No. 18-941

IN THE
Supreme Court of the United States

CARL B. DAVIS, CHAPTER 13 TRUSTEE,
Petitioner,

v.

TYSON PREPARED FOODS, INC.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY

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PRELIMINARY STATEMENT

Respondent concedes that the Tenth Circuit's decision in *WD Equipment, LLC v. Cowen (In re Cowen)*, 849 F.3d 943 (10th Cir. 2017)—which the court below simply followed as controlling precedent—"conflicts with decisions of the Second, Seventh, Eighth, Ninth, and Eleventh Circuits." Op. 8. Respondent denies that the decision below itself also conflicts, but the reason the court followed its own prior decision in *Cowen* is because it concluded that the legal issue in both cases is the same: whether the term "act" used throughout 11 U.S.C. § 362 applies only to "affirmative conduct," which does not include such things as passively retaining seized property or passively acquiring a lien. Pet. App. 3a-4a. Because the decision below simply follows *Cowen* in addressing the same legal question, it likewise conflicts with the authoritative decisions of other courts of appeals that have construed the automatic stay to apply to more than "affirmative conduct," and Respondent's effort to avoid review by artificially narrowing the question presented rings hollow.

First, Respondent's effort to recharacterize the question presented narrowly in a manner that implicates only one part of section 362 is misaligned with what the court below actually decided. Contrary to Respondent's characterization, the Tenth Circuit viewed the dispositive issue as how to interpret the term "act" as it appears *throughout* section 362. *Id.* Viewing Congress' use of the term "act" to be the "operative language for establishing the boundaries of the automatic stay," *id.* 3a n.1, the court reasoned that the term "must be construed in the same way"

wherever it appears "within the same statute," *id.* 3a. Because *Cowen* already construed the term "act" to apply only to "affirmative conduct," the decision below simply represents a further illustration of the Tenth Circuit's prior construction of what the "operative" term "act" entails. Because that interpretation conflicts with how five other courts of appeals have interpreted the same statute, certiorari is warranted.

Second, Respondent's effort to narrow the question presented is exactly the *opposite* of its litigation position below. In the proceedings below, Respondent urged the court to follow *Cowen*, *see* Pet. App. 2a., notwithstanding that *Cowen* involved section 362(a)(3) in particular, and this case involves section 362(a)(4). In its brief filed in the Tenth Circuit, Respondent elaborated that the dispositive statutory language "is the word 'act'," Resp. Br. 22, which appears in both provisions. Reasoning that "the same terms used in different parts of the same act are presumed to have the same meaning," *id.*, Respondent contended that "the term 'act' as used in § 362(a)(4) has the same meaning as that term is used in § 362(a)(3)," *id.* 23-24. Respondent concluded that, because its conduct was not affirmative (as *Cowen* requires), "there has been no violation of § 362(a)(4) and, under that same rationale, there would not be any violation either of § 362(a)(3), (a)(5) and (a)(6)." *Id.* 25. Having argued successfully below that the dispositive issue is *Cowen*'s construction of the term "act" as is appears throughout section 362, Respondent's strategic flip-flop for the sake of avoiding further review in this Court is transparently *ad hoc*.

Third, Respondent's other arguments hold no water. The fact that this Court recently denied review in another case involving the same question only demonstrates the persistence of the issue. *See* Op. 9. Absent this Court's intervention, the issue will only continue to be litigated over and over, consuming scarce judicial resources while the conflicting precedents multiply. And contrary to Respondent's intimation, there has been no "hint" of *en banc* review in the court below. *See id*. Rather, the decision below simply entrenches further the existing conflict, which only threatens to worsen.

Respondent chides Petitioner for "fail[ing] to acknowledge that this case involves Section 362(a)(4), not Section 362(a)(3)." Op. 9; *see also* Op. i, 1, 6, 7, 12 (repeating that argument). But Petitioner expressly made this very acknowledgement. *See* Pet. 3-4 (stating that "*Cowen* involved section 362(a)(3)" whereas this case "involves section 362(a)(4)"). Likewise, the court below did as well, only to explain why it made no difference because the relevant operative language in both subsections is the same and must be construed in the same way. *See* Pet. App. 3a-4a.

Notwithstanding Respondent's repeated attempts to obfuscate and mischaracterize, the decision below presents a clear-cut question of law that the Tenth Circuit has decided in conflict with the decisions of other courts of appeals: in particular, does the term "act" appearing in section 362(a) limit the scope of the automatic stay to "affirmative conduct" such that it excludes from the reach of section 362 what other courts of appeals have concluded fall within its

prohibitions? Contrary to Respondent's intimations, there is no mystery regarding what the Tenth Circuit means by "affirmative conduct"; nor is there any need to resolve multiple questions in the first instance. *See* Op. 12-13. According to the Tenth Circuit's several pronouncements on the matter, "affirmative conduct" does not include such things as passively retaining possession of a car seized before the debtor's bankruptcy filing or passively obtaining a lien. According to the decisions of other courts of appeals, however, section 362 is not so limited. The Petition simply asks the Court to determine who is right on this pervasive and frequently-arising question of statutory interpretation.

