No. 19-357

IN THE

Supreme Court of the United States

CITY OF CHICAGO,

Petitioner,

v.

ROBBIN L. FULTON, JASON S. HOWARD, GEORGE PEAKE, AND TIMOTHY SHANNON,

Respondents.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether an entity that is passively retaining possession of property in which a bankruptcy estate has an interest has an affirmative obligation under the Bankruptcy Code's automatic stay, 11 U.S.C. § 362, to return that property to the debtor or trustee immediately upon the filing of the bankruptcy petition.

PARTIES TO THE PROCEEDING

Petitioner is the City of Chicago.

Respondents are Robbin L. Fulton, Jason S. Howard, George Peake and Timothy Shannon.

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BRIEF FOR PETITIONER

INTRODUCTION

Under the Bankruptcy Code, the filing of a bankruptcy petition freezes the relationship between a debtor and the debtor's creditors that existed on the petition date. The petition itself operates, without the need for a court order, as an automatic "stay" of further acts to enforce creditors' claims, including "any act to obtain possession of … or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). Violations of the automatic stay can result in actual and punitive damages. *Id.* § 362(k)(1). Separately, the Code's turnover provision requires a creditor who has possession of estate property on the petition date—for instance, a

creditor who has lawfully repossessed property but not yet sold it—to turn that property over if it is of consequential value to the estate, the trustee can use it during the bankruptcy case, and the creditor receives adequate protection of its rights. *Id.* § 542(a); *see id.* § 363. The question presented here is whether the automatic stay *by itself* requires creditors to turn over lawfully repossessed property—even if the creditor may assert a valid defense to turnover under the turnover provision—or face a claim for damages. The answer is no: That reading of the Bankruptcy Code contravenes its plain text, turns the function of the automatic stay on its head, renders the actual turnover provision surplusage, and deprives creditors of crucial protections the Code affords them.

Each of the Debtors here repeatedly violated the City of Chicago's traffic laws. When the Debtors failed to pay the resulting fines, the City impounded their vehicles, giving the City a possessory lien on the vehicles securing its claim for the delinquent fines. Each of the Debtors responded by filing for Chapter 13 bankruptcy. In each case, the bankruptcy court held that the automatic stay affirmatively required the City to return the Debtors' vehicles without the need for any turnover proceedings. The Seventh Circuit affirmed. It reasoned that, by retaining possession of the vehicles lawfully impounded before bankruptcy, the City was engaging in an "act … to exercise control" over estate property, in violation of the stay.

That is wrong. As its name suggests, the automatic stay prevents any further collection activity after the petition is filed. It is a negative injunction that preserves the status quo pending further order of the bankruptcy court. But it does not impose an affirmative obligation on creditors to turn over property of the

estate lawfully repossessed or impounded before the bankruptcy filing.

A creditor's obligation to turn over property in its possession is set out not in the automatic stay provision, § 362, but in the turnover provision, § 542(a). Unlike the automatic stay, § 542(a) does not itself operate as an injunction. A creditor that fails to turn over estate property can be sued under § 542(a), and it may respond by raising statutory defenses. For instance, the creditor might contend that the debtor actually has no ownership interest in the property; that the property's value to the estate is inconsequential, as might be the case if the property is worth less than a secured creditor's claim; or that the debtor cannot provide the creditor with adequate protection of the creditor's interest in the property. If the debtor prevails, a bankruptcy court can order the creditor to turn over the property—an order that bankruptcy courts have ample authority to enforce. *See* 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."). Reading § 362 to impose an affirmative requirement to turn over estate property would render § 542(a) superfluous and deprive the creditor of the ability to assert the defenses and receive the process § 542 contemplates before it must surrender property lawfully in its possession.

All agree that, before 1984, this is how the Code operated: The automatic stay barred creditors who had not repossessed the debtor's property from doing so, but it did not require creditors who had repossessed property before the bankruptcy to return it immediately or face sanctions. Turnover was governed by the turnover provision, and a creditor was entitled to a judicial process in which it could assert defenses to turn-

over. Counsel for the Debtors has acknowledged as much. *See* Wedoff, *The Automatic Stay Under § 362(a)(3)—One More Time*, 38 Bankr. L. Letter No. 7, at 2 (July 2018).

The contrary reading now advanced by the Seventh Circuit and the Debtors rests entirely on a 1984 amendment to the automatic stay provision, which added "any act . . . to exercise control over property of the estate" to the list of actions the automatic stay prohibits. 11 U.S.C. § 362(a)(3). But that amendment did not change the basic function of the automatic stay, reflected in its text: to "stay" post-petition acts that would alter the status quo, not to require such acts. "Stay means stay, not go." *In re Cowen*, 849 F.3d 943, 949 (10th Cir. 2017).

Nor is there any other basis for concluding that the 1984 amendment worked a sea change on long-settled bankruptcy practice. The amendment originated in a bill described as making "[t]echnical" and "[c]larify[ing]" changes to the Bankruptcy Code. H.R. Rep. No. 96-1195, at 1, 52 (1980). Indeed, the House Report stated that "[e]very effort" was made "to maintain existing policy intact." *Id.* at 2. This Court has repeatedly held that the Bankruptcy Code should not be read to alter prior bankruptcy practice in the absence of a clear signal that Congress so intended. *Cohen* v. *de la Cruz*, 523 U.S. 213, 221 (1998). To say the least, there is no such clear signal here.

The Seventh Circuit's appeal to bankruptcy policy is likewise unavailing. The question in this case is not whether a debtor should have a way to obtain possession of a car that belongs to the estate. Section 542(a) provides that relief, in appropriate circumstances. The only question is whether the debtor should be required

to follow the procedure § 542(a) contemplates, with its attendant protections for creditors' interests, or whether—as the Seventh Circuit held—debtors may conduct an end-run around those procedures and compel turnover immediately, on pain of sanctions, by relying on the more general terms of § 362. Ordinary principles of statutory construction—and common sense—foreclose the Seventh Circuit's approach.

OPINIONS BELOW

The Seventh Circuit's opinion (Pet. App. 1a-27a) is reported at 926 F.3d 916. The decision resolved a consolidated direct appeal from four judgments entered by bankruptcy courts in separate cases. The bankruptcy court decision in *In re Howard* (Pet. App. 29a-41a) is reported at 584 B.R. 252. The bankruptcy court decision in *In re Peake* (Pet. App. 63a-100a) is reported at 588 B.R. 811. The bankruptcy court decision in *In re Shannon* (Pet. App. 101a-147a) is reported at 590 B.R. 467. The bankruptcy court decision in *In re Fulton* (Pet. App. 43a-62a) is reported at 2018 WL 2570109.

JURISDICTION

The Seventh Circuit entered judgment on June 19, 2019. Pet. App. 1a. Petitioner filed a timely petition for certiorari on September 17, 2019, which this Court granted on December 18, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory addendum reproduces 11 U.S.C. §§ 361, 362, 363, 541, and 542 and Federal Rule of Bankruptcy Procedure 7001.

STATEMENT

A. Statutory Background

1. *Property of the estate.* The filing of a bankruptcy case creates a bankruptcy "estate," 11 U.S.C. § 541(a), which includes "all legal or equitable interests of the debtor in property as of the commencement of the case," *id.* § 541(a)(1). In a Chapter 7 case, the trustee marshals and liquidates all non-exempt estate property and distributes the value realized to creditors. *Id.* §§ 522(b)(1), 704(a)(1). In a Chapter 11, 12, or 13 case, the debtor typically retains possession of property of the estate and enjoys some rights to use or dispose of that property while the debtor formulates and seeks court approval for a plan to repay creditors. *Id.* §§ 363(b)-(c), 1107, 1203, 1207, 1303, 1306.

2. *The turnover power.* Sometimes, at the outset of a bankruptcy case, a debtor may have a "legal or equitable interest[]," 11 U.S.C. § 541(a)(1), in property that is in the lawful possession of a creditor or a third party. For example, a secured creditor may have repossessed its collateral from the debtor but not yet sold or foreclosed on it. Or, as in this case, a municipality may have impounded a debtor's vehicle due to unpaid fines for traffic-law violations. In either situation, the creditor has lawful possession of the collateral, but since the sale or foreclosure process is not complete, the debtor retains an interest in the collateral, which is property of the bankruptcy estate.

Section 542 of the Bankruptcy Code, commonly referred to as the "turnover provision," addresses this circumstance. As relevant here, it provides that an entity in possession of property that the trustee or debtor may use, sell, or lease during the bankruptcy case "shall deliver to the trustee, and account for, such property or

the value of such property." 11 U.S.C. § 542(a); *see United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 205 (1983).

The turnover obligation is not absolute. Turnover is not required, for example, if the property at issue is of "inconsequential value or benefit to the estate." 11 U.S.C. § 542(a). Likewise, an entity in possession of estate property that lacks actual notice or knowledge of the bankruptcy may transfer the property in good faith to another party, without being required to account to the trustee for the property or its value. *Id.* § 542(c); *Whiting Pools*, 462 U.S. at 206 n.12.

The turnover obligation may also be disputed on legal or factual grounds requiring resolution by the bankruptcy court. For instance, the entity in possession of the property in question may contend that the debtor did not have an interest in the property when the bankruptcy case was filed. If so, the property could not be used, sold, or leased by the trustee and is thus not subject to turnover.

