

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 OF *AMICI CURIAE* NATIONAL
ASSOCIATION OF COUNTIES, NATIONAL LEAGUE
OF CITIES, UNITED STATES CONFERENCE OF
MAYORS, INTERNATIONAL CITY/COUNTY
MANAGEMENT ASSOCIATION, INTERNATIONAL
MUNICIPAL LAWYERS' ASSOCIATION, AND
GOVERNMENT FINANCE OFFICERS
ASSOCIATION, IN SUPPORT OF PETITIONER**

AMANDA KELLAR KARRAS
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION
51 Monroe St., Suite 404
Rockville, MD 20850

SCOTT BURNETT SMITH
Counsel of Record
BRADLEY ARANT BOULT
CUMMINGS LLP
200 Clinton Avenue West
Huntsville, AL 35801
(256) 517-5100
ssmith@bradley.com

Counsel for Amici Curiae
(*Counsel continued on inside cover*)

LISA E. SORONEN
STATE & LOCAL LEGAL CENTER
444 North Capitol Street, N.W
Suite 515
Washington, D.C. 20001

STEPHEN C. PARSLEY
BRADLEY ARANT BOULT
CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, AL 35203

ALEXANDRA E. DUGAN
BRADLEY ARANT BOULT
CUMMINGS LLP
1600 Division St.
Ste. 700
Nashville, TN 37203

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IDENTITY AND INTEREST OF *AMICI CURIAE*¹

The amici curiae are six of the nation's leading local government associations.

The National Association of Counties (“NACo”) is the only national association that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (“NLC”) is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with forty-nine state municipal leagues, NLC is the voice of more than 19,000 American cities, towns, and villages, representing collectively more than 200 million people. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions.

The U.S. Conference of Mayors (“USCM”) is the official nonpartisan organization of all U.S. cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is

¹ Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for amicus curiae made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, amici curiae state that counsel for all parties received notice at least ten days prior to the due date of the intention to file this brief and have consented to the filing of this brief.

represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (“ICMA”) is a nonprofit professional and educational organization of over 12,000 appointed chief executives and assistants, serving cities, counties, towns, and regional entities. ICMA’s mission is to advance professional local government through leadership, management, innovation, and ethics.

The International Municipal Lawyers Association (“IMLA”) is a non-profit, nonpartisan, professional organization consisting of more than 2,500 members. Membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA’s mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before state and federal appellate courts.

The Government Finance Officers Association (“GFOA”) is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government-finance professionals through research, education, and the identification and promotion of best practices. Its more than 19,000 members are dedicated to the sound management of government financial resources.

These amici have a compelling interest in the issues raised in this case. This case implicates the legal avenues available to enforce traffic safety laws after a debtor files for bankruptcy. Impounding automobiles for serious safety violations, and as a last resort after an owner's failure to pay traffic fines, is a widespread practice among local governments. Local governments across the country also share a concern as to how the Bankruptcy Code affects their enforcement of tax, licensing, and other laws.

SUMMARY OF THE ARGUMENT

The decision below held that 11 U.S.C. § 362(a)'s automatic stay requires a local government to immediately release an already impounded vehicle once the vehicle's owner files for bankruptcy. Three other circuits, by contrast, have rejected this conclusion, instead holding that a creditor's passive retention of property does not violate the automatic stay because it is not an "act" to exercise control over estate property. The key difference between these outcomes is that the automatic stay provides no opportunity for a local government to assert defenses or seek an order to protect the value of the vehicle prior to its release. *See* 11 U.S.C. § 362(a). On the other hand, if there is no immediate-release rule, the Bankruptcy Code requires the local government to deliver the vehicle after an adversary proceeding for turnover, where the local government can assert defenses and request protective relief. *See* 11 U.S.C. § 542(a); FED. R. BANKR. P. 7001(1).

The Brief for Petitioner lays out the textual and statutory reasons why this Court should overturn the Seventh Circuit's immediate-release rule. This amicus

brief explains how the issue presented in this case affects nearly 39,000 cities, counties, and towns nationwide.² It further explains why this Court should instead endorse the rule that a bankruptcy petitioner must file an adversary proceeding to obtain the release of a vehicle lawfully held by a state or local government. This rule protects the efficacy of traffic and parking regulations; it also avoids perverse incentives for owners of impounded vehicles to file bankruptcy petitions. Additionally, the brief discusses how similar interests are at stake for other assets held by local municipalities.

This Court has the opportunity to adopt a rule that ensures the safety of America's roads and highways. The amici respectfully urge this Court to hold that the Bankruptcy Code's automatic stay does not require a municipality to release property passively held under state or local law when a person files a bankruptcy petition.