Respondent brushes aside how the decision below conflicts with this Court's precedents, in particular *United States v. Whiting Pools*, 462 U.S. 198 (1983). But once again, Respondent's analysis falls short. In *Whiting Pools*, the Court affirmed a bankruptcy court's determination that the automatic stay applies to a creditor in possession of the debtor's assets. *Id*. at 211-12. Relying on the turnover provisions of 11 U.S.C. § 542(a), which operates in tandem with the automatic stay, *see See Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 76 (2d Cir. 2013), the Court emphasized that passive conduct may run afoul of the broad protections Congress affords debtors in bankruptcy. *Whiting Pools*, 462 U.S. at 204, 207. The relevant point that Respondent ignores is that the kind of conduct this Court concluded lies within the reach of these protections is precisely the kind of conduct the court below determined falls outside the scope of section 362.

Respondent only superficially denies that the question presented is an important one. *See* Op. 9. In reality, the automatic stay is implicated in every bankruptcy filing and is "fundamental to the reorganization process, and its scope is intended to be broad." *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773, 774-75 (8th Cir. 1989) (quoting *SBA v. Rinehart*, 887 F.2d 165 (8th Cir. 1989)). Because the automatic stay is foundational to the operation of the bankruptcy system, uncertainty over its scope and application is fundamentally unsettling to the system's sound administration and costly to those who interact with it.

Finally, Respondent does not mount any real defense of the decision below. Nor does it attempt to defend *Cowen*. This failure is telling. Respondent cannot defend the decision below without acknowledging that *Cowen* controls the question presented, which in turn illustrates how the decision below deepens an entrenched conflict among the courts of appeals. Certiorari is warranted.

ARGUMENT

I. THE COURTS OF APPEALS ARE DIVIDED ON THE QUESTION PRESENTED.

Respondent concedes the existence of an acknowledged circuit split. Op. 8. But seeking to avoid the implications of that concession, Respondent then mischaracterizes the nature of the split, referring to it narrowly as a fact-specific question involving the "refusal to return property." Op. 7. That characterization, however, is fundamentally at odds

with how the court below viewed the matter. In both *Cowen* and this case, the Tenth Circuit framed the issue as an identical question of statutory interpretation: whether the term "act" appearing throughout section 362 limits the scope of the provision to "affirmative conduct" such that activities that other courts of appeals have concluded violate the stay are not actually within the statute's scope at all.

On the one hand, a majority of courts of appeals have held that the automatic stay is broad and encompasses both affirmative and passive conduct. *See Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 79 (2d Cir. 2013) (holding that the statute proscribes passively retaining an interest in the debtor's property); *Thompson v. Gen'l Motors Acceptance Corp., LLC*, 566 F.3d 699, 702 (7th Cir. 2009) (applying a plain meaning analysis to section 362(a)(3) to conclude that it applies to passive conduct such as merely "[h]olding onto an asset"); *State of California Emp. Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151 (11th Cir. 2004) (an "act" read to include "knowing retention of estate property" without more); *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773, 774-75 (8th Cir. 1989) (concluding that passive retention of the debtor's property violates the stay); *see also In re Rozier*, 376 F.3d 1323 (11th Cir. 2004).

On the other hand, a minority have given the term "act" a narrow reading that restricts it to "affirmative" behavior. *See In re Cowen*, 849 F.3d at 950 ("[W]e adopt the minority rule: only affirmative acts to gain possession of, or to exercise control over, property of the estate violate [the stay]" and thus the passive act

retaining property previously seized is not implicated); *United States v. Inslaw, Inc.*, 932 F.2d 1467, 1472 (D.C. Cir. 1991) (continued retention of debtor's intellectual property rights did not amount to a violation of the stay). The decision below plainly applies the same narrow reading of the term "act," and thus deepens the conflict.

The circuit split is further revealed not only by the particular holdings of the courts of appeals, but also by their reasoning. For example, the majority finds significance in Congress' 1984 amendments to the Bankruptcy Code, *see* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 441(a)(2), 98 Stat. 333, 371, which added a clause to section 362(a)(3) proscribing "any act . . . to exercise control over property of the estate." *See, e.g.*, *In re Weber*, 719 F.3d at 80. In contrast, courts in the minority find these amendments to be essentially irrelevant. *In re Cowen*, 849 F.3d at 949 (finding the language of the 1984 amendments not probative). Consistent with the minority view, Respondent argues that the 1984 amendments are not material on the theory that "there is no allegation that the creditor exercised control over any property of the estate." Op. 10-11. Respondent's argument, however, is doubly erroneous. First, it is counterfactual—acquiring a lien on property of the estate *is* a form of control because it encompasses the taking of an ownership interest in the property at odds with the estate's interest and gives the creditor priority over other claimants. Second, Respondent's contention once again misses the point.