The Bankruptcy Rules require the trustee to bring an action seeking to compel turnover of property as an adversary proceeding—the equivalent of a separate lawsuit within the bankruptcy case, with the formal notice required for a lawsuit—rather than as a more informal contested matter initiated by motion. Fed. R. Bankr. P. 7001 ("a proceeding to recover … property" from a non-debtor is an adversary proceeding); *id.* 7003, 7004 (requiring summons and complaint to initiate adversary proceeding); *see Bullard* v. *Blue Hills Bank*, 135 S. Ct. 1686, 1694 (2015) (distinguishing adversary proceedings from contested matters).

3. *Adequate protection.* While § 542 requires parties to turn over property in which the estate has an in-

terest to the trustee or debtor, the Bankruptcy Code does not place a creditor's collateral at the debtor's disposal without affording the creditor some protection. Section 542(a) provides that turnover is required only if the trustee may use, sell, or lease the property under § 363 of the Code. 11 U.S.C. § 542(a); *Whiting Pools*, 462 U.S. at 202-203, 205-206 & n.12. Section 363 provides, in turn, that any entity with an interest in property that the debtor proposes to use, sell, or lease is entitled to "adequate protection" of its interest in the property. 11 U.S.C. § 363(e). Indeed, if a debtor is unable to give a secured creditor adequate protection, the court must prohibit the debtor from using the collateral. *Id.* (court "shall prohibit or condition" use of property as "necessary to provide adequate protection").

Adequate protection is designed to ensure that a secured creditor retains its interest in collateral without bearing the risk that the debtor's use of the collateral during the bankruptcy might diminish the collateral's value and impair the creditor's security interest. *See, e.g.*, 3 *Collier on Bankruptcy* ¶ 361.02 (16th ed. 2019). Adequate protection may take various forms. The bankruptcy court might, for example, order the debtor to make periodic cash payments to the secured creditor to compensate the creditor for any depreciation in the value of its collateral. 11 U.S.C. § 361(1); 3 *Collier on Bankruptcy* ¶361.03[2]. In a consumer bankruptcy case in which the creditor's collateral is a vehicle that the debtor wants to keep driving during the bankruptcy case, adequate protection may require the debtor to secure insurance coverage sufficient to compensate the creditor if an accident or other damage to the vehicle diminishes its value. *See In re Denby-Peterson*, 576 B.R. 66, 81-82 (Bankr. D.N.J. 2017), *aff'd*, 595 B.R. 184 (D.N.J. 2018), *aff'd*, 941 F.3d 115 (3d Cir. 2019).

4. *The automatic stay.* Finally, the automatic stay protects the bankruptcy estate during the bankruptcy case. 11 U.S.C. § 362(a). It is "automatic" because the bankruptcy petition itself "operates as a stay" of certain actions by creditors without the need for a court order. *Id.*

The automatic stay serves to "'maintain the status quo and prevent dismemberment of the estate'" while the bankruptcy case is pending. Slip Op. 6, *Ritzen Grp., Inc.* v. *Jackson Masonry, LLC*, No. 18-938 (U.S. Jan. 14, 2020). It halts the race to the courthouse that may have precipitated the bankruptcy case and prevents creditors from seizing estate assets to satisfy their individual claims, enabling an orderly and fair division of the estate's value among all creditors. *See* S. Rep. No. 95-989, at 50 (1978); H.R. Rep. No. 95-595, at 341 (1977); *United States* v. *Inslaw, Inc.*, 932 F.2d 1467, 1473 (D.C. Cir. 1991). The stay also grants the debtor a breathing spell from creditors' collection efforts and an opportunity to formulate a repayment plan. *See In re VistaCare Grp., LLC*, 678 F.3d 218, 231 (3d Cir. 2012).

Most of the automatic stay's commands are addressed to prepetition creditors, barring them from taking any further action to collect on their claims against the debtor. For example, the automatic stay bars the commencement or continuance of any proceeding against the debtor that was or could have been commenced prior to the petition date, as well as any effort to collect on a prepetition claim or enforce a prepetition lien. 11 U.S.C. § 362(a)(1), (4)-(6). That aspect of the stay lasts until the debtor is granted (or denied) a discharge of prepetition claims or the bankruptcy case is terminated. *Id.* § 362(c)(2).

The automatic stay also bars both prepetition and postpetition creditors from seizing estate property to satisfy their claims. For example, § 362(a)(3)—the provision at issue here—prohibits "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." 11 U.S.C. § 362(a)(3). That aspect of the stay remains in effect "until such property is no longer property of the estate." *Id.* § 362(c)(1).

The bankruptcy court may lift the stay for cause, including lack of adequate protection of a secured creditor's interest in its collateral. 11 U.S.C. § 362(d)(1); *Ritzen*, Slip Op. at 7.

Violations of the automatic stay can give rise to a right to compensatory and—in the case of a "willful violation"—punitive damages. 11 U.S.C. § 362(k)(1) ("[A]n individual injured by any willful violation of [the automatic] stay … shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."); *see also Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1803-1804 (2019).

B. Factual And Procedural Background

1. In each of the cases below, the City of Chicago impounded the Debtor's car based on unpaid penalties and fines imposed for violations of the City's laws. City ordinances provide that, for the "purpose of enforcing" its traffic regulations, the City may impound vehicles and hold them until fines and penalties are satisfied. Municipal Code of Chicago, Ill. § 9-100-120(a). Under § 9-100-120, a vehicle may be immobilized if the owner has three or more unpaid violations; 24 hours after immobilization, the vehicle is subject to impoundment. *Id.* § 9-100-120(b), (c). The City has a possessory lien on

impounded vehicles. *Id.* § 9-92-080(f). If impounded vehicles are not claimed within specified time periods, the City may sell or dispose of the vehicles. *Id.* § 9-100-120(f); 625 Ill. Comp. Stat. 5/4-208(a).

In response to the impoundments, each of the Debtors commenced a Chapter 13 bankruptcy case in the U.S. Bankruptcy Court for the Northern District of Illinois and sought the return of his or her car.

Debtor Robbin Fulton's car was impounded in December 2017 because Fulton was discovered to be driving on a suspended license. Pet. App. 4a. The following month, Fulton filed a Chapter 13 petition (commencing her third bankruptcy case). *Id.*; Bankr. N.D. Ill. No. 18-02860, Dkt. 6. At the time of the bankruptcy filing, Fulton owed the City of Chicago $11,831.20 in connection with 54 separate outstanding violations. Pet. App. 4a; Bankr. N.D. Ill. No. 18-02860, Claims Register 1-3. Fulton demanded the return of her car; when the City responded that the Code did not mandate immediate turnover of the car, she sought sanctions for violation of the automatic stay. Pet. App. 4a-5a. Relying on *Thompson* v. *Gen. Motors Acceptance Corp.*, 566 F.3d 699 (7th Cir. 2009), the bankruptcy court concluded that the City's failure to return the car violated the automatic stay. Pet. App. 44a-46a, 49a-51a. In *Thompson*, the Seventh Circuit had held that "passively holding onto an asset … violates section 362(a)(3)," 566 F.3d at 703, and that "the Bankruptcy Code's provisions … require that a creditor immediately return a seized asset in which a debtor has an equity interest to the debtor's estate upon his filing of Chapter 13 bankruptcy," *id.* at

700. The bankruptcy court accordingly ordered the City to return Fulton's car. Pet. App. 5a.[1]

Debtor Jason Scott Howard's car was impounded in August 2017. Pet. App. 7a. Howard had incurred 66 unpaid parking, automated red-light, and speeding tickets and accumulated an outstanding balance of $17,110.80. *Id.*; Bankr. N.D. Ill. No. 17-25141, Claims Register 1-1. Two weeks later, on August 22, 2017, Howard filed a Chapter 13 petition—his third bankruptcy filing in a period of just over 12 months. Pet. App. 7a, 29a-30a. Because of Howard's prior petitions, the automatic stay did not come into effect when the case was filed. 11 U.S.C. § 362(c)(4)(A). But the bankruptcy court granted Howard's motion to impose the stay upon confirmation of his plan. Pet. App. 7a, 29-30a. The bankruptcy court thereafter *sua sponte* ordered the City to show cause why it was not violating the automatic stay by retaining Howard's car. *Id.* 7a, 31a. Ultimately, on April 19, 2018, the bankruptcy court held that the City had violated the automatic stay by "fail[ing] to return the vehicle as required by the *Thompson* ruling since this case was filed on August 22, 2017." *Id.* 40a-41a. It imposed sanctions upon the City of fifty dollars per day. *Id.* 41a.[2]

Debtor George Peake's vehicle was immobilized and subsequently impounded in June 2018 because Peake had failed to pay fines associated with 21 violations of the Chicago Municipal Code. Pet. App. 6a, 64a;

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[1] By order dated August 28, 2019, Fulton's bankruptcy case was dismissed on the trustee's motion for failure to make plan payments. Bankr. N.D. Ill. No. 18-02860, Dkt. 121.

