No. 19-357

IN THE
Supreme Court of the United States

CITY OF CHICAGO,

Petitioner,

v.

ROBBIN L. FULTON,
GEORGE PEAKE, AND TIMOTHY SHANNON,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents Robbin L. Fulton, George Peake, and Timothy Shannon respectfully request that the Court deny the City of Chicago's petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT

The issue before the Court is whether a creditor violates the automatic stay when that creditor decides, after a debtor has filed for bankruptcy, not to comply with its obligation under 11 U.S.C. §542(a) to return estate property to the debtor, thereby frustrating the debtor's fresh start and forcing the debtor to incur the expense and delay of bringing suit to compel compliance. The Seventh Circuit answered that question in the affirmative, ruling that when the City of Chicago refused to return Respondents' cars, "the City was not passively abiding by the bankruptcy rules but actively resisting § 542(a) to exercise control over debtor's vehicles" and "put pressure on the debtors to pay their tickets." (Pet.App.14a.) Because "[t]hat is precisely what the stay is intended to prevent," *id.*, the Seventh Circuit ruled that the City violated §362(a)(3) of the Bankruptcy Code (Pet.App.12a).

The City urges this Court to review the Seventh Circuit's decision on the basis that it directly conflicts with a Tenth Circuit decision and conflicts with a D.C. Circuit decision "by clear implication." (Pet.Br. 2.) After the City filed its petition, the Third Circuit agreed with the Tenth. *In re Denby-Peterson*, No. 18-3562, -- F.3d --, 2019 WL 5538570 (3d Cir. Oct. 28, 2019). Nonetheless, this case does not present the proper vehicle for resolving the conflict among the circuits because, even under the reasoning of the Tenth Circuit's decision, the City still violated the automatic stay. Further, the decisions of the Third Circuit and the D.C. Circuit were premised on significant distinguishing facts. Thus,

granting review would not alter the judgments entered below, making this case a poor vehicle to address any disagreement among the circuits.

Although the Tenth Circuit ruled in *In re Cowen* that a stay violation required a creditor to do something more than simply holding onto a debtor's property until a bankruptcy court ordered its return, the court also concluded that the creditors there had "act[ed]" after the bankruptcy filing in violation of the automatic stay. 849 F.3d 943, 950-51 (10th Cir. 2017). The Tenth Circuit held that when the creditors in that case lied to the bankruptcy court and created false documents designed to show that title to the property at issue had transferred before the debtor filed for bankruptcy, they engaged in post-petition acts that exercised control over estate property in violation of §362(a)(3). 849 F.3d at 950-51. The Tenth Circuit therefore remanded the case to the bankruptcy court, *id.* at 951, where the matter is still pending (*see In re Cowen*, Case No. 13-01622-EEB (Bankr. D. Colo.)).

Here, like the creditors in *Cowen*, the City did more than simply wait for the bankruptcy courts to order the return of Respondents' cars. In two of the three cases involved in this appeal, after the bankruptcy courts had confirmed chapter 13 repayment plans, Respondents asked for their cars back. (Pet.App.4a-5a,45a,102a-103a.) The City not only refused to return the cars, it also demanded that Respondents modify their confirmed plans to provide for greater payments to the City. (Pet.App.4a-5a,45a-46a,103a.) The City made those demands even though: (i) it initially filed claims in Respondents' cases that were inconsistent with its post-bankruptcy demands, (ii) it failed to object to the chapter 13 plans before they were confirmed, and (iii) like any

other creditor, it was bound by the terms of the confirmed plans, *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010). (Pet.App.4a-5a,45a,102a.) In the third case, the City demanded it be treated as a fully secured creditor and paid in full, even though, after accounting for a prior lien on the car, the City's claim was largely unsecured. (Pet.App.63a-64a.)

The City's extra-legal post-bankruptcy demands for greater payment, like the litigation misconduct in *Cowen*, constitute post-petition "acts" that "exercise[d] control" over Respondents' property. Thus, even under the Tenth Circuit's decision, the City violated the automatic stay. *Cowen*, 849 F.3d at 850-51. Granting review is therefore highly unlikely to alter the judgments below, making this case an inappropriate vehicle for addressing the disagreement among the circuits about what type of conduct is necessary to violate §362(a)(3).

Neither the Third Circuit's recent decision nor the D.C. Circuit's 1991 decision alters that conclusion. The creditor in *Denby-Peterson* did not make any extra-legal, post-petition demands. 2019 WL 5538570, at *2. The Third Circuit, therefore, did not have the occasion to address the factual circumstances present in this case and in *Cowen*. The D.C. Circuit's decision, *United States v. Inslaw, Inc.*, 932 F.2d 1467 (D.C. Cir. 1991), also is not in conflict because there the debtor admitted that the creditor had a right to retain the property at issue. In concluding that the stay was not violated, the D.C. Circuit contrasted the facts of the case before it with those in *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773 (8th Cir. 1989). The D.C. Circuit cited *Knaus* for the proposition that "turnover of property admitted to belong to the debtor *is required*." *Inslaw*,

932 F.2d at 1472 (emphasis added). As the City acknowledges, *Knaus* is consistent with the Seventh Circuit's decision here. (Pet.Br.3.) Thus, *Inslaw* does not conflict either directly or by "clear implication" with the Seventh Circuit's decision. (Pet.Br.2.)

The Seventh Circuit's decision also is correct. "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama v. Citizens Bank*, 549 U.S. 365, 367 (2007) (citation omitted); *accord Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Sections 362 and 542(a) of the Bankruptcy Code work together to achieve bankruptcy's principal purpose.

