 amendment to §362(a)(3) did not repeal pre-1984 turnover law. Neither the text of that amendment nor the legislative record of its enactment suggests repeal. To the contrary, the statutory language of that amendment and the legislative explanations thereof demonstrate that

Congress simply extended the protections of the §362(a)(3) stay to intangible property rights that are incapable of actual physical possession.

## A. The "Exercise Control" Clause of \$362(a)(3) Stays Nonpossessory Control of Intangible Property Interests.

1. Congress's 1984 amendment of §362(a)(3) added the "exercise control" provision to the preexisting stay of acts to "obtain possession" of property from the estate. By its very terms, therefore, the §362(a)(3) amendment differentiates between the already-prohibited acts of "possession" and the newly-prohibited acts of "control."

Possession is itself a form of control most often (if not exclusively) defined in terms of control of a physical thing (like land or goods). Use of the term "control" in the 1984 amendment to §362(a)(3), therefore, evokes the semantic distinction commonly drawn between physical "possession" of things capable of physical possession and "control" of intangible property not capable of physical possession.

That very same linguistic usage is (and has long been) well known in commercial law, for example, in the concept of perfection of a security interest by a secured party's "possession" of the collateral. The principal drafter of the original version of Article 9 of the UCC, Professor Grant Gilmore, explained the inadequacy of the term "possession" when dealing with intangible property in his treatise:

In the nature of things possession can be available as a perfection device only where the collateral has, at least in contemplation of law, a tangible existence. . . . In the case of the "pure intangibles" . . . possession is a meaningless concept when applied to an intangible claim not evidenced by a writing which represents the claim.

1 Grant Gilmore, Security Interests in Personal Property §14.1, at 439 (1965). Thus, Article 9 sharply distinguishes between perfection by "possession" of "tangible" personal property<sup>4</sup> and perfection by "control" of various kinds intangible property rights, such as deposit accounts.<sup>5</sup>

Consistent with this well-known linguistic distinction between physical "possession" and "control" of intangibles, the "exercise control" clause of §362(a)(3) prohibits interference with the estate's intangible property interests.

A common example is exercising control of intangible property rights that belong to the estate, such as contract rights or causes of action. These rights are incapable of real

<sup>&</sup>lt;sup>4</sup> "[A] secured party may perfect a security interest in *tangible* negotiable documents, goods, instruments, money, or tangible chattel paper by taking *possession* of the collateral." UCC §9-313(a), 3 U.L.A. 278 (2010) (emphasis added).

<sup>&</sup>lt;sup>5</sup> "A security interest in investment property, deposit accounts, letter-of-credit rights, electronic chattel paper, or electronic documents may be perfected by *control* of the collateral . . . ." UCC §9-314(a), 2C U.L.A. 235 (2005) (emphasis added).

possession unless they are reified. Yet, (a)(3) preserves and guards against interference with them by staying any act to exercise control over estate property.

1 David G. Epstein et al., Bankruptcy §3–14, at 163 (1992).

Courts have thus concluded that a counterparty's unilateral post-bankruptcy termination of a contract with the debtor is a stayed exercise of control over estate property. See, e.g., In re Carroll, 903 F.3d 1266, 1270-71 (9th Cir. 1990). And the "exercise control" clause of §362(a)(3) also prohibits anyone other than the trustee from prosecuting a claim belonging to the debtor's bankruptcy estate. See, e.g., In re TelexFree, LLC, 941 F.3d 576, 588 (1st Cir. 2019) (creditors' attempt to assert estate's avoidance actions); In re Nicole Gas Prod., Ltd., 916 F.3d 566, 578 (6th Cir. 2018) (shareholder's attempt to assert corporate debtor's cause of action).

2. The Seventh Circuit and other courts have misinterpreted §362(a)(3) by assuming that Congress, with the 1984 addition of the "exercise control" clause, was targeting "the mere knowing retention" of possession, *In re Del Mission Ltd.*, 98 F.3d 1147, 1151 (9th Cir. 1996), by "creditors who seized an asset pre-petition," *Weber*, 719 F.3d at 80 (quoting *Thompson v. GMAC*, 566 F.3d 699, 702 (7th Cir. 2009)).

That interpretation of §362(a)(3), however, violates the surplusage canon of statutory construction. Reading the "exercise control" clause

to include not only (i) nonpossessory "control" of intangible property rights, but to also include (ii) possessory "control" over tangible property (as the Seventh Circuit does) would subsume and render inoperative the "obtain possession" clause of §362(a)(3). If retention of possession of property in which the estate has an ownership interest is an act to "exercise control" over property of the estate, then an act to obtain possession of property from the estate surely is also an act to "exercise control" over property of the estate, leaving the "obtain possession" clause with no independent meaning or effect whatsoever.

Admittedly, the term "control" is vague. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 441 (2012) (essence of vagueness lies in "[u]ncertain breadth of meaning"). By attributing the broadest, most inclusive, and most consequential meaning possible to the vague term "control," though, courts like the Seventh Circuit *presume* that Congress, with the 1984 addition of the "exercise control" clause, must have intended to repeal the established pre-1984 turnover law enabling a secured creditor to retain possession of repossessed collateral pending a turnover order conditioned on statutorily-required adequate protection. Not only, therefore, does the Seventh Circuit interpretation contravene the strong presumption against repeal of pre-1984 turnover law, it turns that presumption on its head, by adopting the opposite presumption of repeal.

The most sensible interpretation of the term

"control" in §362(a)(3) is one that gives independent meaning and effect to both clauses of §362(a)(3) and that pays proper heed to the strong presumption against implied repeal: The "exercise control" clause only prohibits nonpossessory control of the estate's intangible property interests.

The legislative history of the 1984 amendment to §362(a)(3) confirms that Congress never intended to repeal pre-1984 turnover law. See Brubaker, Turnover (Part III), supra, at 5-6 (detailed summary of legislative history). Such a dramatic change to preexisting law is inconsistent with the modest objectives of the technicalcorrections bill in which the §362(a)(3) amendment originated, as articulated in the 1980 House Report accompanying that bill. Moreover, the legislative explanations of the §362(a)(3) amendment demonstrate that Congress was simply extending the protections of §362(a)(3) to the estate's intangible property interests that are incapable of physical possession.

The legislative history explaining the original version of §362(a)(3), enacted in 1978, had already suggested a distinction between physical "possession" and "control" of the estate's intangible property interests. In explaining the clause prohibiting "any act to obtain possession . . . of property from the estate," both the House and Senate Reports described this provision as designed to protect "property over which the estate has control or possession." S. Rep. No. 95-989, at 50 (1978) (emphasis added); H.R. Rep. No. 95-595, at

341 (1977) (emphasis added). The original statutory language of §362(a)(3), however, did not address such nonpossessory "control." An amendment to §362(a)(3) to reach nonpossessory acts of "control," therefore, was precisely the kind of clarifying amendment "at the earliest possible time after enactment of the Bankruptcy Reform Act" in order "to complete the legislative work intended by the Bankruptcy Reform Act" that the 1980 House Report describes. H.R. Rep. No. 96-1195, at 2.

The section-by-section explanations of the proposed addition of the "exercise control" clause to §362(a)(3), in both the Senate and House, are also consistent with a desire to reach nonpossessory control of the estate's property interests:

In subsection (a)(3), the automatic stay against acts to obtain possession of property of or from the estate also encompasses acts to exercise control over such property without the need for actually obtaining possession....

126 Cong. Rec. 31,153 (1980) (statement of Sen. DeConcini). See 2 Norton Bankruptcy Law and Practice §43:7, at 43-30 (Hon. William L. Norton, Jr. & William L. Norton III eds., 3d ed. 2015) (when the "exercise control" clause was added to §362(a)(3) in

<sup>&</sup>lt;sup>6</sup> See also id. at 31,140, 31,726, 31,765-66 (statement of Sen. Byrd) (containing an identical description of the proposed amendment to §362(a)(3)). The 1980 House Report also describes the §362(a)(3) amendment in nearly identical terms. See H.R. Rep. No. 96-1195, at 10.