[2] By order dated May 21, 2018, Howard's bankruptcy case was dismissed on the trustee's motion for failure to make plan payments. Bankr. N.D. Ill. No. 17-25141, Dkt. 87.

Bankr. N.D. Ill. No. 18-16544, Dkt. 16-4, Ex. D. A week later, Peake filed a Chapter 13 bankruptcy petition. Pet. App. 6a. The City asserted a claim in Peake's bankruptcy case for $5,393.27. *Id.* Peake sought turnover of the car and sanctions against the City. *Id.* The bankruptcy court found that the City's retention of the vehicle after the bankruptcy filing violated the automatic stay under *Thompson* and ordered the car returned. *Id.* 6a, 64a-67a, 100a. The court imposed sanctions of "$100 per day from August 17 through August 22 and $500 per day thereafter until the City returned [the] vehicle." *Id.* 6a.

Debtor Timothy Shannon's vehicle was impounded in January 2018 because of unpaid parking tickets and three speeding violations, and because Shannon drove the car on a suspended license. Pet. App. 5a, 146a. The following month, Shannon filed a Chapter 13 bankruptcy petition. *Id.* 5a. As of the petition date, Shannon had incurred fines payable to the City of Chicago for 26 separate violations of its Municipal Code. *Id.* 146a; Bankr. N.D. Ill. No. 18-04116, Dkt. 33-2, Ex. B. In June 2018, Shannon moved for sanctions, alleging that the City's failure to return his car to him violated the automatic stay. Pet. App. 5a-6a. The bankruptcy court held that the City violated § 362(a)(3) under *Thompson* and granted Shannon's motion, ordering the return of his vehicle. *Id.* 6a, 109a-113a, 155a.

2. In each of the four cases, the court of appeals granted the City's petition for direct appeal from the bankruptcy court pursuant to 28 U.S.C. § 158(d). All

four cases were consolidated on appeal. The court of appeals affirmed the bankruptcy courts' judgments.[3]

Adhering to circuit precedent under *Thompson*, the court of appeals held that the passive retention of property in which the estate has an interest is an "act to … exercise control" over the property, in violation of the automatic stay. Pet. App. 8a-10a, 12a (citing *Thompson*, 566 F.3d at 700, 702). In the court of appeals' view, the automatic stay operates as a mandatory injunction affirmatively requiring the City to turn over a debtor's vehicle immediately upon the filing of a bankruptcy petition. The debtor need not bring an action for turnover under § 542(a) or provide adequate protection of the City's security interest; the City must give the car back to the debtor before it can seek a judicial determination of its turnover obligation or adequate protection of its interest. Pet. App. 10a. The City therefore "violated the automatic stay pursuant to

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[3] Contrary to the court of appeals' suggestion, the City's failure to turn over the vehicles to the Debtors immediately upon their bankruptcy filings did not reflect a belief that it was entitled to "ignore the Bankruptcy Code[]" or the court's interpretation of it. Pet. App. 2a. Although the Seventh Circuit resolved the question presented here in *Thompson*, 566 F.3d 699, the City was not a party to *Thompson*, and it was required to litigate the issue in the lower courts to preserve it for this Court's review. *See, e.g.*, *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (Court "ordinarily will not decide questions not raised or litigated in the lower courts"). Moreover, lower courts within the Seventh Circuit had held that the City's retention of a debtor's vehicle was authorized by the exception to the automatic stay set forth in 11 U.S.C. § 362(b)(3). *See In re Avila*, 566 B.R. 558 (Bankr. N.D. Ill. 2017); *City of Chicago* v. *Kennedy*, 2018 WL 2087453 (N.D. Ill. May 4, 2018). The Seventh Circuit ultimately rejected that argument (Pet. App. 17a-27a), and that aspect of its decision is not presented for review here.

§ 362(a)(3) by retaining possession of the debtors' vehicles after they declared bankruptcy." *Id.* 12a.

SUMMARY OF ARGUMENT

I. The text, purpose and history of the automatic stay all confirm that it is a "stay," a negative injunction that halts collection activity and preserves the status quo. Section 362(a)(3) "stay[s]" post-petition "acts" to exercise control over property of the estate; it does not require creditors to take affirmative steps to undo lawful actions taken pre-petition. That reading accords with the automatic stay's purpose: to stop creditors' debt-collection efforts and preserve the status quo existing on the petition date, thereby ensuring that the estate is not dismembered by creditors seeking to collect their individual claims against the debtor while the bankruptcy case is pending.

The history of the automatic-stay provision confirms that reading. The parties agree that long-settled bankruptcy law permitted a creditor to retain possession of repossessed or impounded property pending the outcome of a turnover proceeding. And the 1984 addition of language staying acts to "exercise control" over estate property merely clarified that creditors were stayed from taking acts to "control" intangible property just as they were stayed from taking acts to "obtain possession" of tangible property. There is no basis for reading the 1984 amendment as overturning well-established bankruptcy law.

II. The Bankruptcy Code contains a separate statutory provision that permits the debtor or trustee to marshal property of the estate—§ 542(a)'s turnover authority. Reading the automatic stay to require creditors to turn over property in which the estate has an

interest immediately upon the petition date or face sanctions would render § 542(a) surplusage. And it would nullify the protections the Bankruptcy Code's turnover process affords creditors, including the ability to raise defenses to turnover and obtain adequate protection of their interests in the property before relinquishing possession. Indeed, this Court has already held, in *Citizens Bank of Maryland* v. *Strumpf*, 516 U.S. 16 (1995), that § 362(a)(3) should not be read to eviscerate the protections afforded creditors under a closely analogous turnover provision in § 542(b). The same logic compels reversal here.

III. The general Bankruptcy Code policy promoting reorganization or a debtor's "fresh start" does not justify reading into § 362(a)(3) an affirmative turnover obligation that its text and purpose do not support. Dispensing with the need to file turnover proceedings might be better for debtors, but that provides no basis for disregarding the statutory requirements that Congress provided to protect creditors' interests in property when debtors seek to avail themselves of the Bankruptcy Code's benefits.

ARGUMENT

I. A CREDITOR DOES NOT VIOLATE THE AUTOMATIC STAY BY RETAINING POSSESSION OF PROPERTY LAWFULLY OBTAINED BEFORE BANKRUPTCY

The court of appeals' holding that a creditor violates the automatic stay by passively retaining property lawfully repossessed or impounded before bankruptcy contravenes the text and context of the Bankruptcy Code's automatic stay provisions. A "stay" *bars* parties from taking action that alters the status quo; it does not *require* them to take such action. And the automatic

stay, in particular, is designed to freeze in place the positions of the debtor and creditors as of the day the bankruptcy petition is filed.

The parties agree that, before 1984, that was just what § 362(a)(3) did: A creditor who lawfully obtained possession of its collateral from the debtor before bankruptcy was not required by the automatic stay to hand the collateral back without any process or protection for the creditor's interest in the collateral. Rather, the automatic stay simply barred creditors who had *not* obtained possession of their collateral before bankruptcy from attempting to do so in bankruptcy. The Debtors' contention that technical amendments adding the phrase "exercise control" somehow upended the basic function of the automatic stay, turning it from a stay into a mandatory injunction, finds no support in the Bankruptcy Code's text, its history, or common sense.

A. Section 362(a)(3)'s Plain Text Stays Acts That Alter The Status Quo As Of The Petition Date; It Does Not Require Such Acts

We "begin[] with the language of the statute itself." *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 241 (1989). The Bankruptcy Code provides that "a [bankruptcy] petition … operates as a stay" of "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." 11 U.S.C. § 362(a)(3).

In concluding that the City had violated this provision by retaining possession of the Debtors' cars, the Seventh Circuit focused almost entirely on the words "exercise control." Pet. App. 8a-9a; *Thompson* v. *General Motors Acceptance Corp.*, 566 F.3d 699, 702 (7th Cir. 2009). The court looked to a dictionary definition of

"control"—"to exercise restraining or directing influence over" or "to have power over"—and reasoned that "[h]olding onto an asset [and] refusing to return it" fit within the definition. *Thompson*, 566 F.3d at 702.

That analysis might make sense if the Bankruptcy Code provided that "creditors may not exercise control over property of the estate." But it does not. Rather, it carefully provides that a petition "operates as a *stay*" of "any *act* to obtain possession of … or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). Those words are key in determining the scope of the automatic stay. And because the Bankruptcy Code does not define "stay" or "act," they have their ordinary meaning. *See, e.g.*, *Hamilton* v. *Lanning*, 560 U.S. 505, 513 (2010).

In both legal parlance and ordinary English, "stay" means the "halting" or "bringing to a stop" of a proceeding or activity. *See In re Denby-Peterson*, 941 F.3d 115, 125 (3d Cir. 2019); *Black's Law Dictionary* 1709 (11th ed. 2019) (defining "stay" as "[t]he postponement or halting of a proceeding"); *Webster's Third New International Dictionary* 2231 (1993) (defining the noun "stay" as "a bringing to a stop," "the action of halting," and "the state of being stopped"). Indeed, that is precisely how this Court and Congress have previously described the automatic stay. *See* Slip Op. 6, *Ritzen Grp., Inc.* v. *Jackson Masonry, LLC*, No. 18-938 (U.S. Jan. 14, 2020) (the stay "halts efforts to collect prepetition debts"); H.R. Rep. No. 95-595, at 340 (the automatic stay "stops all collection efforts, all harassment, and all foreclosure actions").