Section 362's automatic stay "gives the debtor a breathing spell from his creditors," "stops all collection efforts, all harassment, and all foreclosure actions," and "permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of financial pressures that drove him into bankruptcy." H.R. Rep. No. 95-595, at 340 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97; S. Rep. No. 95-989, at 54-55 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5840-41. In particular, §362(a)(3) prohibits creditors from taking "any act . . . to exercise control over property of the estate." 11 U.S.C. §362(a)(3).

Section 542(a) works in tandem with §362(a)(3) by including within the "reorganization estate" "property of the debtor that has been seized by a creditor prior to the filing of a petition for reorganization." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983). Section 542(a) mandates that any "entity in possession, custody, or control of property" of the estate "shall deliver" such property to the trustee upon the filing of a bankruptcy

petition. 11 U.S.C. §542(a); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("shall" means an action is "mandatory"). Thus, "§542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorganization proceedings" to facilitate the debtor's fresh start. *Whiting Pools*, 462 U.S. at 207. As this Court explained, "[a]ny other interpretation of § 542(a) would deprive the bankruptcy estate of the assets and property essential to its rehabilitation effort and thereby would frustrate the congressional purpose behind the reorganization provisions." 462 U.S. at 208.

Contrary to the City's argument, both §362's automatic stay and §542(a)'s automatic turnover requirements are self-executing. Neither statutory provision requires a debtor to take any action to compel a creditor's compliance; compliance instead is automatically required upon the filing of a bankruptcy petition. *Whiting Pools*, 462 U.S. at 208. Creditors who must return property to the debtor, like the City here, are not left without a safety valve. If a creditor believes its interest in estate property will be impaired by a debtor's use of that property, Bankruptcy Code §363(e) authorizes the creditor to petition the bankruptcy court for "adequate protection" of its interest. 11 U.S.C. §363(e). The text of the statute, however, puts the burden on the creditor to seek adequate protection. *Id.*

Here, the City did not seek adequate protection. (Pet.App.5a-6a.) Instead, the City decided to ignore its statutory obligation to return Respondents' cars and instead retained the cars under lock and key, forcing Respondents to bring suit to get their cars back. (*Id.*) As the Seventh Circuit correctly concluded here, when the

City decided post-petition not to comply with its obligations under §542(a) and forced Respondents to incur significant costs to compel the City to do what it was statutorily obligated to do, the City acted to exercise control over property of the estate in violation of the automatic stay. (Pet.App.14a.)

What is at stake here for the thousands of individuals who file bankruptcy cases each year is whether they must incur filing costs and legal fees to obtain court orders requiring creditors to do what the Bankruptcy Code already requires them to do. For individuals seeking to repay their debts in chapter 13 cases, where the odds are already stacked against successfully completing a three to five year repayment plan, these added costs coupled with the delay of the court process impose a significant burden on already financially-strapped debtors, thereby imperiling their fresh start. *See* Pamela Foohey, Robert M. Lawless, Katherine Porter, & Deborah Thorne, "*No Money Down" Bankruptcy*, 90 S. Cal. L. Rev. 1055, 1057 (2017) ("[A] mere one-third of chapter 13 cases end in a completed repayment plan such that debtors receive a discharge.")[1]

[1] The Administrative Office of the U.S. Courts reported that in 2018, there were 295,921 chapter 13 cases pending. Debtors completed their plans in only 132,798 of these cases. A total of 162,921 cases were dismissed, including 80,866 for failure to make payments required under the plan. That means that 55% of chapter 13s were dismissed in 2018. *See* Administrative Office of the U.S. Courts, 2018 Bankruptcy Abuse Prevention & Consumer Protection Act Report, Table 6, https://www.uscourts.gov/sites/default/files/bapcpa_alltables_1231.2018_0.pdf.

That the City's interpretation of §542(a) is contrary to bankruptcy's fresh start is illustrated by the bankruptcy cases here. For Jason Howard, who did not participate in the appeal below, the cost of obtaining compliance was simply too great; he abandoned his car and dismissed his chapter 13 case. (Pet.App.7a.) For Respondents, the City did not return their cars when served with legal process; instead, it aggressively fought turnover and in two of the cases, even unsuccessfully sought to keep the cars pending appeal. (Pet.App.5a-6a.) As a result, the City retained Respondents' cars for almost nine months in two of the bankruptcy cases and for two months in the third. (*Id.*)

The Seventh Circuit's reading of §542(a) and §362(a)(3) which puts the burden on the creditor to do what the Bankruptcy Code mandates, at risk of sanctions for a stay violation if the creditor elects to disobey, properly comports with both the text and the purpose of the statute. The Court therefore should deny the Petition.

REASONS FOR DENYING THE PETITION

I. Because Granting Review Is Not Likely To Alter The Judgments Below, This Case Is Not The Proper Vehicle For Deciding The Question Presented.

This case is not the proper vehicle for deciding the question of whether a creditor violates §362(a)(3) of the Bankruptcy Code when it continues to hold estate property under lock and key following the filing of a bankruptcy petition and refuses to comply with its obligation to return the property to the debtor under §542(a). Although there is disagreement among the

circuits on the answer to this question, the resolution of that disagreement is not likely to alter the judgments in this case because even under the more narrow reading of §362(a)(3) from the Tenth and Third Circuits, the City still violated the automatic stay.

Moreover, any conflict about where to draw the line between acts which exercise control over property in violation of §362(a)(3) and acts which do not violate §362(a)(3) may be further narrowed or eliminated by proceedings currently pending in *Cowen* or by the courts of appeal in subsequent decisions. The Court should therefore wait to address the reach of §363(a)(3) until the true extent of any conflict is clarified.