1984, "[t]his resulted in extending the stay not only to obtain[ing] possession of estate property but also to acts directed towards exercising control over property of the estate when physical possession is not involved").

By contrast, there is nothing in the legislative history to support the erroneous assumption of the Seventh Circuit and other courts that Congress, with the 1984 amendment to §362(a)(3), must have been targeting secured creditors in possession of repossessed collateral. Nor is there any suggestion that Congress sought to repeal pre-1984 turnover law. As the Tenth Circuit aptly observed: "Congress does not 'hide elephants in mouseholes.' " *In re Cowen*, 849 F.3d 943, 949 (10th Cir. 2017) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)). The strong presumption against implied repeal precludes indulgence in such speculation.

#### B. When a Secured Creditor Has Repossessed Collateral Pre-Bankruptcy, Possession Is Not "Property of the Estate" Protected by §362(a)(3).

The text of the "exercise control" clause of §362(a)(3) also restricts its application to nonpossessory control of intangible property interests by explicitly providing that it only applies to protect "property of the estate." And when a secured creditor has possession of collateral repossessed pre-bankruptcy, possession of that collateral is not "property of the estate."

A debtor's possession of property is itself an interest in property that becomes "property of the estate" when the debtor enters bankruptcy. But when a secured creditor has repossessed its collateral *before* the debtor's bankruptcy filing, the debtor does not have possession and, thus, possession does *not* become "property of the estate." The secured creditor's mere retention of possession, therefore, is not an exercise of control over "property of the estate"; the secured creditor is merely retaining its own property interest, pending provision of court-ordered adequate protection, which "replace[s] the protection afforded by possession." Whiting Pools, 462 U.S. at 207.

1. As the courts have uniformly recognized, including the Second and Seventh Circuits, use of the term "property of the estate" in §362(a)(3) is a reference to "property of the estate" as that concept is extensively defined in Code §541 (entitled "Property of the estate"). See Weber, 719 F.3d at 75-76; Thompson, 566 F.3d at 701-02. Section 541 adopts the technical "bundle of sticks" legal understanding of specific property interests in a particular physical thing (such as the debtor's car) or an intangible thing (such as a debtor's cause of action).

Section 541(a)(1) provides that the "estate is comprised [inter alia] of . . . all legal or equitable *interests* of the debtor *in property* as of the commencement of the case." 11 U.S.C. §541(a)(1) (emphasis added). Both the House and Senate Reports explain that provision in terms of the

technical legal "bundle of sticks" concept of what an "interest in property" is: "The debtor's interest in property . . . includes 'title' to property, which is an interest, just as are a possessory interest, or leasehold interest, for example." S. Rep. No. 95-989, at 82; H.R. Rep. No. 95-595, at 367.

Consistent with the "bundle of sticks" concept of property interests, even when a debtor's only bankruptcy-date "interest" in a particular physical thing is wrongful possession, courts have held that mere possession is an "interest in property" that becomes property of the debtor's bankruptcy estate  $\S541(a)(1)$ . Section 362(a)(3), therefore, protects that possessory interest from any "act" to disturb or undo it (by even the rightful owner and possessor) without the permission of the bankruptcy court via §362(d) stay relief. See, e.g., In re Convenient Food Mart No. 144, Inc., 968 F.2d 592, 594 (6th Cir. 1992); In re Atlantic Business & Community Corp., 901 F.2d 325, 328 (3d Cir. 1990); In re 48th Street Steakhouse, Inc., 835 F.2d 427, 430 (2d Cir. 1987).

As the Court recognized in *Whiting Pools*, the converse is also true. When the debtor does *not* have physical possession of a particular thing when the debtor files bankruptcy, the debtor may have other (and even *all* other) ownership "interests" in that thing that become property of the estate. The possessory "interest" in that thing, however, does *not* become property of the debtor's bankruptcy estate under §541(a)(1). *See Whiting Pools*, 462 U.S. at 207 & n.15. "A debtor's property does not shrink

by happenstance of bankruptcy, but it does not expand, either." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S.Ct. 1652, 1663 (2019) (quoting D.Baird, Elements of Bankruptcy 97 (6th ed. 2014)). "The estate cannot possess anything more than the debtor itself did outside bankruptcy" because §541(a)(1) "defin[es] the estate to include the 'interests of *the debtor* in property.' "*Tempnology*, 139 S.Ct. at 1663 (emphasis in original).

When a repossessing secured creditor has possession, that possessory "interest" can become "property of the estate" only to the extent the estate successfully obtains turnover of possession under §542(a), which will then "bring into the estate property in which the debtor did *not* have a possessory interest at the time the bankruptcy proceedings commenced." Whiting Pools, 462 U.S. at 205 (emphasis added). Section "542(a) grants the [estate] greater rights than those held by the debtor prior to filing of the [bankruptcy] petition" by bringing into "the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorganization proceedings." Id. at 207 & n.15.

Section 541(a)(7) includes in property of the estate "[a]ny interest in property that the estate acquires *after* the commencement of the case." 11 U.S.C. §541(a)(7) (emphasis added). Accordingly, possession "recovered by the trustee under section 542" is also included in "property of the estate." S. Rep. No. 95-989, at 82; H.R. Rep. No. 95-595, at 367.

Section 542(a), therefore, brings possession of repossessed collateral into the estate post-petition in the same way that money or any other "interest of the debtor in property" (transferred to a third party pre-bankruptcy) can be recovered via the Bankruptcy Code's avoiding-power provisions 7 and thereby become "property of the estate." See 11 U.S.C. §541(a)(3) (including in property of the estate "[a]ny interest in property that the trustee recovers" under specified avoiding-power provisions). "Several of these provisions bring into the estate property in which the debtor did not have a possessory [or any other, in some cases] interest at the time the bankruptcy proceedings commenced. Section 542(a) is such a provision." Whiting Pools, 462 U.S. at 205.

When a chapter 13 debtor files bankruptcy without possession of repossessed collateral, and without having recovered possession via a §542(a) turnover proceeding, the possessory "interest" in that collateral is *not* property of the estate. Thus, by retaining possession of repossessed collateral, the secured creditor is merely maintaining the "interest in property" (possession) that the secured creditor (and not the estate) already has. By its terms, then, the "exercise control" clause of §362(a)(3) does not

<sup>&</sup>lt;sup>7</sup> 11 U.S.C. §§544(b)(1) (emphasis added) (giving trustee powers of individual creditors to avoid transfer "of an interest of the debtor in property" under state law, e.g., using state fraudulent transfer statutes); 547(b) (emphasis added) (provision for avoiding a preferential transfer "of an interest of the debtor in property"); 548(a)(1) (emphasis added) (provision for avoiding a fraudulent transfer "of an interest of the debtor in property").

even address that secured creditor's retention of possession, which is not "property of the estate." The "exercise control" clause of §362(a)(3) only applies to nonpossessory control of the estate's intangible property interests.

2. The Seventh Circuit and other courts erroneously apply §362(a)(3) to repossessed collateral cases because they improperly specify the "property of the estate" at issue. For example, the Seventh Circuit (tellingly) stressed that "[w]ithholding possession of property from a bankruptcy estate is the essence of 'exercising control' over possession." Thompson, 566 F.3d at 703 (emphasis added) (quoting In re Sharon, 234 B.R. 676, 682 (B.A.P. 6th Cir. 1999)). But an exercise of control over possession can only violate §362(a)(3) if possession is property of the estate. When a secured creditor has possession of collateral repossessed prebankruptcy, possession is *not* property of the estate; possession only becomes property of the estate if the estate actually obtains possession through turnover.

