No. 19-357

IN THE

Supreme Court of the United States

CITY OF CHICAGO, ILLINOIS,

Petitioner,

—v.—

ROBBIN L. FULTON, *et al.*,

Respondents.

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

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

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT.............................. 3

ARGUMENT 6

I. Turnover Under Bankruptcy Code §542(a) Requires a Judicial Determination of Necessary Adequate Protection. 6

A. Section 542(a) Codifies Established Pre-Code Turnover Practice. 6

B. Consistent with Pre-Code Turnover Practice, §542(a) Requires a Judicial Determination of Necessary Adequate Protection as a Condition Precedent to Turnover of Repossessed Collateral....... 8

II. The 1984 Amendment to Bankruptcy Code §362(a)(3) Did Not Repeal §542(a).............. 13

A. The “Exercise Control” Clause of §362(a)(3) Stays Nonpossessory Control of Intangible Property Interests. 17

B. When a Secured Creditor Has Repossessed Collateral Pre-Bankruptcy, Possession Is Not “Property of the Estate” Protected by §362(a)(3). 23

III. The Seventh Circuit's Interpretation of §362(a)(3) Improperly Disregards the Statutory Relationship Between the Automatic Stay and Turnover. 29

IV. Only Acts That Alter the Status Quo Are Stayed by §362(a)(3). 33

CONCLUSION 36

TABLE OF AUTHORITIES

Cases Page(s)

In re 48th St. Steakhouse, Inc.,
835 F.2d 427 (2d Cir. 1987) 25

In re Atl. Bus. & Cmty. Corp.,
901 F.2d 325 (3d Cir. 1990) 25

In re Bernstein,
252 B.R. 846 (Bankr. D.D.C. 2000) 32

In re Billings,
687 Fed. Appx. 163 (3d Cir. 2017) 33

In re Carroll,
903 F.3d 1266 (9th Cir. 1990) 19

Citizens Bank v. Strumpf,
516 U.S. 16 (1995) .... *passim*

Cont'l Ill. Nat'l Bank & Tr. Co. of Chi. v. Chi R.I. & P. Ry. Co.,
294 U.S. 648 (1935) 8

In re Convenient Food Mart No. 144, Inc.,
968 F.2d 592 (6th Cir. 1992) 25

In re Cowen,
849 F.3d 943 (10th Cir. 2017) 23, 34

In re Del Mission Ltd.,
98 F.3d 1147 (9th Cir. 1996) 19

In re Denby-Peterson,
941 F.3d 115 (3d Cir. 2019) 12

Epic Sys. Corp. v. Lewis,
138 S.Ct. 1612 (2018).. 16

In re Fulton,
926 F.3d 916 (7th Cir. 2019) 31

In re Hall,
502 B.R. 650 (Bankr. D.D.C. 2014) 13

Hawaii v. Office of Hawaiian Affairs,
556 U.S. 163 (2009)... 16

Hui v. Castaneda,
559 U.S. 799 (2010)...................................... 15-16

In re Knaus,
889 F.2d 773 (8th Cir. 1989) 11

Maggio v. Zeitz,
333 U.S. 56 (1948)... 6, 7

Mission Prod. Holdings, Inc. v. Tempnology, LLC,
139 S.Ct. 1652 (2019).. 26

Mueller v. Nugent,
184 U.S. 1 (1902)... 7

In re Nicole Gas Prod., Ltd.,
916 F.3d 566 (6th Cir. 2018) 19

Oriel v. Russell,
278 U.S. 358 (1929).. 7

Pa. Dep't of Pub. Welfare v. Davenport,
495 U.S. 552 (1990).. 16

Phelps v. United States,
421 U.S. 330 (1975).. 8

In re Purbeck & Assocs.,
12 B.R. 406 (Bankr. D. Conn. 1981)...........13, 30

Reconstruction Fin. Corp. v. Kaplan,
185 F.2d 791 (1st Cir. 1950).............................. 9

In re Sharon,
234 B.R. 676 (B.A.P. 6th Cir. 1999)...........28, 30

Taylor v. Slick,
178 F.3d 698 (3d Cir. 1999)............................. 33

In re TelexFree, LLC,
941 F.3d 576 (1st Cir. 2019)............................ 19