The word "stay" is most commonly used in the law to mean a court's temporary suspension of proceedings or of the effectiveness of an order or judgment under

review. *See Nken* v. *Holder*, 556 U.S. 418, 428-429 (2009). The automatic stay is different only in that it stays parties as well as courts from acting, and thus functions as a prohibitory injunction. *See id.* (distinguishing a "stay" of proceedings from an "injunction," while acknowledging that a stay and a prohibitory injunction can have the same "practical effect"). But the essential function of a "stay" is the same in both contexts: It temporarily "'suspends … alteration of the status quo'" by "preventing some action before the legality of that action has been conclusively determined." *Id.* A stay freezes the parties' positions during judicial proceedings so that the parties' rights and obligations can be determined. It does not "'alter[] the legal status quo'" as a mandatory injunction would. *Id.* at 429.[4]

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[4] The distinction between prohibitory and mandatory injunctions—that is, between ordering parties not to act and ordering them to act—is well established. Simply put, "[p]rohibitory injunctions maintain the status quo pending resolution of the case; mandatory injunctions alter it." *North Am. Soccer League, LLC* v. *U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 36 (2d Cir. 2018); *see also, e.g.*, *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479, 484 (1996) (construing federal environmental statute to authorize issuance of either a "mandatory injunction, *i.e.*, one that orders a responsible party to 'take action' by attending to the cleanup … of toxic waste, or a prohibitory injunction, *i.e.*, one that 'restrains' a responsible party from further violating [the statute]" (quoting 42 U.S.C. § 6972(a)(1)(B)); *Ex parte Young*, 209 U.S. 123, 159 (1908) (permitting a negative injunction against state official that imposes "no affirmative action of any nature" but simply prohibits official "from doing an act which he had no legal right to do"); *Marlyn Nutraceuticals, Inc.* v. *Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-879 (9th Cir. 2009) ("A prohibitory injunction prohibits a party from taking action" and "freezes the positions of the parties"; a "mandatory injunction orders a responsible party to take action" and "goes well beyond simply maintaining the status quo" (internal quotation marks omitted)).

"'Act', in turn, commonly means to 'take action' or 'do something.'" *In re Cowen*, 849 F.3d 943, 949 (10th Cir. 2017) (quoting *New Oxford American Dictionary* 15 (3d ed. 2010)). "'[P]assively holding on to an asset'" that the creditor already had in its possession on the petition date is not an "act" in everyday speech or within the meaning of § 362(a)(3). *Id.*; *Denby-Peterson*, 941 F.3d at 125. "[T]he distinction between doing something and doing nothing [was] not … lost" on Congress—a body of "'practical statesmen,' not metaphysical philosophers"—when it drafted the Bankruptcy Code. *National Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 555 (2012) (Roberts, C.J., opinion).

The surrounding text in § 362(a)(3) makes clear that "act" in § 362(a)(3) has its ordinary meaning and does not encompass the failure to act. *See Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) (interpreting statutory language requires examination of "the specific context in which th[e] language is used"). Section 362(a)(3) operates as a "*stay*" of an "act." And, again, a "stay" "prevent[s]" a future act that would "*alter*[] the status quo." *Nken*, 556 U.S. at 429 (emphasis added). But retaining property lawfully repossessed prepetition *preserves* the status quo. Accordingly, even on the Debtors' view that passive possession can be characterized as an "act," it is not the type of act that can sensibly be subject to a "stay."

Section 362(a)(3)'s "stay" of "any act … to exercise control over property of the estate" thus bars creditors "from *doing* something" after the petition date "to exercise control over the estate's property." *Cowen*, 849 F.3d at 949. It stops a creditor from taking a "post-petition affirmative act" that would improve the position the creditor held on the petition date, *Denby-Peterson*, 941 F.3d at 125-126, such as an act "to repos-

sess or liquidate collateral" or "to terminate a lease," *Ritzen*, Slip Op. at 10. *See United States* v. *Inslaw, Inc.*, 932 F.2d 1467, 1474 (D.C. Cir. 1991) ("The automatic stay … serves as a restraint only on acts to gain possession or control over property of the estate. Nowhere in its language is there a hint that it creates an affirmative duty[.]"). The Seventh Circuit's and the Debtors' contrary reading—under which the automatic stay *requires* a creditor to take an act that *worsens* the position it had on the petition date—contravenes the plain text of the statute.

B. The Debtors' Interpretation Turns The Role Of The Automatic Stay On Its Head

As this Court has recognized, the automatic stay plays a critical role in the bankruptcy process: It "'maintains the status quo and prevents dismemberment of the estate' during the pendency of the bankruptcy case." *Ritzen*, Slip Op. at 6; *see also Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1804 (2019) (the automatic stay "aims to prevent damaging disruptions to the administration of a bankruptcy case in the short run"). The Debtors' interpretation of § 362(a)(3) as requiring creditors to *change* the status quo cannot be reconciled with that core function of the automatic stay or with basic bankruptcy principles.

Bankruptcy is designed to marshal the debtor's assets and address the debtor's liabilities in a single centralized proceeding, ensuring that the estate's value can be maximized and divided among the debtor's creditors in an orderly and fair manner. Because that process takes time, bankruptcy needs a "mechanism to preserve the status quo while we sort out the affairs of the debtor. This is the purpose of § 362 and the automatic stay." Baird, *Elements of Bankruptcy* 195 (6th

ed. 2014). Accordingly, once a bankruptcy petition is filed, the automatic stay halts creditors from taking any further action to collect their claims or liquidate property of the estate, thereby "effect[ing] an immediate freeze of the *status quo*." *Hillis Motors, Inc.* v. *Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 585 (9th Cir. 1993); *see also Checkers Drive-In Rests., Inc.* v. *Commissioner of Patents & Trademarks*, 51 F.3d 1078, 1083 (D.C. Cir. 1995) ("Congress included section 362(a) in the Bankruptcy Code to ensure the preservation of the status quo between a debtor and its creditors.").[5]

As the Senate Report on the legislation that resulted in the 1978 Bankruptcy Code explained: "[The automatic stay] gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions." S. Rep. No. 95-989, at 54. "The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors." *Id.* at 49. The stay prevents that harm by freezing in place the state of affairs as of the commencement of the bankruptcy case, permitting "an orderly … procedure under which all creditors are treated equally." *Id.*; H.R. Rep. No. 95-595, at 340 (same); Brubaker, *Turnover, Adequate Protection and the Automatic Stay: A Reply to Judge Wedoff*, 38 Bankr. L. Letter No. 11, at 9 (Nov. 2018) (*Turnover Part III*).

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[5] *Accord In re Dukes*, 909 F.3d 1306, 1321 (11th Cir. 2018); *Hillis Motors, Inc.* v. *Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 585 (9th Cir. 1993); *In re Larson*, 979 F.2d 625, 627 (8th Cir. 1992); *ICC* v. *Holmes Transp., Inc.*, 931 F.2d 984, 987 (1st Cir. 1991); *In re Morton*, 866 F.2d 561, 564 (2d Cir. 1989).

Section 362(a)(3), in particular, protects the estate that is created when a bankruptcy petition is filed, which includes "all legal or equitable interests of the debtor in property" as of the petition date, 11 U.S.C. § 541(a)(1). Once the petition has been filed, the estate has been created, and the automatic stay takes effect, both prepetition and postpetition creditors are stayed from seizing estate property, placing a lien on it, or otherwise attempting to use it to satisfy or secure their claims. Section 362(a)(3) thus "prevent[s] dismemberment of the estate" and ensures that "[a]ny distribution of property must be by the trustee after he has had an opportunity to familiarize himself with the various rights and interests involved." S. Rep. No. 95-989, at 50; *see also* H.R. Rep. No. 95-595, at 341 (same). In other words, § 362(a)(3) "preserv[es] the bankrupt's estate pending orderly distribution by a trustee" and "make[s] sure that creditors do not destroy the bankrupt estate in their scramble for relief." *Checkers*, 51 F.3d at 1082; *see also* 2 *Norton Bankr. L. & Prac.* § 43:7 (3d ed. 2019) (same).

But neither the filing of a bankruptcy petition nor the automatic stay that accompanies it expands a debtor's rights vis-à-vis creditors beyond what the debtor had before the bankruptcy filing. It is a core bankruptcy principle that "[t]he estate cannot possess anything more than the debtor itself did outside bankruptcy." *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1663 (2019). "Whatever 'limitations on the debtor's property apply outside of bankruptcy apply inside of bankruptcy as well. A debtor's property does not shrink by happenstance of bankruptcy, but it does not expand, either.'" *Id.* (quoting Baird, *Elements of Bankruptcy* 97 (brackets omitted)).