As another example, the Second Circuit in Weber reasoned that "[a]lthough [the secured creditor]'s repossession of the vehicle before [the debtor] filed his [bankruptcy] petition lawfully overrode [the debtor]'s immediate possessory rights," the debtor nonetheless "retained other rights under state law consistent with his status as the equitable owner of the vehicle." Weber, 719 F.3d at 77-78 & n.7. Yet, the secured creditor's mere retention of possession of the vehicle, which the Weber court acknowledged was the secured

creditor's property interest, did not in any way interfere with or alter the debtor's remaining equitable ownership interests in the vehicle. Nonetheless, the court reasoned that by retaining possession of the vehicle, the secured creditor "was 'exercising control' over the object in which the estate's equitable interest lay." Weber, 719 F.3d at 79 (emphasis added). That understanding of "property" may well align with the colloquial understanding of property as a thing (i.e., the repossessed vehicle), but that is not the sense in which §362(a)(3), or the Bankruptcy Code generally, uses the term "property of the estate." See Brubaker, Turnover (Part III), supra, at 6-9; Thomas E. Plank, The Outer Boundaries of the Bankruptcy Estate, 47 Emory L.J. 1193, 1194-95, 1200-16 (1998).

# III. The Seventh Circuit's Interpretation of §362(a)(3) Improperly Disregards the Statutory Relationship Between the Automatic Stay and Turnover.

Interpreting §362(a)(3) as a self-executing injunctive turnover order, as the Seventh Circuit and other courts do, is inconsistent with the structural relationship between the Code's automatic stay and the §542(a) turnover provision.

1. As this Court noted in *Whiting Pools*, "there are explicit limitations on the reach of §542(a)," under which turnover is not required. 462 U.S. at 206. But as the Seventh Circuit and other courts read §362(a)(3), "[t]here is no 'exception' to

§362(a)(3) that excuses [a secured creditor]'s refusal to deliver possession" of repossessed collateral. Sharon, 234 B.R. at 683 (emphasis added). That interpretation of §362(a)(3), therefore, violates the surplusage canon by negating the statute's "explicit limitations on the reach of §542(a)." Whiting Pools, 462 U.S. at 206.

Most significantly, "[s]ection 542(a) provides that property be usable under §363." *Id.* at 206 n.12. Section 542(a), therefore, requires judicially-determined "adequate protection *as a condition precedent* to turnover of property since the property may not be used . . . under section 363 without it." *Young*, 193 B.R. at 626 (emphasis in original) (quoting *Purbeck*, 12 B.R. at 408).

The Seventh Circuit's interpretation of §362(a)(3), however, requires immediate turnover of repossessed collateral without the adequate protection that §\$542(a) and 363(e) mandate must "replace the protection afforded by possession." Whiting Pools, 462 U.S. at 207. As a result, the Seventh Circuit's interpretation can result in destruction of the value of the secured creditor's lien.

The most common and stark example of that risk is presented to a secured creditor in petition-date possession of uninsured collateral. See Brubaker, Turnover (Part III), supra, at 12-13. Adequate protection of a secured creditor's rights in collateral such as a car will always include a requirement that the debtor maintain casualty insurance on the car. If a secured creditor were to immediately turn over an uninsured vehicle in

response to nothing more than a chapter 13 debtor's demand (as the Seventh Circuit's interpretation of §362(a)(3) compels), that risks immediate destruction of the secured creditor's collateral (and its corresponding right to adequate protection) via uninsured casualty.

The Seventh Circuit's interpretation of §362(a)(3) poses a similar, and even more immediate risk, for a secured creditor with a possessory lien, such as a mechanic's or attorney's lien, which can be lost entirely upon surrender of possession. The Seventh Circuit below held that a possessory lienholder's surrender of possession under the compulsion of its interpretation of §362(a)(3) will not result in loss of the lien. See In re Fulton, 926 F.3d 916, 928-29 (7th Cir. 2019). Other courts, however, disagree. See, e.g., In re WEB2B Payment Solutions, Inc., 488 B.R. 387, 390-93 (B.A.P. 8th Cir. 2013). Moreover, the Seventh Circuit's interpretation of the controlling state law in the Fulton case was merely a prediction that analogized from authority that is not on all-fours with the unique context of a purely statutory injunction such as the automatic stay. See Brubaker, Turnover (Part III), supra, at 11-12. The Seventh Circuit's interpretation of §362(a)(3), carries therefore. an unavoidable, untenable derogation of the adequate protection rights of holders of possessory liens.

2. In *Citizens Bank v. Strumpf*, 516 U.S. 16 (1995), the Court was presented with a similar conflict between a proposed broad interpretation of the automatic stay and the express statutory

protections given a secured creditor by the Code's turnover provisions—in that case, the debt turnover provision of §542(b).

In *Strumpf*, when the debtor filed chapter 13, he had defaulted on a \$5,000 loan debt owed to a bank and also had a checking account with the bank. In response to the debtor's bankruptcy filing, the bank temporarily froze further withdrawals from the account while it sought permission from the bankruptcy court to exercise its setoff rights with respect to the account. Although §542(b) mandates turnover to the estate of debt payments owed to a debtor, this obligation is expressly abated "to the extent that such debt may be offset under section 553." The bankruptcy court nonetheless held the bank in contempt for violating the automatic stay, forcing the bank to remove its freeze on the debtor's account. The court later granted the bank relief from the automatic stay to exercise its setoff rights, but by that point there were no more funds in the account to set off. Id. at 17-18.

This Court held that the bankruptcy court and the Fourth Circuit erred in construing the stay in a manner that eviscerated the setoff rights expressly preserved by §542(b). *Id.* at 18-21. Likewise, "[t]he right of adequate protection cannot be rendered meaningless by an interpretation of §§362(a)(3) and 542(a) that would compel turnover even before an opportunity for the court's granting of adequate protection." *In re Bernstein*, 252 B.R. 846, 851 (Bankr. D.D.C. 2000).

Pre-1984 turnover law, codified in §§542(a) and

363(e), permitted a secured creditor to retain possession of repossessed collateral pending entry of a turnover order and provision of court-ordered adequate protection. Applying the teaching of *Strumpf*, this Court should "not give §362(a)(3) . . . an interpretation that would proscribe what" the Code's turnover provisions "were plainly intended to permit." 516 U.S. at 21.

### IV. Only Acts That Alter the Status Quo Are Stayed by §362(a)(3).

1. Congress explained that "[t]he purpose of [§362(a)(3)] is to prevent dismemberment of the estate." S. Rep. No. 95-989, at 50; H.R. Rep. No. 95-59, at 341. Section 362(a)(3), thus, furthers the general function of the automatic stay (implicit in even the "stay" designation itself) to maintain the bankruptcy-filing-date status quo, requiring court authorization for any "act" that would alter that status quo. "[T]he automatic stay provisions are intended 'to maintain the status quo between the debtor and [his] creditors' in order to allow 'the parties and  $_{
m the}$  $\operatorname{Court}$ an opportunity appropriately resolve competing economic interests in an orderly and effective way." In re Billings, 687 Fed. Appx. 163, 165 (3d Cir. 2017) (quoting *Taylor v*. Slick, 178 F.3d 698, 702 (3d Cir. 1999) (emphasis in original)).

A secured creditor who merely retains possession of repossessed collateral pending the bankruptcy court's entry of a turnover order is simply maintaining the status quo. Such retention of possession is, thus, fully consistent with the stay's status-quo function. The Seventh Circuit's interpretation of §362(a)(3), by contrast, transforms the "stay" from a shield into a sword.

2. The status-quo function of the stay confirms that a secured creditor's mere retention of its repossessed collateral is not an "act" prohibited by §362(a)(3). "The automatic stay, as its name suggests, serves as a restraint only on acts to gain possession or control over property of the estate." U.S. v. Inslaw, 932 F.2d 1467, 1474 (D.C. Cir. 1996) (emphasis added). It imposes no affirmative obligation to alter the status quo by turning over property to the estate. "Stay means stay, not go." Cowen, 849 F.3d at 949.

This reading of §362(a)(3) is consistent with the *Strumpf* holding that the bank's refusal to pay to the debtor-depositor sums on deposit in the debtor's bank account "was neither a taking of possession of [debtor]'s property nor an exercising of control over it, but merely a refusal to perform its promise" to repay deposited sums. 516 U.S. at 21. Likewise, a secured creditor's mere retention of repossessed collateral is "neither a taking of [debtor]'s property nor an exercising of control over it, but merely a refusal to" transfer its own property interest (possession) to the debtor. *Id*.