In *Cowen* two creditors repossessed the debtor's trucks and refused to return the trucks after the debtor filed a chapter 13 bankruptcy case. 849 F.3d at 946. The creditors claimed that they had transferred title to the trucks before the debtor filed for bankruptcy and that the trucks were no longer property of the bankruptcy estate. *Id.* The bankruptcy court ordered the creditors to return the trucks, but both creditors refused to do so. *Id.* Unable to obtain voluntary compliance with the bankruptcy court's order, the debtor filed an adversary proceeding against the creditors, seeking damages for their stay violations. *Id.*

The bankruptcy court did not believe that the creditors had actually transferred title before the bankruptcy filing, but also concluded that even if they had, the transfer would have been ineffective under state law. *Id.* The bankruptcy court held that the creditor's refusal to return the trucks was an exercise of control over estate property that violated §362(a)(3) and awarded actual and punitive damages to the debtor. *Id.*

On appeal, the Tenth Circuit reversed. Although it concluded that only post-petition "affirmative acts" to exercise control over property of the estate violated the automatic stay, it also held that when the creditors lied to the bankruptcy court and created false documents designed to show that title to the property at issue had transferred before the debtor filed for bankruptcy, the creditors engaged in post-petition acts that exercised control over estate property in violation of §362(a)(3). 849 F.3d at 950-51. The Tenth Circuit therefore remanded the case for further proceedings. *Id.* at 951.

The case is currently on remand in the bankruptcy court. (*See In re Cowen*, Case No. 13-01622-EEB (Bankr. D. Colo.).) The bankruptcy court set a deadline of November 15, 2019 for the filing of dispositive motions. (*Id.* at ECF No. 168.) Depending on how the bankruptcy court rules, it is possible that *Cowen* may return to the Tenth Circuit where that court may further explain what constitutes an "affirmative" post-petition act to exercise control over property and what constitutes passive retention of estate property that does not violate the automatic stay. This Court should not wade into this issue until the appellate courts have had the opportunity to further clarify what acts violate §362(a)(3). In the end, it may be that this dividing line is so fine as to not create any real conflict that merits this Court's attention.

The facts of the cases here demonstrate why that is so. Although the City describes its actions as simply the passive retention of estate property that is not a fair characterization of what the City did. Like the creditors in *Cowen*, and beyond merely retaining possession of Respondents' cars, the City engaged in post-petition actions in the bankruptcy cases below that crossed the line into affirmative misconduct. In Respondent

Shannon's chapter 13 case, for example, the City "refused" to return Shannon's car "unless Shannon modified his plan to treat the City's claim as secured and pay it in full under the plan." (Pet.App.102a-103a.) The City took this position even though it initially filed an unsecured claim and did not object to Shannon's plan. (Pet.App.102a.) The bankruptcy court concluded that "[t]he net effect of the City's positions, if upheld, would allow the City to ignore the confirmation process and force a debtor to pay it in full after confirmation based on the City's possession of a vehicle no matter what the plan says." (Pet.App.106a.)

The City took the same tack in the chapter 13 cases of Respondents Fulton and Howard. (Pet.App.4a,7a,31a, 45a.) As the bankruptcy court explained in Howard's case, "the City of Chicago simply refused to release the Debtor's vehicle unless it was paid 100% of its claim" even though the City did not object to the confirmation of Howard's plan which provided for different treatment for the City's claim. (Pet.App.31a.) In Respondent Peake's chapter 13 case, the City of Chicago demanded immediate payment of "as much as $1,250" for the release of Peake's car. (Pet.App.64a.)

Thus, just like the creditors in *Cowen*, the City did more than simply hold the cars. Post-petition, the City demanded payment beyond that provided for in Respondents' confirmed plans, and contrary to the rule that a confirmed plan is binding on all creditors. *See Espinosa*, 559 U.S. at 275-76. Because the City engaged in affirmative misconduct post-petition which would constitute stay violations even under the Tenth Circuit's narrow reading of §362(a)(3), the judgments of the courts below would likely not be affected even if the Court were to adopt the rule in *Cowen*. Moreover, the

Third Circuit's decision in *Denby-Peterson* does not change this conclusion because the creditor in that case did not make any extra-legal post-petition demands. 2019 WL 5538570, at *2.

The other decision that the City claims creates a circuit split by implication—*Inslaw*—is readily distinguishable. *Inslaw* stands for the unremarkable proposition that a debtor cannot use §542(a)'s turnover provision to liquidate contract disputes. 932 F.2d at 1474. Prior to its bankruptcy filing, Inslaw was embroiled in a contract dispute with the Department of Justice over a case-tracking software system that it had sold to the government. *Id.* at 1468-69. Central to the parties' pre-petition dispute was whether the government was entitled to receive certain enhancements to the system without further payment. *Id.* at 1469. Before bankruptcy the parties agreed to a temporary resolution: Inslaw installed the enhancements and the parties agreed to bargain in good faith over what additional amounts would be due for those enhancements. *Id.* at 1470. Ultimately, the parties could not agree and Inslaw filed for bankruptcy. *Id.*

After it filed for bankruptcy, Inslaw sued the government, claiming that the government willfully violated the automatic stay because it continued to use the enhanced computer system without Inslaw's consent. *Id.* The bankruptcy court found a stay violation and the D.C. Circuit reversed. *Id.* at 1470-71.