In re Third Ave. Transit Corp.,
198 F.2d 703 (2d Cir. 1952)............................... 9

Thompson v. GMAC,
566 F.3d 699 (7th Cir. 2009) 19, 24, 28, 35

United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.,
484 U.S. 365 (1988).. 16

U.S. Nat'l Bank v. Chase Nat'l Bank,
331 U.S. 28 (1947)... 8

United States v. Fausto,
484 U.S. 439 (1988)... 16

United States v. Inslaw,
932 F.2d 1467 (D.C. Cir. 1996)......................... 34

United States v. Whiting Pools,
462 U.S. 198 (1983)....................................*passim*

United States v. Whiting Pools, Inc.,
674 F.2d 144 (2d Cir. 1982)
(Friendly, C.J.),
aff'd, 462 U.S. 198 (1983) 8, 9

In re WEB2B Payment Sols., Inc.,
488 B.R. 387 (B.A.P. 8th Cir. 2013) 31

In re Weber,
719 F.3d 72 (2d Cir. 2013).........12, 19, 24, 28, 29

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001)... 23

In re Young,
193 B.R. 620 (Bankr. D.D.C. 1996)............12, 30

Statutes

11 U.S.C. § 105(a)...7, 8, 12

11 U.S.C. § 361.. 10

11 U.S.C. § 362(a)(3) .... *passim*

11 U.S.C. § 362(d) 25

11 U.S.C. § 362(k)(1) 35

11 U.S.C. § 363 ....10, 11, 12, 30

11 U.S.C. § 363(e)......................10, 11, 12, 13, 30, 33

11 U.S.C. § 521(a)(4) 7

11 U.S.C. § 541 24

11 U.S.C. § 541(a)(1) 24, 25, 26

11 U.S.C. § 541(a)(3) 27

11 U.S.C. § 541(a)(7) 26

11 U.S.C. §542(a)... *passim*

11 U.S.C. §542(b)... 32

11 U.S.C. § 544(b)(1) 27

11 U.S.C. § 547(b).. 27

11 U.S.C. § 548(a)(1) 27

11 U.S.C. § 553 32

11 U.S.C. § 1107(a).. 3

11 U.S.C. § 1303 3

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §441(a)(2), 98 Stat. 333, 371 14

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 13

Uniform Acts

UCC §9-313(a), 3 U.L.A. 278 (2010) 18

UCC §9-314(a), 2C U.L.A. 235 (2005) 18

Legislative Materials

H.R. Rep. No. 95-595 (1977) 10, 21-22, 25, 26, 33

H.R. Rep. No. 96-1195 (1980) 14, 22

S. Rep. No. 95-989 (1978)......................21, 25, 26, 33

126 Cong. Rec. 31,152, 31,153 (1980) (statement of Sen. DeConcini).....................14, 22

126 Cong. Rec. 31,140, 31,726, 31,765-66 (statement of Sen. Byrd)................................... 22

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Elements of Bankruptcy 97 (6th ed. 2014) 26

Ralph Brubaker,
Turnover, Adequate Protection, and the Automatic Stay (Part I): Origins and Evolution of the Turnover Power,
33 Bkrtcy. L. Ltr. No. 8 (Aug. 2013) 1, 6, 8

Ralph Brubaker,
Turnover, Adequate Protection, and the Automatic Stay (Part II): Who Is "Exercising Control" Over What?,
33 Bkrtcy. L. Ltr. No. 9 (Sept. 2013)............1, 35

Ralph Brubaker,
Turnover, Adequate Protection, and the Automatic Stay: A Reply to Judge Wedoff,
38 Bkrtcy. L. Ltr. No. 11 (Nov. 2018)........*passim*

1 David G. Epstein et al.,
Bankruptcy (1992) 19

1 Grant Gilmore,
Security Interests in Personal Property (1965).. 18

Ronald J. Mann,
Bankruptcy and the U.S. Supreme Court (2017).. 16

Hon. William L. Norton, Jr. et al.,
2 Norton Bankr. L. & Prac. (3d ed. 2015)........ 22

Thomas E. Plank,
The Creditor in Possession Under the Bankruptcy Code: History, Text, and Policy, 59 Md. L. Rev. 253 (2000)............2, 7, 8, 9