3. Courts adopting the Seventh Circuit's interpretation of §362(a)(3) lose sight of the limited status-quo function and purpose of the automatic stay, in an effort to respond to "policy

considerations," Thompson, 566 F.3d at 703. regarding the procedural burdens and delays that turnover proceedings place upon chapter 13 debtors. See Brubaker, Turnover (Part III), supra, at 9-11. Those concerns are properly addressed by the Bankruptcy Rules Advisory Committee or Congress. See Brubaker, Turnover (Part II), supra, at 8-9 (discussing potential amendments to the Bankruptcy Rules); Final Report of the ABI Commission on Consumer Bankruptcy 45-48 (2019) (recommending statutory amendments).

The policy reflected in the statute is that the §362 automatic stay will preserve the status quo pending a judicial determination of necessary adequate protection made in the context of a §542(a) turnover proceeding. See Tabb, supra, §3.1, at 236 ("The stay seeks to preserve the status quo as of the date the bankruptcy case is commenced, until such time as the bankruptcy court can act."). Punishing a secured creditor who merely maintains the status quo, as the Seventh Circuit does, with contempt sanctions and statutory damages, "including costs and attorney's fees, and, in appropriate circumstances, . . . punitive damages," 11 U.S.C. §362(k)(1), is unwarranted and inappropriate.

#### CONCLUSION

The Court should reverse the judgment of the Seventh Circuit.

Respectfully submitted,

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FEBRUARY 2020

## IN THE Supreme Court of the United States

CITY OF CHICAGO

Petitioner,

v.

ROBIN L. FULTON, GEORGE PEAKE AND TIMOTHY SHANNON.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE*PROFESSORS JOHN A. E. POTTOW
AND JAY LAWRENCE WESTBROOK

\_\_\_\_\_

IN SUPPORT OF RESPONDENTS.

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#### STATEMENT OF INTEREST

Amicus Pottow is the John Philip Dawson Collegiate Professor of Law at the University of Michigan Law School. He has spent decades studying the bankruptcy system and has briefed and argued cases before this Court before on the subject of bankruptcy law. Amicus Westbrook has also spent decades studying the bankruptcy system and has briefed cases before this Court. Amici are the primary co-authors of one of the leading textbooks on debtorcreditor law. See Elizabeth Warren. Jay Lawrence Westbrook, Katherine A. Porter, & John A. E. POTTOW, THE LAW OF DEBTORS AND CREDITORS (7th Edition, Wolters Kluwer 2014). Amici are members of College the American ofBankruptcy International Insolvency Institute and have served on the U.S. delegation to the United Nations Commission on International Trade Law as expert advisers on insolvency law. Amici file this brief as part of their ongoing service to assist courts confronting important issues of bankruptcy law—here, the proper interpretation of the automatic stay under 11 U.S.C. § 362(a)—and to ensure the Court's opinion is narrowly focused thereon.1

<sup>&</sup>lt;sup>1</sup> In accordance with Supreme Court Rule 37, counsel for Petitioner and Respondent have consented to this brief's filing. No counsel for any party authored this brief in whole or in part, and no party or their counsel made any monetary contribution toward the preparation or submission of this brief. No person other than the *amicus curiae* made a monetary contribution to its preparation or submission.

### SUMMARY OF ARGUMENT

The Court should follow the clear text of § 362(a)(3)'s bar to "any act . . . to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). In interpreting that clear text, the Court should first consider several important background practices of the bankruptcy system that provide context to the statute, including the use of trustees to administer estate property, the reality that in most bankruptcy estates the trustee or debtor is in possession of secured collateral (not the secured party), and that lower courts near-unanimously agree that enforcing liens through exercising possessory rights to force repayment violates other paragraphs of the automatic stay beyond § 362(a)(3).

As to the text of § 362(a)(3) itself, the Court should reject the untenable distinction between "active" and "passive" acts in interpreting the term "act," eschewing such a recipe for litigation and potentially ridiculous results. Nor should the Court accept various glosses on "to exercise control" offered by the City and its supporting amici: the UCC-specific usage of "control" either has no bearing on § 362(a)(3) or supports respondents' interpretation; the pre-Code historical practices are irrelevant in the face of unambiguous text; and there is no surplusage problem created for § 542(a) by following the natural reading of "to exercise control over property of the estate" in § 362(a)(3).

More specifically on the final point, § 542(a)'s turnover obligation to "account for[] such property, or

the value of such property," 11 U.S.C. § 542(a), provides plenty of non-redundant work for that section to do alongside a proper reading of § 362(a)(3) when a secured party (or anyone) remains in possession of estate property postpetition. Nor does § 542(a) impose any "preconditions" that require resolution before prompt compliance with a trustee's demand for turnover; a rule that would require a trustee in every case seeking to use the turnover power to procure a court order first would be gratuitous, cumbersome, and senselessly burden bankruptcy dockets while burning through estate resources.

Finally, the two additional arguments relied upon by the City and its supporting amici make no sense. An alternative rule to § 362(a)(3) (and § 542(a)) premised upon drawing a distinction between possessing property and possessing possession of property would make it impossible for trustees to administer their estates. Similarly, this Court's opinion in Citizens of Maryland Bank v. Strumpf, 516 U.S. 16 (1995), which pertains to a creditor's right to offset mutual monetary obligations, has no relevance to this case; it is simply a red herring.

### **ARGUMENT**

I. THE COURT SHOULD CONSIDER BACKGROUND CONTEXT OF BANKRUPTCY PRACTICE TO SITUATE ITS ANALYSIS OF THE CLEAR TEXT OF § 362(a)(3).

Before presenting their primary argument, Amici offer three introductory points to lay an operational context for the Court regarding aspects of the bankruptcy system.

First, the majority of bankruptcy cases are administered by a panel trustee under chapter 7. To be sure, debtors can remain in possession in chapters 11, 12, and 13, 11 U.S.C §§ 1107, 1203, 1303 (2020), but the modal bankruptcy case has a trustee. See Admin. Office of the U.S. Courts, Bankruptcy Abuse Prevention and Consumer Protection Act Report (2018). This means all the arguments advanced by the City and its supporting amici concerning the scope of §§ 362, 363, and 542, for example, should be considered not just in light of their effect upon reorganizing debtors, but upon the countless panel trustees appointed to administer the hundreds of thousands annual consumer and business chapter 7 cases. This specific case is about car-owning consumer debtors in reorganization, but these Code provisions more generally apply to the trustees who represent unsecured creditors. Every burden placed on panel trustees means delay and expense for the creditors within unsecured a limited-resource

bankruptcy estate where, by definition, there is not enough money to go around.

Second, many if not most debtors have secured debt. See Robert M. et al., Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors, 82 Am. Bankr. L. J. 349, 366-67 (2008) (discussing data from the Consumer Bankruptcy Project, including incidence of consumer secured debt). The vast majority of that collateral is in the possession of the debtor upon filing. Sometimes, as here, a secured creditor has removed possession of that collateral from the debtor by the filing date, but most of the time the property is still in the hands of the debtor. One reading of the briefs in this case suggests a battle of sorts between secured creditors and debtors, where the right to adequate protection payments is cast as a grand compromise to a secured creditor's sacrifice of parting with collateral when demanded turnover by a trustee. Pet'r's Br. 35 ("In substance, § 542(a) of the Code therefore contemplates a trade."). But the empirical baseline is that most adequate protection motions are brought under § 362(d), when the secured creditor does not have possession of the collateral during the case. See 11 U.S.C. § 362(d)(1) (allowing stay to be lifted "for cause, including "lack of adequate protection"). Indeed, "lift stay" motions, the bread and butter of bankruptcy court litigation, are so frequent that courts often provide detailed descriptions and instructions guiding unrepresented creditors through the process. See, e.g., United States Bankruptcy Court, Eastern District of Michigan, How to File a Motion for fromtheAutomatic ReliefStay,

https://www.mieb.uscourts.gov/how-file-motion-relief-automatic-stay (last visited March 9, 2020).