Because Inslaw "freely admit[ted]" that the government was entitled to continue to hold the software, the D.C. Circuit held that §542(a) did not require the government to return the software upon the bankruptcy filing. 932 F.2d at 1472. The D.C. Circuit

reasoned that the government's claim that it owned the software distinguished the case from *Whiting Pools*, where this Court held that a creditor claiming a lien on seized property must comply with §542(a) and return the property to the debtor upon the filing of a bankruptcy petition. *Inslaw*, 932 F.2d at 1472. Because turnover was not required, the D.C. Circuit held that the government did not violate the automatic stay by "act[ing] in accord with his view of the dispute . . ." and continuing to use the software. *Id.*

Inslaw, like *Cowen*, addressed the automatic stay question in the context of a dispute over ownership of the property. In both of those cases, the parties in possession claimed title to the property. *Cowen*, 849 F.3d at 946; *Inslaw*, 932 F.2d at 1472. That is not the case here. The City has never claimed it owned Respondents' cars. Instead, like the Internal Revenue Service in *Whiting Pools*, the City only claims a lien on the cars. *Compare* 462 U.S. at 202 *with* Pet.App.4a-7a. Thus, like the Internal Revenue Service in *Whiting Pools*, the City was required to return the cars to Respondents when they filed for bankruptcy. The City's refusal to do so, coupled with its post-petition demands that the debtors modify their confirmed plans and pay the City's claims in full, were post-petition acts that would satisfy the test for a stay violation even under *Cowen's* reasoning. The City's petition, therefore, should be denied.

II. The Seventh Circuit's Decision Is Correct.

The primary purpose of bankruptcy is to provide the "'honest but unfortunate debtor'" with a fresh start. *Marrama*, 549 U.S. at 367 (citation omitted); *accord Local Loan Co.*, 292 U.S. at 244. One of the ways the Bankruptcy Code accomplishes this objective is by

requiring the marshalling of property belonging to the debtor into the bankruptcy estate so that a debtor may use the property productively and repay his creditors. *Whiting Pools*, 462 U.S. at 208. Thus, when a debtor files a bankruptcy petition, a person holding property belonging to the debtor becomes obligated under Bankruptcy Code §542(a) to return that property to the debtor (in a chapter 11, 12, or 13 case) or to the trustee (in a chapter 7 case). *Whiting Pools*, 462 U.S. at 205-08; *Knaus*, 889 F.2d at 775. This rule is based on the sound principle that a debtor's assets are more valuable if used "to facilitate the rehabilitation" of the debtor rather than sitting idly in the hands of a creditor. *Whiting Pools*, 462 U.S. at 203.

Respondents' bankruptcy cases illustrate this point. Respondents filed chapter 13 petitions seeking to repay their creditors. (Pet.App.2a.) As chapter 13 debtors, Respondents were required to submit "all or such portion of their future earnings . . . as [was] necessary for the execution of [their] plan[s]." 11 U.S.C. §1322(a)(1). What this means in practical terms is that by filing for chapter 13 relief, Respondents must pay over all of their projected disposable income to their creditors for three to five years depending on the amount of the debt that needs to be repaid and the level of Respondent's income. 11 U.S.C. §1325(b). Respondents will only receive a fresh start—a discharge of their debts—if Respondents are able to complete their plan payments. 11 U.S.C. §1328(a).

Thus, sections 1322, 1325, and 1328 of the Bankruptcy Code make it clear that for a chapter 13 plan to succeed and for the debtor to obtain a discharge, the debtor must be earning a steady paycheck. To earn a paycheck, the debtor must have reliable transportation

to his workplace. In today's world, this means that many debtors must have access to a car. Respondent Peake, for example, "relies on his car to travel approximately forty-five miles from his home to work" each day. (Pet.App.6a.) When the City refused to return Respondents' cars, forcing them to file suit, incur fees, and wait months to get their cars back, the City jeopardized Respondents' chapter 13 plans and their fresh starts. In short, the City violated §362(a)(3).

The majority of circuits to reach the question of whether such conduct violates the automatic stay have held that when a creditor, like the City here, decides not to comply with §542(a)'s turnover requirement, the creditor engages in an act to exercise control over estate property in violation of §362(a)(3), allowing the debtor to recover his actual damages, including attorneys' fees and costs, under §362(k). (Pet.App.14a citing *Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 79 (2d Cir. 2013); *Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151 (9th Cir. 1996); *Knaus*, 889 F.2d at 775)); *see also Motors Acceptance Corp. v. Rozier (In re Rozier)*, 376 F.3d 1323, 1324 (11th Cir. 2004) (per curiam). As the Seventh Circuit explained "'[h]olding onto an asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use of an asset all fit within th[e] definition, as well as within the commonsense meaning of [exercising control]'" over estate property and therefore such conduct violates §362(a)(3). (Pet.App.9a (quoting *Thompson v. Gen. Motors Acceptance Corp.*, 566 F.3d 699, 702 (7th Cir. 2009)).)

The Seventh Circuit reasoned that "[i]n refusing to return the vehicles to their respective estates, the City was not passively abiding by the bankruptcy rules but

actively resisting § 542(a) to exercise control over debtors' vehicles" and "put pressure on the debtors to pay their tickets." (Pet.App.14a (emphasis added).) Because "[t]hat is precisely what the stay is intended to prevent," the Seventh Circuit (and the Second, Eighth, Ninth, and Eleventh Circuits) have correctly concluded that a creditor violates §362(a)(3) when it refuses to comply with §542(a)'s turnover requirements. (Pet.App.14a.)