² See U.S. CENSUS BUREAU, *2017 Census of Governments* (Table 2), <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html> (2019).

ARGUMENT

I. Local governments across the country rely on vehicle impoundment to enforce traffic safety laws.

Impoundment for traffic safety violations is a national practice that should not be undermined by an immediate-release rule. For example, in 2018, a total of 14,673 vehicles were impounded by Denver for code violations.³ Milwaukee impounded between 29,000 and 32,000 vehicles annually from 2016 to 2018.⁴ In Boston, the annual number of impounded vehicles ranged from approximately 12,000 to 16,000 for each of the past three years.⁵ Montgomery County, Maryland, tows approximately 18,000 vehicles per year.⁶ These are just four American municipalities. It is safe to say that not just tens of thousands but even several hundreds of thousands of vehicles are subject to impoundment each year in American local governments.

³ Statistics provided by a City of Denver Assistant City Attorney on October 3, 2019, via email. This information is retained on file.

⁴ Statistics provided by the Office of the City Attorney for Milwaukee on October 4, 2019, via email. This information is retained on file.

⁵ Statistics provided by the City of Boston Law Department on October 4, 2019, via email. This information is retained on file.

⁶ Statistics provided by the Office of the County Attorney for Montgomery County on October 10, 2019, via email. This information is retained on file.

Local governments impound vehicles in a variety of situations: when a vehicle is parked in a dangerous or obstructive manner, when a driver fails to comply with insurance and permitting requirements, and when fines and fees go unpaid for a sufficient length of time. A brief overview of several local governments across the nation illustrates the uses of impoundment.

The City of Denver authorizes its police to impound vehicles immediately in a variety of situations, including parking and traffic offenses, abandonment of the vehicle, and lack of a license. D.R.M.C. § 54-811(1)-(16), (18). Denver also permits impoundment as a last resort (following multiple notices and booting of the vehicle) for failure to pay fines for illegal parking or driving without a license plate. D.R.M.C. § 54-811(17), (19). The City of Denver considers all these situations to be “obstructions to traffic or public nuisances,” rather than being motivated by financial benefit. D.R.M.C. § 54-811. No vehicle may be released from impoundment until the storage and impoundment fees are paid.⁷ D.R.M.C. § 54-813.

Texas has statewide regulations permitting all municipalities to impound vehicles in three situations. First, a vehicle will be impounded following multiple violations of state law requiring auto insurance. TEX. TRANSP. CODE § 601.261. The vehicle cannot be released until the owner pays fees and obtains a court order of release. *Id.* § 601.267(1). Second, a vehicle will

⁷ Local governments often contract out the actual towing and impoundment and incur costs associated with these services.

be impounded if it was not registered and is involved in an accident causing injury, death, or property damage over \$500. *Id.* § 601.291. The owner can only obtain the return of the vehicle by paying the cost of impoundment and obtaining a certificate of release from the department. *Id.* § 601.295. Third, impoundment is also authorized for repeatedly failing to pay tolls. *Id.* § 372.112. The toll road operator is required to release the impounded vehicle only after all unpaid tolls, fees, and impoundment-related charges have been paid. *Id.* Maintaining efficient traffic safety laws is particularly critical in such states with significant populations. Texas has approximately 15.4 million registered drivers.⁸

Like Texas, Pennsylvania also has statewide provisions authorizing impoundment. Pennsylvania municipalities can impound a vehicle immediately if the owner fails to pay fines that total \$250 or more and have been imposed for violating registration, permitting, and license plate requirements. 75 PA. STAT. AND CONS. STAT. § 6309.1. The vehicle may be impounded within 24 hours of the fine if the owner fails to pay the amount or agree to an installment plan. *Id.* A vehicle may be impounded immediately if it is being driven without a license or while the operator's driving privileges are suspended. *Id.* § 6309.2(a). Under that subsection, the vehicle will be released only after all fines, towing fees, and storage costs have been paid, and only when proof of valid registration and financial responsibility have been

⁸ U.S. Department of Transportation, Federal Highway Administration, Highway Statistics, DL-201, available at www.fhwa.dot.gov/policyinformation/statistics/2017/.

provided. *Id.* § 6309.2(d). Parking a vehicle on a highway or public property in violation of any local ordinance is another ground for impoundment. *Id.* § 6109(a)(22). These regulations govern nearly 9 million licensed drivers in Pennsylvania.⁹

As seen in the examples above, impoundment is commonly employed to enforce vehicle licensing, registration, and insurance regulations. In each instance, the impoundment is directly correlated to the violation. An immediate-release rule would require release of vehicles impounded for violating these regulations, thereby removing a valuable tool from local governments and undermining the public safety.