Accordingly, any suggestion that a secured creditor in possession of collateral incurs great imposition by having to adjudicate an adequate protection dispute only after possession returns to the hands of the debtor is false; upon turnover the creditor finds itself in the exact same position as most other secured creditors, who all process their lift-stay motions through § 362(d) just fine while the trustee or debtor enjoys possession. In effect, then, the City is seeking a leg up and preferential treatment that accords it litigation advantage not shared by most other secured creditors in the bankruptcy system.

Finally, repossession is one way to enforce a secured creditor's lien upon default, UCC 9-609(a) ("Secured Party's Right to Take Possession After Default"). It is also functionally a necessary antecedent to private sale and foreclosure of personal property under (near-universal) Article 9 of the Uniform Commercial Code, UCC 9-610 ("Disposition of Collateral After Default"), as few buyers will buy collateral they can't see and their seller doesn't have. But enforcement by repossession does not require private sale. For example, the creditor can lease out the collateral, collecting rents to apply toward the outstanding indebtedness. See id. at 610(a) (allowing leasing and licensing of repossessed collateral).

For consumer collateral in particular, the power of repossession in enforcing the lien is thus not to take the first step toward a private foreclosure sale of the collateral but to focus the debtor's mind on curing the default. Few lenders want to sell used cars at a loss: they want their loans to perform. They want repayment and loan reinstatement, so much so that the internet is rife with advice for borrowers of how to seek a reinstatement quote from their lender to make their backpayments and get their cars back. See, e.g., Reinstatement Payoff, JUSTIA, https://www.justia.com/foreclosure/reinstatementand-payoff/ (last visited Mar. 9, 2020). If the debtor comes up with the back payments, the lender can and often does simply allow reinstatement of the loan and return of the collateral to the debtor rather than exercise its right to sell. Thus, enforcement of the lien through retention of repossessed collateral, not foreclosure sale, is often the primary means to cajole repayment after default of secured debt. Indeed, the City in this case candidly admitted it would release the cars to the debtors as soon as they paid their debts. Pet'r's Br. 10 ("[T]he City may impound vehicles and hold them until fines and penalties are satisfied.").

This perhaps is the most significant contextual point to consider before addressing § 362(a)(3): the City's conduct—refusing to take action until the debtor's debt is repaid—is literally a textbook example of an automatic stay violation. It is "an act to collect, assess, or recover a claim," 11 U.S.C. § 362(a)(6). See, e.g., Andrews University v. Merchant, 958 F.2d 738, 741 (6th Cir. 1992) (automatic stay violation for refusal to release academic transcript until outstanding debt paid) (collecting cases), discussed in Warren et al., at 72; see also Scroggins v. Roman

Catholic Church (In re Scroggins), 209 B.R. 727, 729-30 (Bankr. D. Ariz. 1997) ("A large number of cases stand for the proposition that a college or educational institution violates the automatic stay imposed by 11 U.S.C. § 362 if the institution withholds a debtor's transcripts because the debtor is in default on a prepetition debt.").2 To be sure, the stay violation is paragraph grounded under a different  $\S 362(a)(3)$ , namely,  $\S 362(a)(6)$ , but this passive conduct violates the stay nonetheless. (Collateral retention also violates § 362(a)(4) because it is an "act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4) (emphasis added).)3

Amici bring this final point of introductory context to the Court's attention in part to implore it to avoid broad pronouncements about the scope of the bankruptcy stay and be clear, if it so decides to resolve this case under § 362(a)(3), that it is not addressing §§ 362(a)(4), (6). Note that these paragraphs are

<sup>&</sup>lt;sup>2</sup> Congress intended the stay to "give[] the debtor a breathing spell from his creditors" and to "stop[] all collection efforts, all harassment, and all foreclosure actions." S. REP. No. 989 (1978).

<sup>&</sup>lt;sup>3</sup> Note that there is wide overlap in the scope of the various paragraphs of § 362(a). Paragraph (a)(6) is probably the "heart" of the automatic stay, which bars any act to collect a claim. § 362(a)(6). A violation of § 362(a)(6) will likely, as here, violate other provisions of the stay as well, but not always. For example, a third party responding to a secured-creditor friend's request to hold or even hide collateral would likely be engaging in a § 362(a)(3) violation but not attempting to collect a debt under § 362(a)(6).

lurking in this case, however. For example, the debtors argued in the courts below that the automatic stay's violation could be grounded in myriad parts of § 362(a), and indeed the bankruptcy court found violations of § 362(a)(4) and § 362(a)(6). Pet. App. 113a–15a. In consolidated appeal, however, the Seventh Circuit explicitly held that it did not need to address the §§ 362(a)(4) and 362(a)(6) arguments in light of its finding of a violation of § 362(a)(3), Pet. App. 14a, which is perhaps not surprising given the existence of binding Seventh Circuit precedent, Thompson v. General Motors Acceptance Corp., 566 F.3d 699 (7th Cir. 2009), expressly holding retention of collateral a violation of § 362(a)(3).4 (The City

<sup>4</sup> Amici were curious at how the City would argue no violation of §§ 362(a)(4) and 362(a)(6). In its brief before the Court of Appeals, Appellant's Br. 48-49, the only authority the City offered for its startling position was two law review articles authored by the City's supporting amici, see Ralph Brubaker, Turnover, Adequate Protection, and the Automatic Stay (Part I), 33 No. 8 BANKRUPTCY LAW LETTER 1, at 7 (2013); Thomas E. Plank, The Creditor in Possession Under the Bankruptcy Code: History, Text, and Policy, 59 MD. L. REV. 253, 316 (2000), an unpublished court opinion, *In* re Garcia, 740 F. App'x 163, 164 (10th Cir. 2018), and a "superseded" Restatement of Law from 1941 (RESTATEMENT (FIRST) OF SECURITY § 72 cmt. a (1941)). (The FOREWORD to the latest Restatement of Law (Third): Suretyship and Guaranty (1996) instructs that it "should be regarded as completely superseding Division II of the Restatement of Security. Division I of that Restatement has long been largely superseded by Article 9 of the Uniform Commercial Code.")

sought to persuade, unsuccessfully, the Seventh Circuit to overrule that precedent.)

The scope of the question presented, which broadly invokes § 362 and not any specific subsection or paragraph therein, Pet. (i), formally permits this Court to affirm on the alternative ground of the stay's violation being found under §§ 362(a)(4) and/or (6) on the undisputed facts. Sup. Ct. R. 14.1(a) ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.") (emphasis added). Amici recognize, however, that it would be unusual for the Court to exercise its discretion thus in light of the focus on § 362(a)(3) in the opinion below and the briefing. Moreover, they believe the City's interpretation of § 362(a)(3) cannot be sustained, and is indeed dangerous to the operation of the bankruptcy system, and so join in advocating affirmance on the reasoning of the opinion below with its focus on  $\S 362(a)(3)$ . They flag the lurking  $\S \S 362(a)(4)$  and (6) issues in an attempt to be comprehensive and assist the Court in its deliberations.

# II. The Court Should Follow the Clear Text and Most Natural Reading of § 362(a)(3).

The City concedes that its argument entirely hinges on the interpretation of the words "an act," admitting that the *Thompson* court's interpretation of "to exercise control" to include retention of collateral and refusal to return "make[s] sense." Pet'r's Br. 18. Its supporting amicus agrees, conceding that "exercise control" in isolation "plausibly . . . encompass[es] the

City's passive retention of vehicles that it seized prebankruptcy." U.S. Br. 7.

In contending the text does not apply to exercising dominion over the debtors' repossessed cars, the City supporting amici advance the following interpretive arguments about "control": (1) "control" should be restricted to non-tangible property, as it sometimes is in the Uniform Commercial Code, Pet'r's Br. 30-31; Brubaker Br. 17; (2) the whole phrase "to exercise control" should not be read to overrule pre-Code practice, which allegedly accorded secured creditors the right to resist turnover prior to obtaining adequate protection, Pet'r's Br. 25-29; Brubaker Br. 17; and (3) the whole phrase must be read to permit passive retention of property to avoid plunging § 542(a) into the abyss of surplusage, Pet'r's Br. 29; Brubaker Br. 19; U.S. Br. 30. A fourth, overarching argument is added to this mix that focuses on the antecedent term "any act" (which is what § 362(a)(3) stays) to contend that the City's conduct did not violate the stay because it is passive, not active, and hence not an "act." Pet'r's Br. 20; U.S. Br. 21. None of these arguments accords with best principles of textual interpretation or the normal functioning of commercial law practices.