A. The City's Argument And Third Circuit's Contrary Decision Are Based On An Incorrect Reading Of §542(a).

The linchpin of the City's contrary argument is its contention that §542(a)'s turnover requirement is not self-executing. (Pet.Br.24-26.) According to the City, a creditor has no obligation under §542(a) to return estate property until a bankruptcy court orders it to do so. Based on this incorrect understanding of §542(a), the City reasons that a creditor is not acting to exercise control over the property it has seized when it retains that property until a bankruptcy court orders its return. (Pet.Br.24-26.) The Third Circuit adopted this reasoning in *Denby-Peterson*. 2019 WL 5538570, at *1, *9-12.

The reading of §542(a) that the Third Circuit adopted and the City advances here is contrary to the text of §542(a), this Court's precedent, and §542(a)'s legislative history.

1. The Text Of §542(a) Compels The Conclusion That §542(a) Is Self-Executing.

The text of §542(a) unambiguously states that any entity holding estate property "shall deliver" that property to the trustee (in a chapter 7 case) or the debtor (in a chapter 11, 12, or 13 case). Section 542(a) states:

> *Except as provided in subsection (c) or (d) of this section*, an 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.

11 U.S.C. §542(a) (emphasis added). The Third Circuit's decision (and the City's argument here) incorrectly ignores §542(a)'s unambiguous text in three fundamental ways.

The first problem with the Third Circuit's (and the City's) reading of §542(a) is that it ignores Congress's use of the verb "shall" in the statute. As this Court has explained, when Congress uses the verb "shall" in connection with an action, it means that the act is mandatory. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977-78 (2016); *Lexecon*, 523 U.S.

at 35. "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Kingdomware*, 136 S. Ct. at 1977. Here, the operative language commands that any "entity" in possession of estate property "*shall deliver*" that property "to the trustee." 11 U.S.C. §542(a) (emphasis added). In chapter 11, 12, or 13 cases that means delivery to the debtor. 11 U.S.C. §§1107(a), 1203, 1207(b), 1303, 1306(b). By suggesting that a creditor is not automatically required to comply with §542(a)'s turnover requirements, the Third Circuit (and the City) fail to give effect to the plain meaning of the word "shall," in contravention of the rule that the words in a statute should be given their plain meaning. *See, e.g.*, *Kingdomware*, 136 S. Ct. at 1976-78.

The second fundamental problem with the Third Circuit's (and the City's) reading of §542(a) is that it reads requirements into the statute that Congress did not include. It is axiomatic that "'[n]othing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*).'" *Shea v. Kerry*, 961 F. Supp. 2d 17, 29 n.3 (D.D.C. 2013) (quoting Antonin Scalia & Brian A. Garner, Reading Law: The Interpretation of Legal Texts 93-100 (2012)), *aff'd*, 796 F.3d 42 (D.C. Cir. 2015). Although the Third Circuit and the City pay lip service to Congress's use of the mandatory "shall" in §542(a), the Third Circuit held (and the City argues) that this mandatory obligation *only* comes into existence *after* the debtor files an adversary complaint and obtains a court order binding the person holding the debtor's property. *Denby-Peterson*, 2019 WL 5538570, at *11-12; (Pet.Br.24).

But §542(a) does not expressly state, or even hint, that an adversary complaint is a prerequisite to turnover. If Congress had wanted to impose that

requirement, it could have easily done so by inserting the phrase "*after notice and hearing*" or "*after entry of a court order*" before the command "*shall deliver*." By adding the additional requirement of filing suit into §542(a)'s text, the Third Circuit violated a basic rule of statutory construction that courts may not add language to a statute that Congress itself did not include. *See*, *e.g. EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015); *Shea*, 961 F. Supp. 2d at 29 n.3.

Adding the requirement that a lawsuit is necessary also makes little sense in light of the statute's use of the mandatory "shall." If, as this Court has held, the use of the word "shall" "normally creates an obligation impervious to judicial discretion," what is the point of requiring the debtor to file suit, as the outcome of that suit would be preordained? *Lexecon*, 523 U.S. at 35.

Perhaps recognizing that the text of §542(a) does not even hint that turnover is only required if the debtor files suit first, the Third Circuit and the City point to Rule 7001 of the Federal Rules of Bankruptcy Procedure. *Denby-Peterson*, 2019 WL 5538570, at *10 & n.70; (Pet.Br.24). Rule 7001 provides that "a proceeding to recover . . . property" is an adversary proceeding, governed by Part VII of the Federal Rules of Bankruptcy Procedure. Fed. R. Bank. P. 7001(1). Significantly, Rule 7001 does not cross-reference §542(a); nor is Rule 7001 limited to §542(a) turnover actions. It applies whenever a trustee (or debtor in chapter 11, 12, or 13 cases) sues for a money judgment.

More significantly, the fact that the Federal Rules of Bankruptcy Procedure contain procedural rules that govern the conduct of litigation when litigation becomes necessary to obtain a turnover of property, does not

mean that a turnover suit is always necessary. That is akin to arguing that parties to a contract are free to ignore contract terms until a suit is brought to compel compliance. The presence of civil procedures to force a person to do what the law requires they do on their own does not excuse performance in accordance with the law until those procedures are commenced.

The Third Circuit's (and the City's attempt) to read Rule 7001 into §542(a) also fails because while the Court has "the power to prescribe by general rules . . . the practice and procedure in cases under title 11 . . . [s]uch rules shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. §2075. Thus, holding that Rule 7001 requires the filing of suit first when §542(a) by its own terms contains no such requirement "would give the [Bankruptcy] Rules an impermissible effect." *See Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 454 (2004).