Accordingly, if a creditor lawfully repossesses or impounds its collateral before bankruptcy—so that the creditor, not the debtor, had the lawful right to possession of the property on the petition date—the automatic stay cannot render the creditor's possession of the collateral unlawful. The stay preserves the status quo by preventing a creditor from taking any postpetition act, such as repossessing or foreclosing on property, that would better the creditor's position compared to what it had on the petition date. But the stay emphatically does not require a creditor to take affirmative action to undo its lawful exercise of its rights before bankruptcy, thereby changing the status quo and worsening the position it had on the petition date. "The automatic stay … serves as a restraint only on acts to gain possession or control over property of the estate." *Inslaw*, 932 F.2d at 1474. Moreover, it "applies only to acts taken *after* the petition is filed." *Id.* "Nowhere in its language is there a hint that it creates an affirmative duty to remedy past acts." *Id.*

As discussed further below, *see infra* Part II, there *is* a way for the estate to recover collateral that a secured creditor lawfully repossessed prepetition, if the debtor can use, sell, or lease that property during the bankruptcy case. The debtor can bring suit under § 542, the Bankruptcy Code's turnover provision, and in some circumstances can compel the creditor to surrender the collateral. Likewise, a trustee can bring certain other property transferred before bankruptcy into the estate by bringing suit to invalidate a preferential payment or fraudulent conveyance. *See* 11 U.S.C. §§ 544, 547, 548. But all of these provisions for bringing property into the estate are subject to strict procedural and substantive limitations, designed to protect creditors' interests in such property. *See id.* §§ 542(a), (c)-

(d), 544(b), 547(b)-(c), 548(a), (c); *Mission*, 139 S. Ct. at 1663. And achieving the objectives of these provisions is outside the ambit of the automatic stay, which functions to preserve the debtor's rights as of the filing of the petition, not to expand them.

C. The Automatic Stay's History Confirms That § 362(a)(3) Does Not Compel Creditors To Turn Over Lawfully Repossessed Property

The history of the automatic stay provision is also instructive in determining the scope of present-day § 362(a)(3). The parties agree that for decades, before and after the enactment of the Bankruptcy Code, the stay did *not* require creditors to return property that was repossessed prepetition. Debtors contend that changed in 1984, when Congress amended § 362(a)(3) to stay not only "any act to obtain possession of property of the estate," but also "any act … *to exercise control* over property of the estate." The addition of the "exercise control" language, they argue, fundamentally changed the automatic stay, turning it from a status-quo-preserving bar on future seizures of property into a mandatory injunction requiring creditors to surrender property already lawfully in their possession, without any process and on pain of sanctions. But the long-established function of the automatic stay, and the lack of any indication that Congress believed the 1984 amendment worked such a significant change, refute the Debtors' interpretation.

Well before enactment of the Bankruptcy Code, pre-Code law recognized bankruptcy courts' power to enter stays of lawsuits and other creditor actions to "main[tain] … the status quo" during bankruptcy proceedings. *Continental Ill. Nat'l Bank & Tr. Co.* v. *Chicago, Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 675-679

(1935) (upholding injunction entered under the Bankruptcy Act of 1898 restraining creditors from selling collateral during reorganization efforts). During the 1970s, the scope of the bankruptcy stay was broadened and the Federal Rules of Bankruptcy Procedure made it "automatic" in many instances, taking effect when a petition was filed without the need for a court order. *See* Kennedy, *The Automatic Stay in Bankruptcy*, 11 U. Mich. J. L. Reform 175, 177-178, 182-184 (1978). But the purpose of the stay remained the same: "to maintain the status quo … by restraining other proceedings which would impede the reorganization effort by bringing about the liquidation of the debtor's property." *In re Stanndco Developers, Inc.*, 534 F.2d 1050, 1052 & n.3 (2d Cir. 1976); *see also In re Decker*, 465 F.2d 294, 296-297 (3d Cir. 1972) ("[T]he stays authorized by [the Bankruptcy Act] are in the nature of temporary injunctions designed to maintain the status quo."); 14 *Collier on Bankruptcy* ¶ 11-44.02 (14th ed.) (explaining that the automatic stay "protects the debtor against harassment and possible impairment of the … rehabilitation process by adverse disposition of its property before the necessary steps can be taken to obtain … relief").

In 1978, the new Bankruptcy Code codified and expanded the existing automatic stay. As originally enacted, § 362(a)(3) of the Code stayed "any act to obtain possession of property of the estate or of property from the estate." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 362, 92 Stat. 2549, 2570. That version of § 362(a)(3), barring only postpetition "act[s] to obtain possession" of estate property, undisputedly did not require creditors who lawfully obtained possession of estate property prepetition to surrender that property.

Thus, under the Bankruptcy Code as enacted in 1978, nothing in § 362 could be construed to impose a turnover obligation. And it was generally understood that while § 542 of the Code empowered a debtor or trustee to seek turnover of property that the estate could use, sell or lease, creditors were not required to turn over such property as soon as the petition was filed or face sanctions. Rather, "turnover could be refused and the creditor could raise defenses to turnover before being required to relinquish possession." *In re Hall*, 502 B.R. 650, 664 (Bankr. D.D.C. 2014); Brubaker, *Turnover Part III*, 38 Bankr. L. Letter No. 11 at 2-3. As the Debtors' counsel has put it, "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)." Wedoff, *The Automatic Stay Under § 362(a)(3)—One More Time*, 38 Bankr. L. Letter No. 7 at 2 (July 2018).

In 1984, Congress enacted a number of technical and clarifying amendments to the Code. One such amendment added to § 362(a)(3) the language on which the Debtors rely, barring "any act to … exercise control over property of the estate." Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 441(a)(2), 98 Stat. 333, 371. The Debtors contend, and the Seventh Circuit held, that the 1984 amendment effected a sea change in long-settled law, requiring creditors to turn over collateral in their possession to the debtor or trustee immediately upon the filing of the bankruptcy case or else face sanctions. Pet. App. 10a; *Thompson*, 566 F.3d at 702-703. That argument fails.

As this Court has repeatedly held, it "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Cohen* v. *de la Cruz*, 523 U.S. 213, 221 (1998); *see also*, *e.g.*, *Hall* v. *United States*, 566 U.S. 506, 518 (2012) (holding 2005 Bankruptcy Code amendment did not "disrupt settled Chapter 13 practices"); *Hamilton*, 560 U.S. at 515-517 (same) ("pre-[amendment] bankruptcy practice is telling"; "we would expect that, had Congress intended" a substantive change, "Congress would have said so expressly"); *Travelers Cas. & Sur. Co. of Am.* v. *Pacific Gas & Elec. Co.*, 549 U.S. 443, 453-454 (2007) (holding Bankruptcy Code provision did not overturn pre-Code law).

No such clear indication—indeed, no indication at all—is present here. To the contrary, there is ample evidence that the 1984 amendments to § 362 were intended to be clarifying rather than substantive. The "exercise control" language originated in a bill entitled "An Act to Correct Technical Errors, Clarify and Make Minor Substantive Changes to Public Law 95-598 (the Bankruptcy Reform Act of 1978)." H.R. Rep. No. 96-1195, at 1, 52 (1980); Brubaker, *Turnover Part III*, 38 Bankr. L. Letter No. 11 at 5-6. The original House Report explained that the bill made changes where "the treatment of a subject in the Bankruptcy Reform Act was found to be incomplete; or [] there was overlooked some minor yet relevant matter." H.R. Rep. No. 96-1195, at 2. Substantively, however, "[e]very effort" was made "to maintain existing policy intact." *Id.* The legislative history specifically addressing the changes to § 362(a)(3) was cursory, doing little more than repeating the language of the amendment. *Id.* at 10.

Just as in *Cohen*, which also addressed one of the technical amendments in the 1984 Act, "the change to

the language" of §362(a)(3) "in no way signals an intention" to alter established law in the dramatic way the Debtors claim. 523 U.S. at 221. Had Congress intended, in the face of decades of contrary practice, to require a creditor to turn over property in its possession as soon as a bankruptcy case was filed—regardless of the creditor's defenses or the debtor's ability to provide adequate protection—"one would expect Congress to have made [its intent] unmistakably clear." *Id.* at 222.

What is even more implausible is that, according to the Debtors, Congress instituted this new turnover requirement not by amending the *turnover* provisions of the Bankruptcy Code but by amending the *automatic stay*, a provision that before 1984 was uniformly understood to have nothing to do with turnover. And this sweeping change was made not through a clear statement of the secured creditor's new duty to turn over estate property immediately, but instead through an oblique reference to "exercising control" over such property. That is simply not credible. "If Congress had meant to add an affirmative obligation—to the automatic *stay* provision no less, as opposed to the *turnover* provision—to turn over property belonging to the estate, it would have done so explicitly." *Cowen*, 849 F.3d at 950.

In addition, the Debtors' reading—under which possessing property of the estate is an "act to exercise control" over that property—would effectively render the "obtain possession" language surplusage, in violation of basic canons of statutory interpretation. *See, e.g.*, *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001). That would be especially odd here, where the stay of acts to obtain possession of estate property is the core of the statutory provision and the "exercise control" language is a later addition. *See id.* ("We are especially unwill-

ing" to treat a statutory term as surplusage "when the term occupies so pivotal a place in the statutory scheme[.]"). If "acts to exercise control" include merely being in possession of property, why include the "obtain possession" language at all, since affirmative actions to take possession of property would already be covered by the "exercise control" language?