A. An Attempt To Distinguish "Active" from "Passive" Conduct in Stay Violations Would Inject Disastrous Litigiousness and Delay into the Bankruptcy System and Yield Ridiculous Results.

To begin, the City makes too much of the Bankruptcy Code's phrasing "stay of . . . any act," 11 U.S.C. § 362(a)(3), suggesting passive conduct is not an "act" and hence cannot trigger the bar. The United States goes further, albeit without any citation to authority, by suggesting that no other paragraph of § 362(a) bars passive conduct. U.S. Br. 17 ("It would thus be particularly anomalous to read the 'exercise control' prong of Section 362(a)(3) as the sole component of the automatic stay that requires a creditor to take an affirmative act by forcing the creditor to turn over property that it possessed prebankruptcy."). The United States is simply wrong, as any bankruptcy textbook makes clear. See, e.g., Andrews, 958 F.2d, at 741 (refusal to give debtor transcript violates § 362(a)(6)).

So, too, is the City wrong. The crux of its argument is that "stay" intends to invoke negative obligations only, suggesting positive obligations require the specific terminology of injunctions. Pet'r's Br. 18-20. This view is mistaken. First, the more benign reason Congress uses "stay" in § 362(a) but "injunction" in § 524(a)(2) is for the simple reason that the stay is designed to be temporary, in operation only during the bankruptcy case's duration, whereas the post-discharge injunction of § 524 is to be permanent. Given

this distinction between temporary (stay) and permanent (injunction) relief, it is difficult to imagine what preferred terminology the City would have had Congress use in § 362(a)—other than that which it chose, the broadest possible application to a "stay" of "any act."

But the City is more importantly wrong in suggesting the automatic stay of bankruptcy simply means "freeze." *Id.* 16-17. Leaving aside the question-begging nature of the proper characterization of the status quo to be frozen, the City's approach would render the cessation of collection practices policed by the automatic stay meaningless. Consider the ridiculous results that would arise under this approach. For example, a hired thug applying thumbscrews to encourage a non-paying debtor to cough up would be allowed upon the bankruptcy petition's filing to stand up, walk away, and leave the hapless debtor's thumbs pinned.

Of course, if forced to pigeonhole the thumbscrewing freeze into an "act," we perhaps might say that the *walking away*, or the *leaving on of the screws*, or even the *closing of the ears* to the debtor's postpetition howls of pain all might constitute the triggering "act," the automatic stay seeks to target, but why would Congress want to require such a litigation effort? Is the proper "status quo" really a debtor with thumbs half-screwed, or is it better conceived as a debtor who has free use of his thumbs before the collection conduct began?

Similarly, if a car is impounded, but after filing bankruptcy the debtor uses a spare set of keys to try drive the car back home, is it a sufficiently affirmative act to close the gate before the debtor can get off the compound? To change the locks on the car before the debtor shows up? To put a boot on the car? To refuse to answer the debtor's phone calls? To use caller ID to screen those phone calls? This can go on ad infinitum. and the one thing bankruptcy trustees do not have on their side is time. This is why the simpler—and less litigious—solution is recognizing what bankruptcy courts in the trenches already know: what the City downplays as merely passive, non-act conduct, such as retaining possession of an impounded debtor's car until she pays (or leaving it affixed to the tow truck), or withholding a debtor's academic transcript, or refusing to remit taxes, violates the stay, regardless how a metaphysical debate on whether that action is better characterized as active or passive resolves. See, e.g., In re Del Mission Ltd., 98 F.3d 1147 (9th Cir. 1996) (tax authority's retention of refund and refusal to remit funds to debtor violates the stay).

# B. The UCC-Specific Usage of "Control" to Pertain to Primarily Intangible Property Is Inapposite to the Amendment that Added "Exercise Control" to § 362(a)(3).

Law professor amici make much of the use of "control" in the Uniform Commercial Code and its focus therein on certain types of intangibles. *See* Brubaker Br. 18; *see also* UCC 9-314(a) (prescribing "control" as a means of perfecting certain intangibles).

The initial difficulty with suggesting Congress's 1984 amendments intended to use this UCC-specific meaning of "control" is that the UCC's Article 9 was not revised to use these terms until reforms initiated during the 1990s. See American Law Institute, Comment 1 to Revised Article 9 § 9-314 (1998). More importantly, on its own terms, the UCC talks only about control simpliciter. See, e.g., UCC 9-314(a) ("Perfection by Control. A security interest in investment property, deposit accounts, letter-of-credit rights, electronic chattel paper, or electronic documents may be perfected by control of the collateral . . . ."). The UCC does not say the "exercise of control," just "control."

This diction is textually significant because it means one could sensibly talk about "obtaining" control, to use the pre-1984 language of the Bankruptcy Code, were one interested exclusively in the initial acquisition phase of that control. If so, then Congress's choice to add the term "to exercise" before "control" in 1984 to § 362(a)(3) must mean Congress wanted to reach activity beyond the mere obtaining of control, as the phrase "obtain possession of" was already in the statute (i.e., Congress could have just added "or control" after "obtain possession"). The conspicuous addition of the longer term "or to exercise control over," creates the logical textual inference that "exercise" of control (in contrast to mere "obtaining" control) intends application to ongoing dominion, not just the one-off act of acquiring that dominion ab initio.

Accordingly, giving content to the verb "to exercise" before "control" requires these amici either to contend "to exercise control over" does not cover ongoing retention of control (a position for which they offer no support from the UCC), or to submit that Congress intended a different, broader level of stay protection for intangible than tangible estate property—with the former protected from stay violations due to initial acquisition and ongoing retention of control but the latter protected only from the one-off step of acquisition of possession but not ongoing retention conduct. Suffice it to say, no theory has been offered by amici to support such a bizarre hypothetical congressional intent.

Thus, the Court should read "to exercise control over" in its ordinary sense of dominion. Control, Merriam-Webster's Collegiate Dictionary (11th Edition 2003) (defining as "to exercise restraining or directing influence over" or "to have power over"). The UCC provides no basis to restrict it to intangible property. Indeed, consider the widespread example of ignition interruption switches ("kill switches"), which by work of a few computer keystrokes send out a remote control signal that disables a delinquent debtor's car from starting. Leaving the kill switch on so the debtor cannot drive is surely exercising control, in a dramatic way, of the debtor's car, just as surely as it is in no way possession of that eminently tangible collateral. Were amici's UCC-specific definition of "control" accepted to restrict that word's reach to intangible property only in § 362(a)(3), presumably no kill switch conduct would violate the automatic stayeven if a creditor responded petulantly to a bankruptcy petition's filing by immediately pressing the button in an open act of defiance to the trustee.

As for the "scarce" legislative history of the 1984 amendments, In re Denby-Peterson, 941 F.3d 115, 126-127 (3d. Cir. 2019), it provides no support for a UCCspecific reading of "control." The city's supporting of amici make great hav out Congress' characterization of those amendments as "technical" (perhaps implying that the label "technical" can negate clear text that litigants find unwelcome). U.S. Br. 10–11, and further emphasize the legislative history declaration that "[e]very effort has been made to . . . maintain existing policy intact." H.R. REP. No. 96-1195, at 2. See also 126 CONG. REC. 31,152 (1980) (floor statement of Sen. DeConcini in conjunction with Senate's concurrence in House amendments to S.658) ("The bill before us today is basically one of technical and conforming type amendments that are totally unobjectionable and reflect the congressional intent that may not always have been clear regarding the Code.").

These comments shed no light. Even leaving aside that they were to a prior bill and not the actual package of amendments enacted, the problem is they can be consistent with two hypothetical narratives that motivated Congress to act in 1984, as follows.