Hood allowed a bankruptcy court to declare a state student loan non-dischargeable, notwithstanding Rule 7001(6)'s summons requirement, because the applicable statute, 11 U.S.C. §523(a)(8), did not require the state to be served by summons. 541 U.S. at 453-54. Similarly, in *Roell v. Withrow*, this Court held implied consent to proceed before a federal magistrate was effective even though Rule 73(b) of the Federal Rules of Civil Procedure required a statement of consent, because 28 U.S.C. §636(c) did not require express consent. 538 U.S. 580, 587 & n.5 (2003). Accordingly, there is no merit in the Third Circuit's holding (and the City's argument) that Rule 7001 reads a requirement into §542(a) that Congress did not include.

The final problem with The Third Circuit's decision (and the City's argument) is that it ignores the prefatory clause of §542(a). That clause, which states: "*Except as provided in subsection (c) or (d) of this section*," sets forth all of §542(a)'s exceptions to the turnover requirement of all property with more than inconsequential value. If Congress had wanted to add the requirement that a creditor could ignore §542(a) until the debtor filed suit, it would have added the requirement that a debtor must file a lawsuit into these exceptions.

2. *Whiting Pools* Holds That §542(a) Is Self-Executing.

The Third Circuit's holding (and the City's argument) that §542(a) is not self-executing also is contrary to this Court's decision in *Whiting Pools*. The Court held in *Whiting Pools* that §542(a) requires parties in possession of estate property to return that property to the debtor upon the filing of the debtor's bankruptcy petition. 462 U.S. at 203-04, 212. The Court explained the operation of §542(a) this way: "[i]n effect, § 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorganization proceedings." 462 U.S. at 207. The Court therefore concluded that the IRS could not protect its lien in the seized property by "withholding the seized property from the debtor's efforts to reorganize." *Id.* at 212.

The Third Circuit dismissed *Whiting Pools* in a footnote. It did so on the basis that before the case reached this Court, the bankruptcy court had ordered the debtor to make adequate protection payments to the IRS as a condition to the turnover of the seized property.

Denby-Peterson, 2019 5538570, at *11 n.76. Based on this procedural history, the Third Circuit reasoned that §542(a) "is not self-effectuating because adequate protection can serve as a condition precedent before turnover." 2019 WL 5538570, at *11 n.76. But this Court did not rule that a creditor could condition its obligation under §542(a) to return estate property to the debtor on the receipt of adequate protection; it held the opposite. *Whiting Pools*, 462 U.S. at 212. In its concluding paragraph, the Court made clear that the IRS could not "withhold[] the seized property from the debtor's efforts to reorganize" as a means of protecting its interests. *Id.*; *see Thompson v. Gen. Motors Acceptance Corp.*, 566 F.3d 699, 703-05 (7th Cir. 2009).

The procedural posture in which the bankruptcy court entered its adequate protection order also demonstrates why the Third Circuit's reliance on that order is misplaced. In the bankruptcy court, the IRS moved for stay relief and Whiting Pools counterclaimed for turnover under §542(a). 462 U.S. at 200-01. The bankruptcy court refused to lift the stay, but ordered Whiting Pools to make adequate protection payments to the IRS in lieu of stay relief. *Id.* at 201. Thus, the bankruptcy court had the adequate protection issue squarely in front of it in connection with the IRS's motion for stay relief. The bankruptcy court did not, as the Third Circuit suggests, hold that §542(a) allows a creditor to delay returning property pending a ruling on adequate protection. In any event, even if that had been the bankruptcy court's ruling, this Court's decision, which is controlling, is to the contrary. *Whiting Pools*, 462 U.S. at 203-04, 212.

Whiting Pools also was decided in 1983, before Congress amended §362(a)(3) in 1984 to bar the exercise

of control over estate property. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §441(a)(2), 98 Stat. 333, 371 (amending 11 U.S.C. §362(a)(3)). Accordingly, the fact that *Whiting Pools* does not cite §362(a)(3) is not significant; what is significant is its holding that §542(a) requires creditors, like the City, which are holding estate property to return it to the debtor, once that creditor learns the debtor has filed for bankruptcy. 462 U.S. at 203-04, 212.

3. Section 542(a)'s Legislative History Supports The Conclusion That §542(a) Is Self-Executing.

Although resort to legislative history is not necessary when the text of a statute is plain as §542(a) is here, the legislative history of §542(a) supports the conclusion that a debtor's bankruptcy filing, and not a court order, is what triggers a creditor's turnover obligation. The relevant Congressional reports set out a creditor's turnover obligation with no limitation: "Subsection (a) of [§542] requires anyone holding property of the estate on the date of the filing of the petition, or property that the trustee may use, sell, or lease under section 363, to deliver it to the trustee." S. Rep. No. 95-989, at 84, 1978 U.S.C.C.A.N. at 5870; H.R. Rep. No. 95-595, at 369, 1978 U.S.C.C.A.N. at 6296-97.

* * *

Thus, by its unambiguous terms, §542(a) compels any person holding estate property to turn over that property to the trustee (in chapter 7 cases) or the debtor (in chapter 11, 12, and 13 cases) upon learning of the debtor's bankruptcy filing.

B. By Retaining Respondents' Cars In Violation of §542(a), The City Engaged In An Act That Exercised Control Over Respondents' Cars In Violation Of §362(a)(3).

The City's argument that it did not "act" to exercise control of Respondents' cars depends on its position that it had a right to retain the cars. (Pet.Br.19-20.) As demonstrated above, the City did not have that right; §542(a) required the City to turn over the cars to Respondents. Thus, by retaining possession of the cars (under lock and key) that the City was not entitled to retain, the City engaged in an "act" "to exercise control over property of the estate" in violation of §362(a)(3).