There is a much more natural explanation for the addition of the "exercise control" language to § 362(a)(3). The legislative history of the original provision enacted in 1978—along with the rapid development of commercial law governing intangible property rights—explains why § 362(a)(3) needed clarification. That provision, the 1978 Senate Report explained, was intended to protect "property over which the estate has *control or possession*." S. Rep. No. 95-959, at 50 (1977) (emphasis added). As originally enacted, however, § 362(a)(3) stayed only acts to obtain "possession," without mentioning "control." The 1984 amendment corrected that apparent oversight, clarifying that § 362(a)(3) stays acts to exercise "control" over property even where the creditor does not obtain "possession" of it.

That clarification ensured that the stay protects property of the estate from dismemberment by postpetition acts that improve a creditor's position vis-a-vis estate property but are not readily characterized as "obtaining possession" of property. For instance, "a creditor in possession who improperly sells property belonging to the estate" could not easily be described as "obtaining possession" of property—the creditor has already obtained possession before bankruptcy—but it is certainly exercising control over that property. *Cowen*, 849 F.3d at 950. Likewise, intangible property rights—such as causes of action, contract rights, and

intellectual property—cannot be physically "possessed." The addition of the "exercise control" language ensured that the stay prevents creditors from taking similar actions against such intangible interests. *Id.*; *see also* Brubaker, *Turnover Part III*, 38 Bankr. L. Letter No. 11 at 4-5 & nn.23-28 (§ 362(a)(3)'s language "suggests a distinction between physical 'possession' of things capable of physical possession … and 'control' of intangible property not capable of physical possession").[6]

Indeed, § 362(a)(3)'s stay of acts to "exercise control" over property of the estate has been held to protect a wide range of intangible interests from actions that might otherwise fall outside the reach of the bar on acts to "obtain possession" of estate property. *See, e.g.*, *In re Prudential Lines Inc.*, 928 F.2d 565, 574 (2d Cir. 1991) (action to eliminate debtor's tax benefits); *Hillis Motors*, 997 F.2d at 585-586, 590 (action to dissolve debtor's corporate charter); *In re Securities Investor Protection Corp.*, 460 B.R. 106, 114 (Bankr. S.D.N.Y.

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[6] At the time the relevant language was enacted in 1978 and 1984, it was widely recognized that the concept of "possession" had become inadequate to address many forms of intangible rights that were becoming increasingly common. *See, e.g.*, Coogan, *Article 9—An Agenda for the Next Decade*, 87 Yale L.J. 1012, 1045-1046 (1978) (noting that growth of intangible rights in commercial affairs was "jeopardiz[ing] old customs … depend[ent] on 'possession[,]' an idea that presupposes the existence of something tangible to possess"); 1 Gilmore, *Security Interests in Personal Property* § 14.1, at 439 (1965) ("[P]ossession is a meaningless concept when applied to an intangible claim."). Commercial practices that had emerged to provide the functional equivalent of "possession" for intangible rights were ultimately codified in the 1990s revisions to the Uniform Commercial Code, which explicitly distinguishes between "possession" of tangible property and "control" of certain intangible rights. *See, e.g.*, U.C.C. §§ 9-313, 9-314; *id.* § 9-105 cmt. 2; *id.* § 9-603 Reporter's Note (Oct. 1992 draft).

2011) (action to usurp estate's cause of action); *In re Albion Disposal, Inc.*, 217 B.R. 394, 407-408 (W.D.N.Y. 1997) (action to terminate debtor's contract rights); *In re Nat'l Cattle Cong., Inc.*, 179 B.R. 588, 597 (Bankr. N.D. Iowa 1995) (action to revoke debtor's gaming license).

In contrast to the Debtors' interpretation, that reading of § 362(a)(3) makes sense of the entire provision, giving distinct meanings to "obtain possession" and "exercise control." It explains Congress's treatment of the amendment as a clarification rather than a significant change. And it comports with the universal understanding of the automatic stay and turnover provisions for many years before 1984, consistent with this Court's admonition that the Bankruptcy Code should not lightly be read to overturn past practice.

II. THE DEBTORS' INTERPRETATION OF § 362(a)(3) WOULD RENDER THE TURNOVER PROVISION SUPERFLUOUS AND DEPRIVE SECURED CREDITORS OF CRITICAL STATUTORY PROTECTIONS

The Seventh Circuit's conclusion is also at odds with the Bankruptcy Code's express inclusion of a provision dealing with the turnover of estate property, 11 U.S.C. § 542. That provision carefully balances the interest in facilitating the reorganization of a corporate debtor or promoting an individual debtor's fresh start with the non-bankruptcy rights and entitlements of creditors. The Seventh Circuit's construction of the automatic stay would sweep aside and render superfluous the careful balance Congress struck in enacting § 542(a).

A. Section 542 Contemplates A Procedure Under Which Creditors May Raise Statutory Defenses To Turnover

Section 542(a) of the Bankruptcy Code permits a debtor to seek turnover of property lawfully obtained by a secured creditor before the petition date. But turnover is not required in all circumstances. Rather, § 542 contains express statutory defenses. For instance, a creditor is not obligated to turn over property where "such property is of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a).

Furthermore, as this Court recognized in *United States* v. *Whiting Pools, Inc.*, one of the "explicit limitations on the reach of § 542(a)" is "that the property be usable under § 363." 462 U.S. 198, 206 & n.12 (1983); 11 U.S.C. § 542(a) (requiring turnover only if the property is "property that the trustee may use, sell, or lease under section 363" of the Bankruptcy Code). And the trustee cannot use property under § 363 unless the creditor is provided "adequate protection" of its interest in the property as a condition to relinquishing possession.

Specifically, § 363 provides that "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." 11 U.S.C. § 363(e). Under this provision, "[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." *Whiting Pools*, 462 U.S. at 204. Thus, a secured creditor is not obligated to turn over property that the trustee proposes to use under § 363

unless, as a condition to turnover, the creditor obtains adequate protection of its interest in the property. *Hall*, 502 B.R. at 659-660; Brubaker, *Turnover, Adequate Protection, and The Automatic Stay (Part II): Who Is 'Exercising Control' Over What?*, 33 Bankr. L. Letter No. 9, at 4-5 (Sept. 2013) (*Turnover Part II*).

Accordingly, if the trustee or debtor demands return of the property in a turnover action, a creditor may respond by raising statutory defenses and asserting its right to receive "adequate protection." 11 U.S.C. §§ 542(a), 363(e); *Denby-Peterson*, 941 F.3d at 128-131; *Hall*, 502 B.R. at 659-661; Brubaker, *Turnover Part II*, 33 Bankr. L. Letter No. 9, at 4-5. In the case of a vehicle in which the creditor holds a security interest, adequate protection may include a requirement that the debtor obtain appropriate insurance. If the value of a creditor's security interest may diminish as a result of the debtor's use of the property, adequate protection may also include cash payments to compensate a secured creditor for that diminution of value. 11 U.S.C. § 361(1).

In these ways, the Bankruptcy Code is careful to compensate the secured creditor for the loss of its possessory interest when the creditor is required to turn over possession of its collateral. Instead of possession, the secured creditor is entitled to adequate protection of all of its interests in property in which the estate also has an interest. *Whiting Pools*, 462 U.S. at 207 ("The Bankruptcy Code provides secured creditors various rights, including the right to adequate protection, and these rights replace the protection afforded by possession."); *see also* Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part I): Origins and Evolution of the Turnover Power*, 33 Bankr. L. Letter No. 8, at 6 (Aug. 2013) (*Turnover Part I*).

In substance, § 542(a) of the Code therefore contemplates a trade. The secured creditor gives up possession, while the estate is required to provide adequate protection that fairly compensates the secured creditor for the loss of possession. A consequence of this structural protection for the rights of creditors is that a secured creditor's obligation to turn over estate property can become judicially enforceable only following a turnover proceeding. That proceeding will not only allow the bankruptcy court to rule on the debtor's entitlement to the property, but will also ensure that the secured creditor receives the adequate protection to which it is entitled in return for relinquishing possession of its collateral. Requiring such property to be turned over immediately after the bankruptcy petition is filed, by contrast, creates the risk that the secured creditor's collateral will be destroyed or damaged before the debtor has taken the necessary steps to protect the secured creditor's interest—an outcome that would frustrate the very purpose of adequate protection. *Hall*, 502 B.R. at 660-661; Brubaker, *Turnover Part II*, 33 Bankr. L. Letter No. 9, at 6-7.

In nonetheless mandating that very outcome, the rule adopted by the Seventh Circuit makes a hash of the Bankruptcy Code's structural protections for secured creditors and disregards established principles of statutory construction. If § 362(a)(3) itself requires immediate turnover of property in which the estate has an interest, § 542's turnover provision would be superfluous. *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 562 (1990) ("express[ing] a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"). And if § 362(a)(3) requires a creditor to turn over property immediately after a bankruptcy filing or

face sanctions, §§ 542(a)'s and 363(e)'s carefully designed protections for creditors to assert defenses to turnover and secure adequate protection for their property rights before relinquishing possession would become meaningless. *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction … is a holistic endeavor" in which a provision's "meaning[] … [should be] compatible with the rest of the law"); *id.* at 371-375 (rejecting reading of § 362 that "contradict[ed] the carefully drawn disposition of" other "provisions … dealing with the rights of secured creditors"); *see also Mission*, 139 S. Ct. at 1663 (rejecting reading of Code's executory-contract provision that would permit debtor effectively to "avoid" a pre-bankruptcy transfer of property under the contract free of the limitations on achieving that result under the Code's "avoidance" provisions).