<u>Narrative A</u>: "The Code only talks about obtaining *possession* of property of the estate, and since only tangible property is possessable, perhaps we should clarify it covers intangible property as well, by adding

the word *control*, otherwise electronic chattel paper will be unprotected from coverage under § 362(a)(3)."

<u>Narrative B</u>: "The Code only uses the term 'obtain possession of,' which could lead someone to make a technical argument that it bars only the one-off *acquisition* of the property and not its *ongoing retention*, so let's add 'or exercise control' to clarify any ongoing conduct, no matter how passive, is captured."

Both these hypothetical motivations could have led to the addition of the phrase "or to exercise control over" to § 362(a)(3). True, the exercise of control may subsume obtaining possession, leaving the initial phrase with perhaps less work to do, Pet'r's Br. 30, U.S. Br. 16, but it would probably not be the first time that Congress added a statutory patch while allowing pre-existing textual barnacles that could have been scrubbed at the same time to remain. Moreover, the epithet surplusage seems exaggerated: the reach of "any act to obtain possession" might cover pre-control possession transition acts—e.g., hiring a repo company to tow the car—that might not fall under the scope of the exercise of control over the property. Thus, "intra-tow," a debtor's car might be in the control of neither the debtor nor the creditor but nonetheless be in the midst of an act to obtain possession. (This issue's resolution probably turns on principles of agency law unnecessary to resolve here.)

Indeed, if anything, Narrative B intuitively seems more consistent with a "technical" correction undesigned to change much—certainly more so than a concern that the entire swath of the intangible

economy had been left outside the scope of the automatic stay's protection under § 362(a)(3).<sup>5</sup> In sum, there is no reason to believe the 1984 amendments had anything to do with intangible-focused definition of "control" that would work its way into Article 9 over a decade later.

## C. Pre-Code Practice Presents No Obstacle to Applying the Code's Clear Text.

As for the pre-Code practice, it is largely irrelevant given the 1978 overhaul's sweeping expansion of bankruptcy court jurisdiction. Cent. Va. Cmty. Coll. v. *Katz*, 546 U.S. 356, 363 (2006) ("Critical features of every bankruptcy proceeding are the exercise of exclusive jurisdiction"); see also 28 U.S.C. § 1334(e)(1) (2020) (vesting exclusive jurisdiction over all property of the debtor "wherever located"). No longer were secured creditors quasi-outsiders to the estate, with byzantine practices of summary and plenary jurisdiction: everything was to be governed by one bankruptcy court. once, together. automatically. Bankruptcy Reform Act of 1978, Pub.L. No. 98-353 (1978). However interesting the historical practice was, it has little bearing on the interpretation of the clear text that Congress chose to enact in 1978 for § 362(a)(3) and to amend in 1984 (at least in the

<sup>&</sup>lt;sup>5</sup> "Exercise control" also mops up additional scenarios, consistent with *either* narrative, such as the kill switch, just as it covers a lender who insists truthfully that she's not in possession of the collateral—but whose good friend is and is deeply solicitous to his lender-buddy's interests.

absence of a statutory ambiguity, which is noticeably absent here).

# D. The Natural Reading of § 362(a)(3) Creates No Surplusage Problem with § 542(a).

Finally, the City and its supporting amici give short shrift to the non-redundant operation of § 542(a) created by the natural reading of § 362(a)(3). For example, § 542(a) turnover operates as a mandatory obligation not just on secured creditors but on any entity—e.g., a third-party bailee who happens to be holding estate property but is not otherwise a party to the bankruptcy (such as a shipper, consignee, or even parking valet). So while it is true that stay-violating conduct under § 362(a)(3) may also violate turnover obligations under § 542(a) (and vice-versa), that in no way renders § 542(a) meaningless. The simplest way to observe § 542(a)'s non-redundancy vis. § 362(a)(3) is the affirmative duty to account it places on its subjects. 11 U.S.C. § 542(a) ("An entity . . . shall deliver to the trustee, and account for, such property or the value of such property . . . . ") (emphasis added). Holders of estate property, be they creditors or not, must account to the trustee for property loss or devaluation.

Indeed, a glib example taken from the United States' brief, ironically intended to demonstrate a weakness of the debtors' arguments, actually helps to show a distinction between §§ 362 and 542:

A creditor could cease to "exercise" that form of "control" simply by abandoning property that it had seized pre-bankruptcy, rather than surrendering it to the debtor or trustee. The City might, for example, simply relinquish "control" over respondents' cars by leaving them unlocked and unguarded in the lot, or by giving them to the first passerby that expressed interest.

#### U.S. Br. at 12.

The United States is almost correct. Were a party who found itself in possession of bankruptcy estate property to abandon it on the street in a fit of panic, there would be probably no violation of § 362(a)(3) (no exercise of control). But there almost certainly would be a violation of § 542(a)(1) for accountable loss of value to the estate by theft or vandalism. Hence, § 542(a)'s directive to account provides it with plenty of non-redundant work to do beyond § 362(a)(3).

The City more broadly appears to misunderstand the functioning of a "utility provision" like § 542, which applies not just to secured creditors in possession of estate property (a small slice of potential targets), but to anyone: creditors (secured and unsecured), third parties (bailees, employers, lost-and-found operators), and even debtors (when a trustee is operating the estate)—anyone who happens to find property of the estate in their hands. They are supposed to turn that property over expeditiously to

<sup>&</sup>lt;sup>6</sup> Note § 542(c) relieves a good-faith transferor of the estate's property of this duty to account. 11 U.S.C. § 542(c)

the trustee (or debtor in possession in chapters 11, 12, and 13) upon demand, backed up by the court's § 105(a) power to compel compliance.

To that end, the City overreads a footnote in this Court's opinion in *United States v. Whiting Pool. Inc.*, 462 U.S. 198 (1983), by suggesting that certain "preconditions" to turnover must be adjudicated as necessary antecedents to swift compliance with a trustee's demand. Pet'r's Br. 7 (discussing Whiting *Pool*, 462 U.S. at 206 n.12 (1983)). It is true that the turnover and accounting obligations of § 542(a) only apply to property that, for example, the trustee can "use, sell, or lease under § 363," 11 U.S.C. § 542(a), but it is not instructive to consider that restriction a meaningful impediment, let alone a condition, to turnover for the simple reason that all property can be used, sold, or leased under § 363.7 11 U.S.C. § 363(b), (c). The rules in § 363 pertain mostly to whether the property is to be used in the ordinary course of business, not in the ordinary course of business, or involves cash collateral; their inclusion of use in the ordinary course of business and use not in the ordinary course of business exhausts the universe of possible uses. *Id*.

The City's attempt to squeeze the requirements of § 363(e) into § 542(a)—as a precondition to compliance no less—is even more off the mark. It's not just that

<sup>&</sup>lt;sup>7</sup> The reference to property that can be used under § 363 in § 542(a) is not redundant, however, because it serves to anchor the extension of turnover's reach to § 522-exempt property. 11 U.S.C. § 542(a).

there is no "363 debate" in a turnover demand, as all property of the estate is eligible for use under § 363. Instead, there is a more fundamental problem to casting § 363(e) as a precondition to § 542(a) turnover: the trustee *may*, but is *not obligated*, to use, sell or lease property under § 363. That is, a trustee can store the property in a lockbox until ready to do something with it. Accordingly, there would be no basis for an adequate protection motion under § 363(e) unless and until the trustee (or debtor in possession) proposes to use, sell, or lease the property under § 363, i.e., engage in conduct with respect to the property that might jeopardize the secured creditor's lien—and that decision might be months away from a turnover demand.