While the City does not dispute that it exercised control over Respondents' cars or that those cars are property of the estate, it argues that it did not "act" post-petition. According to the City, finding a §362(a) stay violation here necessarily reads the word "act" out of the statute because an act requires affirmative action. (Pet.Br.19-20.) Drawing a distinction that §362(a)(3) by its own terms does not draw, the City argues that "passive" retention of property, as opposed to affirmative action, is not an act.

But federal courts recognize that possessing something without entitlement is an act. The Tenth Circuit held in *United States v. Sanchez DeFundora*, that "[p]ossession of an object is an act, for criminal law purposes, if the possessor knowingly received the object or if he became aware that he possessed it for a sufficient period of time to have been able to terminate his possession." 893 F.2d 1173, 1177 (10th Cir. 1990); *accord Hanover Ins. Co. v. Fremont Bank*, 68 F. Supp. 3d 1085,

1100 (N.D. Cal. 2014) ("The 'wrongful act' underpinning [a] conversion [claim] may be a simple refusal to surrender possession or an 'unjustified refusal to deliver possession'") (citation omitted).

Here, the City continued to possess something it was not entitled to keep. And the City most certainly did do something to retain Respondents' cars. It kept the cars locked and guarded in its auto pounds where Respondents could not access them. The City took these actions knowing that the cars were critically important to the success of Respondents' chapter 13 repayment plans. As the Seventh Circuit concluded, the City affirmatively decided to use the leverage that withholding Respondents' cars created to demand greater payment of its pre-petition claims, "precisely what the stay is intended to prevent." (Pet.App.14.) The Seventh Circuit's conclusion that the City acted here in violation of the automatic stay was correct.

C. The Purpose, History, And Structure Of The Bankruptcy Code Demonstrate That The Seventh Circuit's Decision Was Correct.

The City also argues that the Seventh Circuit's decision contravenes the purpose, history, and structure of §362(a)(3) and the Bankruptcy Code. (Pet.Br.19-26.) The City's arguments are mistaken.

Purpose. The City contends that the purpose of the automatic stay is to preserve the status quo as it existed when the debtor filed for bankruptcy. According to the City, the Seventh Circuit's decision alters that status quo by requiring the return of property the debtor did not possess before he filed for bankruptcy. (Pet.Br.20-21.)

The problem with this argument is that at the outset of a chapter 13 debtor's bankruptcy case the status quo is that the debtor should be in possession and control of *all* estate property. The combination of the broad definition of estate property in §541 coupled with the turnover requirement of §542(a) gives debtors in chapter 13 cases a right to all of their property at the outset of the case. That is the status quo.

The goal of keeping chapter 13 debtors in possession of all of their property is reflected in the House Report that accompanied the Code. It stated that "[t]he benefit to the debtor of developing a plan of repayment under chapter 13, rather than opting for liquidation under chapter 7, is that it permits the debtor to protect his assets." H.R. Rep. No. 95-595, at 118, 1978 U.S.C.C.A.N. at 6079. As the Second Circuit explained in *Weber*, "*Whiting Pools* teaches that the filing of a petition will generally transform a debtor's equitable interest into a bankruptcy estate's possessory right in the vehicle." *Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 79 (2d Cir. 2013). Thus, as the Seventh Circuit correctly held, "the status quo in bankruptcy is the return of the debtor's property to the estate." (Pet.App.14a.)

History. The City also argues that Congress did not intend to make a creditor's retention of estate property a stay violation when it amended §362(a)(3) in 1984 to prohibit "any act" "to . . . exercise control over property of the estate." (Pet.Br.22-24.) The City contends that prior to 1984, if a creditor was unwilling to return estate property, the debtor could not claim the creditor's conduct violated the automatic stay; instead, the City contends that a debtor's only available remedy was to

bring an adversary complaint under §542(a) to compel turnover. (Pet.Br. 22-24.)[2]

According to the City, Congress could not have intended to expand the reach of §362(a)(3) to cover a refusal to return estate property because this amendment was included in a bill that was originally called "An Act to Correct Technical Errors, Clarify and Make Minor Substantive Changes to Public Law 95-598 (the Bankruptcy Reform Act of 1978)." (Pet.Br.23.) Ultimately, however, the amendment to §362(a)(3) was made by the Bankruptcy Amendments and Federal Judgeship Act of 1984, which was more than a technical amendments bill. Pub. L. No. 98-353, §441(a)(2), 98 Stat. 333, 371 (amending 11 U.S.C. §362(a)(3)). And in any event, the fact that Congress terms an amendment technical does not alter the effect of the statutory language. *See Freytag v. Comm'r*, 501 U.S. 868, 875 (1991) ("the technical nature of the amendment . . . does not alter the wide-ranging effect of the statutory text's grant of authority to the Chief Judge to assign 'any other proceeding'").

The City also argues that reading §362(a)(3) to cover a creditor's refusal to comply with §542(a)'s turnover requirements is supposedly contrary to the rule that the Bankruptcy Code should generally be read to be consistent with pre-Code practice. (Pet.Br.24.) That argument also is mistaken. "[W]hile pre-Code practice, 'informs [the Court's] understanding of the language of the Code,' it cannot overcome that language. It is a tool

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[2] This is technically not accurate. Prior to 1984, §542(a) was held to be self-executing, so that a failure to turn over estate property was "probably contumacious." *Fitzgerald v. IRS (In re Larimer)*, 27 B.R. 514, 516 (Bankr. D. Idaho 1983).

of construction, not an extratextual supplement." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 10 (2000) (citations omitted).