B. While Section 542 Imposes A Mandatory Duty To Turn Over, It Does Not Operate As An Injunction

Courts that have adopted the approach urged by the Debtors rely in part on the notion that § 542 is "self-executing," compelling the creditor to turn over property "without condition or any further action" by the trustee or debtor to "'commence a [turnover] proceeding or obtain a court order.'" *In re Weber*, 719 F.3d 72, 79 (2d Cir. 2013); *In re Del Mission Ltd.*, 98 F.3d 1147, 1151 (9th Cir. 1996); *In re Knaus*, 889 F.2d 773, 775 (8th Cir. 1989). Because, on this view, a secured creditor's "duty to turn over the property" "arises upon the filing of the bankruptcy petition," these courts have concluded that § 542 works in conjunction with § 362(a)(3) to provide that a creditor's "failure to fulfill this duty … constitutes a prohibited attempt to exer-

cise control over property of the estate." *Knaus*, 889 F.2d at 775; Pet. App. 10a-12a.

That is wrong. "Even if the turnover provision were 'self-executing,' … there is still no textual link between § 542 and § 362." *Cowen*, 849 F.3d at 950.

Moreover, § 542 is not "self-executing." Courts adopting a contrary view cite § 542's language providing that a creditor "shall" deliver property in which the estate has an interest to the trustee. Pet. App.11a; *Thompson*, 566 F.3d at 704; *Del Mission*, 98 F.3d at 1151. But those courts disregard the rest of the statutory language placing "explicit limitations on the reach of § 542(a)." *Whiting Pools*, 462 U.S. at 206 & n.12. "[O]n its face, the turnover provision includes numerous explicit conditions that must be satisfied before a property is subject to turnover." *Denby-Peterson*, 941 F.3d at 129. Those requirements make it evident that the turnover provision cannot be "self-effectuating," but "[i]nstead[] … is effectuated by virtue of judicial action." *Id.* at 130. And "[i]t is only after the bankruptcy court determines whether those requirements are met that the debtor's right to turnover is triggered." *Id.* at 128; *Hall*, 502 B.R. at 655-664; Brubaker, *Turnover Part II*, 33 Bankr. L. Letter No. 9, at 4-5; Brubaker, *Turnover Part I*, 33 Bankr. L. Letter No. 8, at 4-6.

Thus, while § 542 does impose a duty of turnover that is mandatory when the statute's conditions for turnover are met, that duty is enforced like any other statutory obligation, through a judicial proceeding to obtain a court order directing compliance. If the court concludes that an order directing turnover is warranted, and the creditor refuses to comply, the court may exercise the ordinary power of civil contempt to enforce its order. 11 U.S.C. § 105(a) ("The court may is-

sue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); *Taggart*, 139 S. Ct. at 1801 ("Under traditional principles of equity practice, courts have long imposed civil contempt sanctions to 'coerce the defendant into compliance' with [the court's] injunction"); *Cowen*, 849 F.3d at 950.[7]

Indeed, statutes are not ordinarily construed as injunctive commands punishable by contempt. For example, the Freedom of Information Act ("FOIA") provides, similarly to § 542(a), that government agencies "shall" make public specified information, subject to statutory exceptions. 5 U.S.C. § 552(a). But agencies are entitled to assert defenses to disclosure and may withhold information pending a court order determining whether disclosure is required. *See, e.g.*, *U.S. Dep't of Justice* v. *Tax Analysis*, 492 U.S. 136, 142 (1989); *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 45 U.S. 136, 150 (1980).

When Congress intends a statute to operate as an injunction, it uses explicit injunctive language making that intent clear, as with the automatic stay. *See, e.g.*, 11 U.S.C. § 362(a) (petition "operates as a stay"); *see also id.* § 524(a)(2) (bankruptcy discharge "operates as an injunction"); *Taggart*, 139 S. Ct. at 1801 ("the statutes specifying that a discharge order 'operates as an injunction' … bring with them the 'old soil' that has

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[7] *See also, e.g.*, *International Union* v. *Bagwell*, 512 U.S. 821, 826-834 (1994) (discussing history of contempt power); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510-511 (1874) ("The power to punish for contempts is inherent in all courts" and "essential … to the enforcement of the judgments, orders, and writs of the courts[.]").

long governed how courts enforce injunctions").[8] But unlike the automatic stay, § 542(a) contains no such language. *Hall*, 502 B.R. at 656 ("§ 542(a) does not operate as a statutory injunction.").

The Debtors contend that Congress could have inserted the phrase "after entry of a court order" in § 542(a) if it did not intend § 542(a) to be "self-executing." Opp. 17-18. But the same could be said of many Code provisions. Section 548 provides that "[t]he trustee may avoid" certain pre-bankruptcy transfers as fraudulent transfers, with no mention of any requirement for a court order. 11 U.S.C. § 548(a)(1); *see also*, *e.g.*, §§ 544, 545, 547(b), 549(a). Yet a creditor is not obligated to turn over to the trustee immediately upon demand any property that the trustee seeks to avoid as a fraudulent transfer, in the absence of a judicial proceeding and order determining that the property was fraudulently transferred and must be returned.

Indeed, there is ample evidence in the legislative history confirming that Congress did not intend § 542(a) to be "self-executing." In the same 1984 legislation that added § 362(a)(3)'s "exercise control" language, Congress enacted 28 U.S.C. § 157, which gave bankruptcy judges authority to "hear and determine … core proceedings arising under title 11," including "orders to turn over property of the estate." *Id.* § 157(b)(1), (b)(2)(E); Pub. L. No. 98-353, § 104, 98 Stat.

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[8] *See also, e.g*, 15 U.S.C. § 8306(b)(4) ("filing of a petition" for certain relief under Wall Street Transparency and Accountability Act "shall operate as a stay of the order"); 18 U.S.C. § 3626(b), (e)(2) ("motion made" under Prison Litigation Reform Act to terminate prospective relief regarding prison conditions "shall operate as a stay" of such relief); 27 U.S.C. § 204(h) ("commencement of proceedings" under Federal Alcohol Administration Act "shall … operate as a stay of the Secretary's order").

333, 336. The House Report for the original 1978 legislation similarly stated that the "[p]rocedure for determining whether an entity must turnover [sic] property of the estate" "will be dealt with by the Rules of Bankruptcy Procedure." H.R. Rep. No. 95-595, at 293, 297 (1977). The Bankruptcy Rules provide that a turnover action must proceed by way of an adversary proceeding commenced by a complaint, Fed. R. Bankr. P. 7001(1), (7), which provides a creditor with the opportunity to assert defenses and its right to adequate protection.

Furthermore, as this Court recognized in *Whiting Pools*, § 542(a) codified "judicial precedent predating the Bankruptcy Code" under which "the bankruptcy court could order the turnover of collateral in the hands of a secured creditor." 462 U.S. at 207-208 & n.16 (citing *Reconstruction Fin. Corp.* v. *Kaplan*, 185 F.2d 791, 796 (1st Cir. 1950)). Under that pre-Code precedent, turnover was a judicially developed procedure, derived from the bankruptcy court's equitable power to protect its jurisdiction over the debtor's property, in which the trustee or debtor-in-possession could petition the court for a turnover order. *Kaplan*, 185 F.2d at 794-797; *see also Maggio* v. *Zeitz*, 333 U.S. 56, 61-64 (1948); McGovern, *Aspects of the Turnover Proceeding in Bankruptcy*, 9 Fordham L. Rev. 313, 313-317 (1940).

Turnover under pre-Code law thus was not a "self-effectuating" obligation arising upon the bankruptcy filing, but rather relief obtained through a turnover order. *Denby-Peterson*, 941 F.3d at 130 n.77; *Hall*, 502 B.R. at 655-657; Brubaker, *Turnover Part I*, 33 Bankr. L. Letter No. 8, at 2-4; 2 *Collier on Bankruptcy* ¶¶ 23.10[1]-[4] (14th ed.). And as this Court observed in discussing § 542's codification of the turnover power, "[n]othing in the legislative history evinces a congressional intent to depart from that practice." *Whiting*

Pools, 462 U.S. at 208; *id.* at 207 & n.16; *United States* v. *Whiting Pools, Inc.*, 674 F.2d 144, 150-155 (2d Cir. 1982) (analyzing legislative history and concluding "§ 542 … was intended to codify *RFC v. Kaplan*"), *aff'd*, 462 U.S. 198 (1983). Section 542 thus "simply provides an express statutory basis for a bankruptcy court to enter an injunctive order compelling turnover of identified property in the possession of a third party." Brubaker, *Turnover Part I*, 33 Bankr. L. Letter No. 8, at 4.