Thus, the suggestion that compliance with § 363(e) is incorporated by reference into § 542(a) as a necessary precondition to turnover makes no sense when a § 363(e) fight might be unripe or inapposite at the time of a § 542(a) turnover request. For example, if the trustee just intends to hold onto the collateral (say, seasonal business inventory during the offseason in logical belief the market is best during season), the secured creditor has no remedy under § 363(e); that Code section has no application. The proper remedy for concerns of delay would be found under the lift-stay provisions of § 362(d), which neither the City nor its supporting amici have argued can be shoehorned into § 542(a). If the City tries to counter that the trustee's merely passive "holding on" to the property constitutes "use" under § 363 that would trigger a § 363(e) right to adequate protection, it will probably have to revisit

its opposition to characterizing mere retention of estate property by a secured creditor as an "act" to exercise control under § 362(a)(3).

As for the final alleged § 542(a) condition—that the property not be of "inconsequential value or benefit," 11 U.S.C. § 542(a), U.S. Br. at 23, it is also another functionally irrelevant constraint. The bankruptcy system is premised upon trustees abandoning such property so as not to burden them and their resourcelimited estates. See 11 U.S.C. § 554(a) (allowing abandonment by trustee of burdensome property of "inconsequential value and benefit"). Trustees who have such property in their estates never issue turnover demands under § 542;they bring abandonment motions under § 554. The reference in § 542(a) to such property does nothing more than relieve holders from accounting obligations, not work as some important adjudicative precondition to compliance with a turnover demand.

Thus, despite the City's and its supporting amici's protestations, § 542(a) is not relegated to surplusage by following the clear text of § 362(a)(3). Nor does it contain preconditions that must be satisfied sufficient to justify the creation of a judicially-crafted requirement of finding adequate protection prior to compliance with a trustee's demand. Indeed, the Court could use this case as an opportunity to clarify that the obligations of § 542(a) are "self-executing." (Congress' intent here is clear when contrasting the procedure under 11 U.S.C. § 542(e), which requires a court hearing as precondition to relief.) Interpreting compliance with a mandatory statutory obligation to

await the trustee's procurement of a court order adds no benefit and imposes affirmative costs of trustee time and delay in recovery for unsecured creditors.

While sometimes trustees need resort to orders under § 105(a) when creditors or third parties are recalcitrant in their turnover duties (and those orders fall within the core jurisdiction of the bankruptcy courts, see 28 U.S.C. § 157(b)(2)(E)), the provision of remedial rules for miscreants should not serve as justification to water down a mandatory obligation into an "only if you make me" duty. Imposing a duty on the trustee to get a court order in every turnover case would crowd dockets and crush an already overburdened system for no ready benefit. In fact, properly prosecuted, turnover orders against creditors and third parties are adversary proceedings, which require issuance of a complaint and full judicial process. Fed. R. Bankr. P. 7001 ("[A] proceeding to recover . . . property" from a non-debtor is an adversary proceeding); id. 7004 (requiring summons and complaint to initiate adversary proceeding); id. 7012 (providing a minimum of thirty days to provide an answer). Why would Congress want to add this elaborate procedure onto all cases where estate property must be chased? Certainly Whiting Pools commands no such system-delaying result.

Accordingly, try as they may, the City and its supporting amici simply cannot overcome the clear textual meaning of "to exercise control over property of the estate" as including ongoing possession and dominion over a car to the exclusion of the bankruptcy trustee.

III. THE COURT SHOULD REJECT THE ALTERNATIVE APPROACH PREMISED ON DISTINGUISHING "POSSESSION OF PROPERTY" FROM "Possession OF **Possession** PROPERTY."

alternative argument that no turnover obligation even arises here because the City is not, and never has been, in possession of property of the estate, Pet'r's Br. 25, is unsound and should be rejected. The argument is premised upon a conception that the City is not in possession of debtors' cars (which are property of their estates), but only in possession of possession of debtors' cars (which possession, as a discrete property right, is not property of their estates, given that possession lies lawfully with the City postimpoundment). With respect, there is no indication anywhere in the history of the Bankruptcy Code or bankruptcy practice that Congress intended to conceive of "possession of possession" of collateral as discrete from possession of the collateral. Bologna can only be sliced so thin before it becomes pulp. Among other problems with this wildly unprecedented approach is that the bankruptcy system would grind to a halt. This is because the logical conclusion of this reasoning is that a secured creditor who has repossessed collateral could secret it away from the trustee, even hide it, because the trustee has no right to possession.

The secured creditor's response to a thus-stymied trustee—"That's OK, the estate still *owns* the underlying asset, you just can't *possess* it for purposes

of marketing it and selling it to pay the estate's claims!"—would likely be cold comfort, just as administering the estate would become impossible. To be sure, it might work if the lien on the collateral were so great that there would be no value left over for the estate, but in that case, the trustee would abandon the property and not want it. By contrast, in cases where there is equity in the collateral for the estate to realize, there is no way the trustee could responsibly do her job to liquidate that value for the benefit of creditors without being able to possess the res. The Court should read possession of property of the estate to mean exactly what it says and Congress intended: possession of the thing itself, not possession of possession of the thing.

#### IV. STRUMPF IS A RED HERRING.

Finally, the City's suggestion that this Court's opinion in Citizens Bank of Maryland v. Strumpf, 516 16 (1995),creates tension with straightforward reading of "to exercise control over property of the estate" in § 362(a)(3) is also misplaced. First, as this Court made clear in *Strumpf*, setoff has its own rules in  $\S\S$  362(a)(7) and 553 premised upon conceiving a deposit account as a contractual obligation to pay money upon demand, not a sequestered dollar-sign-adorned bag of cash. Id. at 18-19. Thus, one does not "repossess" such cash upon default (let alone sell it at a foreclosure sale), one offsets it. Unlike repossessing a car, here the cash is in the bank account all along (under the "control" of the bank, to be sure, but § 362(a)(7)'s more specific rules may supersede § 362(a)(3)'s more general ones).

Moreover, the "freeze" this Court sanctioned in Strumpf as not a setoff was necessary to allow the bank to preserve its setoff right. Once bank funds are withdrawn or commingled, the substantive right of setoff is destroyed. See, e.g., In re Lifestyle Furnishings, LLC, 418 B.R. 382 (Bankr. D. Idaho 2009) (finding creditor's inadvertent release of funds to trustee constituted waiver of setoff right). Not so with returning possession to the debtor of her car. The lien stays on. While the parties disagree as to the caselaw, see Brubaker Br. 31; Resp't Br. 50–52, the debtors are correct as to the majority rule. Moreover, in the unlikely event a lien on tangible property were destroyed by compliance with § 542(a), the bankruptcy court could issue a retroactive order under § 105(a) protecting the lien's status or even surcharge the collateral with an equitable lien in favor of the thusaggrieved creditor. Accordingly, nothing in Strumpf impedes affirmance of the opinion below. Its holding on what constitutes a setoff, and its reasoning on the need to preserve the substantive right when a creditor also owes the debtor offsetting debts, has nothing to do with whether holding onto a tangible car constitutes exercising control over property of a bankruptcy estate.8

<sup>&</sup>lt;sup>8</sup> Strumpf has a confusing passage of dictum in its final paragraph that purports to opine on the scope of §§ 362(a)(3) and (6). Strumpf, 516 U.S. at 21. The paragraph quotes both

#### CONCLUSION

The Court should affirm the decision below due to the violation of § 362(a)(3). In the alternative, it could affirm within the scope of the question presented that the undisputed facts, namely, the City's concession it would return the cars upon payment of the debts, demonstrate as a matter of law violations of §§ 362(a)(4) and/or (6).

Dated: MARCH 2020

paragraphs, but then only analyzes § 362(a)(3)—§ 362(a)(6) appears to become forgotten—in rejecting the contention that the refusal to pay a contractual debt owing the estate is an exercise of dominion or control over property of the estate (which would invoke § (a)(3)). *Id.* It is dictum because earlier the Court expressly holds that it is not deciding the scope of the automatic stay but only whether the freeze was a setoff. *Id.* at 19 ("All that concerns us is whether the refusal was a setoff."). In any event, the passage presents no impediment to affirmance in this case and is consistent with respondents' position. (The dictum may actually be incorrect if the debt owing is characterized as a property interest in the nature of an account receivable—intangible property qua chose held by the debtor—but that question need not be resolved by the Court presently.)

# Respectfully submitted,

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