Here, as the Seventh Circuit correctly concluded, the 1984 amendment to §362(a)(3) had to mean something. (Pet.App.10a.) "[T]he mere fact that [in 1984] Congress expanded the provision to prohibit conduct above and beyond obtaining possession of an asset suggests that it intended to include conduct by creditors who seized an asset pre-petition." *Thompson*, 566 F.3d at 702. The Seventh Circuit's decision therefore is fully consistent with §362(a)(3)'s legislative history.

Structure. The City argues that the Seventh Circuit's decision supposedly upsets the structure of the Bankruptcy Code by requiring the City to surrender possession of the cars before the bankruptcy court determines what adequate protection is necessary to protect the City's interests in those cars. (Pet.Br.24-26.) But as the Seventh Circuit correctly held, it is the City's reading of §542(a) and §362(a)(3) which would upset the Code's structure. (Pet.App.13a-17a.)

The City's conduct in the cases below reveals the problem with the City's "structure" argument. The City never moved for adequate protection in any of the four chapter 13 cases below. (Pet.App.4a-6a,15a.) In effect, the City is arguing that a creditor can delay, possibly forever, seeking relief under §363(e), which places the burden on the creditor to request adequate protection, and then use that delay to avoid complying with §542(a)'s turnover requirements. As the Seventh Circuit recognized in *Thompson*, if that were the rule, a creditor would have "no incentive to seek protection of an asset

of which it already has possession" and §542(a) would be rendered meaningless. 566 F.3d at 704.

As the Seventh Circuit correctly held, the rule which better comports with §542(a)'s mandatory language is a rule that requires a creditor to comply with §542(a) and turnover estate property upon the filing of a debtor's bankruptcy petition. *Thompson*, 566 F.3d at 703-05. If the creditor believes its interests in the property it must turnover are not adequately protected, it can petition the bankruptcy court for adequate protection under §363(e) or for stay relief under §362(d). *Thompson*, 566 F.3d at 703-05. What a creditor cannot do is take the actions the City took here: refuse to return an asset to gain leverage over the debtor thereby imperiling the debtor's fresh start and violating the automatic stay.

D. The Seventh Circuit's Decision Is Not Inconsistent With *Strumpf*.

The City also contends that the Seventh Circuit's decision is inconsistent with this Court's ruling in *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995). The City misreads *Strumpf* as standing for the proposition that a creditor does not violate the automatic stay when it refuses to return property to a debtor. (Pet.Br.26-28.) But *Strumpf* addressed a different subsection of §542(a): §542(b), which does not apply here. And in reaching its conclusion that the stay was not violated in that case, the Court expressly distinguished its holding from the factual circumstances present here. 516 U.S. at 21.

In *Strumpf*, the debtor owed money to the bank where he also kept a checking account. *Id.* at 17. After

the debtor filed for bankruptcy, the bank froze the account and filed a motion for stay relief so that it could setoff its loan balance against the checking account. *Id.* at 17-18. The debtor argued that when the bank froze his account, the bank violated the automatic stay because §362(a)(7) barred "the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor[.]" 11 U.S.C. §362(a)(7). The debtor also argued that the bank's freeze of the account was an act to exercise control over property of the estate in violation of §362(a)(3). *Strumpf*, 516 U.S. at 21.

The Court rejected the debtor's argument that the bank violated the automatic stay when it temporarily froze the debtor's checking account. *Id.* at 19. The Court held that a temporary freeze was "not a setoff within the meaning of §362(a)(7)," because a setoff required permanent action. *Id.* The Court also rejected the debtor's argument that even a temporary refusal to pay was wrongful under §542(b) or §362(a)(3). 516 U.S. at 19-21.

Central to the Court's ruling was the fact that a bank account "consists of nothing more or less than a promise to pay"; put differently, a bank account is not a pot of money that belongs to the depositor. *Id.* at 21. Because a bank account is a contractual promise to pay, §542(b), not subsection (a), was the applicable turnover provision. Section 542(b) requires entities that owe a debt to the debtor, like a bank owes to its depositors, to pay such debt "except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor." 11 U.S.C. §542(b). The Court reasoned that "[i]t would be an odd construction of § 362(a)(7) that required a creditor with a right of setoff to do immediately that

which § 542(b) specifically excuses it from doing as a general matter: pay a claim to which a defense of setoff applies." 516 U.S. at 20.

Because the text of §542(b) expressly excused the bank from paying what was due, the Court also rejected the debtor's argument that the bank had exercised control over property of the estate in violation of §362(a)(3). 516 U.S. at 21. The Court explained that the debtor's reliance on §362(a)(3) "rests on the false premise that petitioner's administrative hold took something from respondent, or exercised dominion over property that belonged to respondent." 516 U.S. at 21. While the Court concluded "[t]hat view of things might be arguable if a bank account consisted of money belonging to the depositor and held by the bank," because a bank account is only a "promise to pay," the bank was not exercising control over estate property. *Id.* Instead, the bank was merely refusing to perform its promise. *Id.*

The City ignores both the textual differences between §542(a) and §542(b) and the critical differences between a car and a bank account. Unlike §542(b), §542(a) by its terms does not contain an express exception to the obligation to return estate property. And unlike the promise to pay that a bank account represents, a car is tangible personal property. Thus, as *Strumpf* recognized, its holding in no way negated a violation of §362(a)(3) by a creditor who withholds estate property in violation of §542(a). 516 U.S. at 21.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.[3]

Respectfully submitted,

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[3] Alternatively, if this Court is inclined to address the question, this case would present a better vehicle than *Denby-Peterson*, given that the creditor in *Denby-Peterson* is no longer participating in that case. (Pet.Br.31.)