The Debtors accordingly misread *Whiting Pools* in contending that it holds § 542(a) to be "self-executing." Opp. 20. In rejecting the argument that secured creditors are exempted from § 542(a)'s reach, the Court never suggested that the statute requires secured creditors to turn over property *immediately upon the filing*, in the absence of a court order. To the contrary, consistent with its discussion of § 542(a)'s historical roots, *Whiting Pools* stated that "[t]he issue before us is whether § 542(a) … authorized the Bankruptcy Court to subject the IRS to a *turnover order* with respect to the seized property." 462 U.S. at 199 (emphasis added); *see also id.* at 201-202 & n.7 (noting bankruptcy court conditioned turnover on the provision of adequate protection).

Accordingly, § 542(a) is not "self-executing." It entitles creditors to assert defenses to turnover and to secure adequate protection of their interests in their collateral before being ordered to surrender it. The Seventh Circuit's rule reading § 362(a)(3) to require turnover immediately upon the bankruptcy filing does serious damage to that statutory scheme.

C. Reading Section 362(a)(3) To Compel Immediate Turnover Of Property Is Inconsistent With This Court's Decision In *Strumpf*

The Seventh Circuit's decision is also inconsistent with this Court's decision in *Citizens Bank of Maryland* v. *Strumpf*, 516 U.S. 16 (1995).

In *Strumpf*, this Court considered the interplay between the automatic stay and § 542(b) of the Bankruptcy Code. The question was whether a bank that places an administrative freeze on funds in a debtor's bank account during the bankruptcy case, to preserve the bank's ability to set off the bank's claim against the debtor against the funds in the account, violates the automatic stay. *See* 516 U.S. at 17. The Court held that such an administrative freeze did not violate the automatic stay. *Id.* at 21.

As the Court explained, the automatic stay does prohibit a creditor from effecting a setoff of mutually owing obligations. *See Strumpf*, 516 U.S. at 19; *see* 11 U.S.C. § 362(a)(7) (staying "the setoff of any debt owing to the debtor that arose before the commencement of the [bankruptcy] case … against any claim against the debtor"). A creditor that would be entitled to setoff under common law outside bankruptcy must thus obtain relief from the stay to effect such a setoff once the debtor has sought bankruptcy protection.

The bank in *Strumpf* froze the debtor's bank account to permit it to seek stay relief so that it could exercise its setoff rights. The debtor argued that freezing the account was itself a stay violation, and that the bank was under an affirmative obligation to pay the funds in the account to the debtor immediately under § 542(b). That provision, which is very similar to § 542(a), requires an entity that owes a debt that is

property of the estate to pay that debt to the trustee. *See Strumpf*, 516 U.S. at 20; *see* 11 U.S.C. § 542(b).

Like § 542(a), however, § 542(b) permits the third party to assert certain defenses to payment. Specifically, § 542(b) provides that the trustee's right to demand payment does not apply "to the extent" that the party owing money to the estate is entitled to assert setoff as a defense to the estate's claim. This Court accordingly held that reading the automatic stay to require immediate payment of any debt to the estate would "eviscerate" the statutory exceptions to the duty to pay such debts. *Strumpf*, 516 U.S. at 20.

So too here. *Strumpf* refused to "give § 362(a)(3) … an interpretation that would proscribe what § 542(b)'s exception … [was] plainly intended to permit." 516 U.S. at 21 (quotation marks and original brackets omitted). Likewise, § 362(a)(3) should not be interpreted to proscribe what § 542(a) would otherwise permit: a creditor's assertion of defenses to turnover and its right to adequate protection before it surrenders its collateral. The Seventh Circuit's contrary reading of § 362(a)(3) similarly "eviscerate[s]" the statutory protections associated with the turnover obligation.

III. THE "POLICY CONSIDERATIONS" UNDERLYING THE SEVENTH CIRCUIT'S RULE ARE UNPERSUASIVE

As the Tenth Circuit noted in *Cowen*, the "majority rule" adopted by the Seventh Circuit seems driven more by "policy considerations" than by faithful adherence to the statutory text. 849 F.3d at 949-950. Of course, where—as here—the text of the statute is plain, there is no reason for a court to pass judgment on the wisdom of Congress's policy choices. But, in any

event, these "policy considerations" are unpersuasive even on their own terms.

There is no dispute that a trustee or debtor in possession is entitled to recover property in which the estate has an interest, such as a repossessed or impounded car, absent a valid defense to turnover. The question presented here is only *when* turnover must occur: immediately upon the filing of the bankruptcy petition, or after resolution of any disputes and the provision of adequate protection in a turnover proceeding under § 542(a). Indeed, the Debtors have acknowledged as much, asserting that "[w]hat is at stake here … is whether [debtors] must incur filing costs and legal fees to obtain court orders requiring creditors" to turn over property, or whether they may be excused from that obligation because that would promote bankruptcy's "fresh start" policy. Opp. 6.

Reading §§ 362 and 542 in accordance with their text and purpose does not threaten debtors' ability to reorganize or obtain a fresh start. Debtors must simply file turnover proceedings—which courts can and frequently do hear on short notice and decide expeditiously—and can recover their property promptly thereafter. In cases in which the debtor's right to turnover is clear and the debtor can provide adequate protection, the creditor is likely simply to turn over the property without the need for a hearing. And while it may be true that it would be better for debtors if they were relieved of the obligation to file such proceedings (and creditors were thereby stripped of their statutory protections), that does not by itself mean the Bankruptcy Code provides for it. As this Court explained in *Mission*, while the "Code of course aims to make reorganizations possible[] … it does not permit anything and everything that might advance that goal." 139 S. Ct. at 1665.

CONCLUSION

The judgment of the Seventh Circuit should be reversed.

Respectfully submitted.

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STATUTORY ADDENDUM

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11 U.S.C. § 361

§ 361. Adequate protection

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11 U.S.C. § 362

§ 362. Automatic stay

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

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

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)—

(A) of the commencement or continuation of a civil action or proceeding—

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[(5) Repealed. Pub.L. 105-277, Div. I, Title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681-886]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559) under any security agreement or arrangement or oth-

er credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 or section 109(h) of title 49, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of

trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer—

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circum-

stances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property—

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549;

(25) under subsection (a), of—

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for

the secured claim of such authority in the setoff under section 506(a);

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors, if—

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded—

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors if—

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as **required** by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property,

an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e)(1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 in which the debtor is an individual,

the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless—

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended—

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h)(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no long-

er be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)—

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2), after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i) If a case commenced under chapter 7, 11, or 13 is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case

commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

(k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

(l)(1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that—

> **(A)** under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and
>
> **(B)** the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent

of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3)(A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A)—

> **(i)** subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and
>
> **(ii)** the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)—

> **(A)** subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be

required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).

(5)(A) Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify—

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

(C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.

(D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

(m)(1) Except as otherwise provided in this subsection, subsection (b)(23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

(2)(A) If the debtor files with the court an objection to the truth or legal sufficiency of the certification described in subsection (b)(23) and serves such objection upon the lessor, subsection (b)(23) shall not apply, unless ordered to apply by the court under this subsection.

(B) If the debtor files and serves the objection under subparagraph (A), the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied.

(C) If the debtor can demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied, the stay provided under subsection (a)(3) shall remain in effect until the termination of the stay under this section.

(D) If the debtor cannot demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied—

> **(i)** relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to proceed with the eviction; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's certification.

(3) If the debtor fails to file, within 15 days, an objection under paragraph (2)(A)—

(A) subsection (b)(23) shall apply immediately upon such failure and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating such failure.

(n)(1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor—

(A) is a debtor in a small business case pending at the time the petition is filed;

(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business

debtor in good faith and not for the purpose of evading this paragraph.

(2) Paragraph (1) does not apply—

(A) to an involuntary case involving no collusion by the debtor with creditors; or

(B) to the filing of a petition if—

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

(o) The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (27) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

11 U.S.C. § 363

§ 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

> **(A)** such sale or such lease is consistent with such policy; or
>
> **(B)** after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended—

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course

of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section—

(1) in the case of a debtor that is a corporation or trust that is not a moneyed business, commercial corporation, or trust, only in accordance with nonbankruptcy law applicable to the transfer of prop-

erty by a debtor that is such a corporation or trust; and

(2) only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of

this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the

debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

(p) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

11 U.S.C. § 541

§ 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes

entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;

(5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds—

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $6,825[1];

(6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(6) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $6,825[1];

(7) any amount—

(A) withheld by an employer from the wages of employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where—

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b);

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made—

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition; or

(10) funds placed in an account of a qualified ABLE program (as defined in section 529A(b) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds—

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(h) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $6,825[1].

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

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[1] Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

11 U.S.C. § 542

§ 542. Turnover of property to the estate

(a) 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.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to

pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

Federal Rule of Bankruptcy Procedure 7001

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

(1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under §554(b) or §725 of the Code, Rule 2017, or Rule 6002;

(2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, but not a proceeding under Rule 3012 or Rule 4003(d);

(3) a proceeding to obtain approval under §363(h) for the sale of both the interest of the estate and of a co-owner in property;

(4) a proceeding to object to or revoke a discharge, other than an objection to discharge under §§727(a)(8), 1 (a)(9), or 1328(f);

(5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan;

(6) a proceeding to determine the dischargeability of a debt;

(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;

(8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;

(9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or

(10) a proceeding to determine a claim or cause of action removed under 28 U.S.C. §1452.