Local governments also authorize impoundment where there is evidence of criminal activity. For example, in addition to other bases, the City of SeaTac, Washington authorizes impoundment when there are indications of criminal activity. The vehicle may be impounded where a police officer has information sufficient to form a reasonable belief that the vehicle constitutes evidence of a crime or contains evidence of a crime, if impoundment is reasonably necessary to obtain or preserve evidence. SEATAC MUN. CODE, § 9.20.030(A)(5). Vehicles may also be impounded where the driver was arrested or taken into custody and is physically or mentally incapable or too intoxicated to rationally decide on steps to take to protect the property. *Id.* § 9.20.030(A)(7).

⁹ *Id.*

Impoundment where the driver is under the influence of alcohol or drugs is not unique to SeaTac. According to the Centers for Disease Control and Prevention, many states and local governments also authorize vehicle impoundment in situations where police encounter a driver under the influence of alcohol or drugs.¹⁰ In seven states, the vehicle is impounded for a short period of time, until the driver is no longer intoxicated. Fifteen other states allow a longer period of impoundment based on the severity of the public safety issue.¹¹

Studies have shown impoundment to be effective in preventing repeat DUI offenses. A study on a local impoundment law in Cincinnati, Ohio, found that it reduced recidivism by 40 percent while the vehicle was impounded and by 25 percent for one year after impoundment.¹² Another study, which analyzed the effects of an earlier California law that allowed impoundment of vehicles driven by a person with a suspended or revoked license, concluded that impoundment reduced repeat offenses by approximately 24 percent and crashes by approximately 25 percent (as compared to unlicensed

¹⁰ CENTERS FOR DISEASE CONTROL AND PREVENTION, *Motor Vehicle Safety: Vehicle Impoundment* (2015), <https://www.cdc.gov/motorvehiclesafety/calculator/factsheet/impoundment.html>.

¹¹ *Id.*

¹² Voas, Tippetts, and Taylor, *Temporary vehicle impoundment in Ohio: a replication and confirmation*, ACCID. ANAL. PREV. 1998 Sep.; 30(5):651, 655.

drivers whose vehicles were not impounded).¹³ A rule requiring immediate release of these impounded vehicles would undermine local governments' ability to enforce these traffic safety laws.

Indeed, it is not a stretch to say that the immediate-release rule amounts to a *de facto* preemption of state and local traffic codes. The automatic stay provision would operate to cancel an essential and common mechanism for enforcing traffic codes. Given that traffic codes exist to promote the public safety—one of the core responsibilities of state and local governments—construing the Bankruptcy Code as mandating immediate release of an impounded vehicle without a chance for the impounding authority to respond upsets the balance of federalism.

II. The immediate-release rule adopted by the Seventh Circuit imperils enforcement of traffic safety laws and incentivizes frivolous bankruptcy filings.

A rule that a bankruptcy filing requires immediate release of an impounded vehicle would potentially reverse hundreds of thousands of impoundments conducted every year by local governments, *regardless* of the original reason for impoundment. Therefore, it is crucial to consider how

¹³ Deyoung, DJ, *An evaluation of the specific deterrent effects of vehicle impoundment on suspended, revoked, and unlicensed drivers in California*, ACCID. ANAL. PREV. 1999 Jan-Mar; 31(1-2):45-53.

local and state laws and public safety would be affected if this Court were to affirm the decision below.

In 2018, the Northern District of Illinois—which covers the City of Chicago—saw 17,603 chapter 13 bankruptcy cases filed.¹⁴ This was significantly more than in any other federal district and was likely due to the number of owners filing petitions to obtain the return of impounded cars.¹⁵ Indeed, a 2013 investigation by the *Chicago Tribune* found that hundreds of owners of impounded vehicles had turned to a single scam artist to file fraudulent bankruptcy petitions to recover their vehicles without paying an impoundment fee.¹⁶ In 2016, approximately 3,800 vehicles impounded by Chicago were released in response to chapter 13 bankruptcy petitions.¹⁷ These

¹⁴ See Caseload Statistics Data Tables – *Bankruptcy Cases Filed, Terminated and Pending*, Table F-2. Available at https://www.uscourts.gov/sites/default/files/data_tables/bf_f2_1231_2018.pdf; see also Dugan, Alexandra & Elizabeth R. Brusa, *The City Has My Vehicle. What Now?* Financial Services Perspectives (May 7, 2019), available at <https://www.financialservicesperspectives.com/2019/05/the-city-has-my-vehicle-what-now/>.

¹⁵ *Id.*

¹⁶ Annie Sweeney, *Feds: Bankruptcy scam freed impounded vehicles*, CHICAGO TRIBUNE (Apr. 25, 2013) <https://www.chicagotribune.com/news/ct-xpm-2013-04-25-chi-feds-bankruptcy-scam-freed-impounded-vehicles-20130425-story.html>.