The 1984 amendments are material because, as a matter of statutory interpretation, they underscore the intended breadth of the automatic stay provision, undercutting the view that the term "act" should be construed narrowly in the manner adopted by the court below. Indeed, that is precisely how the courts in the majority have construed the amendments. Likewise, the question presented—arising from what the court below actually decided—is also a question of statutory interpretation. In particular, it is a pure question of law involving whether the term "act" is limiting in the way the Tenth Circuit reasoned. Respondent's effort to narrow the question presented not only mischaracterizes what the Court below actually decided, it likewise misses the point of the actual conflict among the courts of appeals—namely, that a majority have interpreted section 362 in a manner that fundamentally conflicts with how the court below construed the statute. Respondent's effort to narrow the question presented for the sake of avoiding the conflict is inappropriately artificial.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS.

The decision below also conflicts with this Court's reasoning in *Whiting Pools*. As noted, the Court in *Whiting Pools* affirmed a bankruptcy court's determination that the automatic stay applied to a creditor (the IRS) in possession of the debtor's assets. 462 U.S. at 211-12. Relying primarily on the Bankruptcy Code's turnover provisions, 11 U.S.C. § 542(a), the Court emphasized that purely passive conduct—in that case the creditor's retention of the debtor's assets seized prior to bankruptcy—may well

run afoul of the broad bankruptcy protections afforded to bankrupt debtors. *Whiting Pools*, 462 U.S. at 204, 207. As elaborated more fully in the Petition, the kind of conduct this Court concluded lies within the reach of these protections is precisely the kind of conduct the court below determined falls beyond the scope of section 362 because it is not "affirmative conduct." *See* Pet. 21-24.

Respondent makes scant effort to address the reasoning of *Whiting Pools*, relying instead on the spare observation that the Court did not overtly undertake to construe any particular part of section 362. Op. 13-14. But the inconsistency summarized above persists. Notably, a number of courts of appeals have read *Whiting Pools* the same way as Petitioner. *See, e.g., In re Weber*, 719 F.3d at 79. Certiorari is warranted.

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

Respondent does not deny that the question presented raises a profoundly important issue. As noted, the automatic stay is foundational to the sound administration of the bankruptcy system, and whether the stay is interpreted broadly in the manner other courts of appeals have held, or narrowly in the manner adopted by the court below, affects a multitude of bankruptcy proceedings. Moreover, the question presented is the subject of frequent litigation. Absent this Court's intervention, the current conflict among the lower courts will only spread and worsen—at great cost to debtors and creditors alike. Because the matter involves a pure question of statutory interpretation, and because the

relevant issues and arguments are all well-known and elaborated in the case law, the question is ripe for resolution.

While Respondent cannot deny the fundamental importance of the automatic stay provision, it tries to minimize the policy concerns underpinning the majority view. *See* Op. 16-17. In doing so, Respondent once again seeks to artificially limit the scope of the decision below (and the question presented) as involving merely "Section 362(a)(4)'s application to statutory subrogation liens." Op. 17. The court below, however, did not follow *Cowen* on the ground that *Cowen* involved a subrogation lien. Rather, the court followed *Cowen* because both cases involve the same question of statutory interpretation: does the "operative" term "act" used throughout section 362 encompass only "affirmative conduct" such that the passive acquisition of a lien falls outside the scope of the provision just like the passive retention of property. Moreover, the relevant policy concerns at play transcend any particular subsection of the stay provision, and they all aim at the same goal: protecting the debtor, the debtor's bankruptcy estate, and the interests of other creditors. *See* Pet. 8. Because the question presented is vitally important, certiorari is warranted.

IV. THE DECISION BELOW WAS WRONGLY DECIDED.

As explained in the Petition, the decision below, together with the Tenth Circuit's controlling decision in *Cowen*, are contrary to longstanding bankruptcy principles and precedents. *See* Pet. 26-27. Tellingly, Respondent makes no attempt to defend the decision

in this case. That is perhaps unsurprising because, in order to do so, Respondent would have to defend *Cowen*. Because *Cowen* concededly conflicts with the decisions of other courts of appeals, defending *Cowen* would simply underscore how the decision below, which relies entirely on *Cowen*, likewise conflicts with the decisions of other courts of appeals. Because the decision below deepens an acknowledged circuit split on the basis of faulty reasoning, certiorari is warranted.

CONCLUSION

For the foregoing reasons, as well as those set forth in its Petition, Petitioner respectfully requests that the Court grant certiorari in this case.

Respectfully submitted,

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