Thomas E. Plank,
The Outer Boundaries of the Bankruptcy Estate,
47 Emory L.J. 1193 (1998) 29

Antonin Scalia & Bryan A. Garner,
Reading Law: The Interpretation of Legal Texts (2012) 20

Charles J. Tabb,
Law of Bankruptcy (4th ed. 2016).................2, 35

Eugene R. Wedoff,
The Automatic Stay Under §362(a)(3)—One More Time,
38 Bkrtcy. L. Ltr. No. 7 (July 2018)................. 13

Final Report of the ABI Commission on Consumer Bankruptcy (2019) 35

INTEREST OF *AMICI CURIAE*[1]

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

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

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

[1] Counsel for the parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no party or their counsel made any monetary contribution toward the preparation or submission of this brief.

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

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SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

B. Consistent with Pre-Code Turnover Practice, §542(a) Requires a Judicial Determination of Necessary Adequate Protection as a Condition Precedent to Turnover of Repossessed Collateral.

1. The traditional injunctive turnover power developed alongside limitations on bankruptcy courts' powers to entertain actions against so-called "adverse claimants." *See* Brubaker, *Turnover (Part I)*, *supra*, at 3-4. And a secured creditor who had taken possession of its collateral before the bankruptcy filing was "the archetypal 'adverse claimant' " who was *not* subject to a turnover order. *U.S. v. Whiting Pools, Inc.*, 674 F.2d 144, 148 (2d Cir. 1982) (Friendly, C.J.), *aff'd*, 462 U.S. 198 (1983). *See Phelps v. U.S.*, 421 U.S. 330 (1975). "Generally, a creditor in possession of collateral could liquidate the collateral without interference" from the bankruptcy court. Plank, *supra*, at 266. *See U.S. Nat'l Bank v. Chase Nat'l Bank*, 331 U.S. 28, 33 (1947) (secured creditor "may disregard the bankruptcy proceeding, decline to file a claim and rely solely upon his security if that security is properly and solely in his possession").

2. In *Continental Illinois National Bank & Trust Co. v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648 (1935), this Court adopted a more expansive conception of bankruptcy courts' general power to issue injunctions in reorganization cases, under the statutory predecessor to §105(a). Thereafter, and by extending the reasoning of *Continental Illinois* to turnover orders, the lower courts concluded that in

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§362. Automatic Stay

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

> **(3)** any act to obtain possession of property of the estate or of property from the estate *or to exercise control over property of the estate*[.]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The most sensible interpretation of the term

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

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

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

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

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

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

126 Cong. Rec. 31,153 (1980) (statement of Sen. DeConcini).[6] *See* 2 Norton Bankruptcy Law and Practice §43:7, at 43-30 (Hon. William L. Norton, Jr. & William L. Norton III eds., 3d ed. 2015) (when the "exercise control" clause was added to §362(a)(3) in

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

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

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

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

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

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

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

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

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

Consistent with the "bundle of sticks" concept of property interests, even when a debtor's only bankruptcy-date "interest" in a particular physical thing is *wrongful* possession, courts have held that mere possession is an "interest in property" that becomes property of the debtor's bankruptcy estate under §541(a)(1). Section 362(a)(3), therefore, protects that possessory interest from any "act" to disturb or undo it (by even the rightful owner and possessor) without the permission of the bankruptcy court via §362(d) stay relief. *See, e.g., In re Convenient Food Mart No. 144, Inc.*, 968 F.2d 592, 594 (6th Cir. 1992); *In re Atlantic Business & Community Corp.*, 901 F.2d 325, 328 (3d Cir. 1990); *In re 48th Street Steakhouse, Inc.*, 835 F.2d 427, 430 (2d Cir. 1987).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A secured creditor who merely retains possession of repossessed collateral pending the bankruptcy court's entry of a turnover order is

simply maintaining the status quo. Such retention of possession is, thus, fully consistent with the stay's status-quo function. The Seventh Circuit's interpretation of §362(a)(3), by contrast, transforms the "stay" from a shield into a sword.

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

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

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

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

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

CONCLUSION

The Court should reverse the judgment of the Seventh Circuit.

Respectfully submitted,

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