¹⁷ Melissa Sanchez, *Impounded vehicles can't be held after drivers file for bankruptcy, court says*, ABA JOURNAL (July 10, 2019) <http://www.abajournal.com/news/article/chicago-cant-hold-impounded-vehicles-after-drivers-file-for-bankruptcy-court-says/>.

vehicles are returned to the debtor not just in the case of unpaid fines, but also in cases where the vehicle was impounded because the driver did not have insurance, the driver had no license, or some other public safety reason.

Although this wave of bad-faith chapter 13 filings began in Chicago, nothing limits the practice to that city. If this Court were to endorse the immediate-release rule, the doors would open for this practice to spread nationwide.

It is important to note that the alternative rule, endorsed by the Third, Tenth and D.C. Circuits, still leaves an avenue for the debtor to obtain the release of his or her impounded vehicle. Under 11 U.S.C. § 542(a), a debtor is entitled to recover property, including an impounded vehicle, but the debtor must bring an adversary proceeding to obtain release of the property. FED. R. BANKR. P. 7001(1). At that time, the creditor has the opportunity to seek adequate protection of its interest in the property, which is a right under the Bankruptcy Code. 11 U.S.C. § 361. In the context of automobiles, this procedure would allow a judge to require the debtor to maintain sufficient insurance on the vehicle, post a bond, or take other action sufficient to protect the collateral. *Id.* This balances the interest of the debtor in obtaining use of the vehicle against the interest of the local government in ensuring that its interest in the collateral is protected.

An immediate-release rule, however, affords no protection to a local government's interest in an impounded vehicle. As one municipal director of code enforcement stated, "If a vehicle is released to the

debtor before the fees/fines are paid, the city will never see the car or the unpaid fees/fines again.”¹⁸ This outcome would imperil local governments’ ability to enforce traffic safety regulations. If required to immediately release the vehicle, a local government loses the opportunity to appear before a judge and request one of the above-mentioned forms of protection or relief prior to its release. Consequently, its ability to enforce its traffic safety statutes will be significantly hampered.

Two other problems would result from imposing the immediate-release rule on state and local governments. The public is threatened if a debtor immediately obtains the release of vehicles that were impounded for a safety-related violation, such as driving without a license, lacking insurance, or dangerous driving, including while under the influence of drugs or alcohol. If the immediate-release rule applies at all, it applies regardless of the reason that a vehicle was impounded.

Allowing a bankruptcy filing to automatically release an impounded vehicle also creates incentives to abuse the bankruptcy system. The story of Chicago illustrates that bad-faith petitions are likely to be filed solely to avoid paying fines and fees. This strains all parties involved in bankruptcy proceedings—trustees, the U.S. Trustee, judges, and court personnel—even if

¹⁸ Comments provided to IMLA by the City of Denver’s Director of Prosecution and Code Enforcement on September 17, 2019, via email. This information is retained on file.

the petition is quickly abandoned or dismissed.¹⁹ Filing for bankruptcy solely to obtain the release of a vehicle is less likely to occur if the local government will have a chance to assert defenses and request that the bankruptcy court require the debtor to undertake protective measures when the vehicle is released. Thus, requiring an adversary proceeding reduces the burden of inappropriate petitions on local governments and bankruptcy personnel.

III. The immediate-release rule would apply to passively held assets in general and threaten enforcement of other municipal laws.

A final reason for this Court to reject the immediate-release rule is the deleterious effect it has on other municipal laws that use liens for enforcement. Similar policy concerns apply here: construing the automatic stay as requiring the immediate release of assets would undermine the government's ability to enforce tax, licensing, and regulatory laws.

Statutes in all fifty states authorize state and local governments to place liens, attach, or seize personal and real property.²⁰ Ultimately, this process culminates in a sale of the property. Depending upon the state in question, governments can utilize this

¹⁹ Dugan & Brusa, *The City Has My Vehicle. What Now?*, *supra* n.7.

²⁰ For a comprehensive survey of state tax lien provisions, see Taxation: *Collections And Remedies*, 0140 SURVEYS 1 (Sep. 2018) (Westlaw).

remedy to recover debts owed for delinquent taxes, outstanding fines, or various unpaid fees. Liens on real property can be foreclosed in the same manner as other real estate foreclosures.²¹ Personal property can also be sold judicially or, in some states, non-judicially.

The immediate-release rule would also apply to such assets that are held by state and local governments pursuant to other laws. Under that rule, maintaining a lien that had been filed before the bankruptcy petition could be considered as “exercising control” and therefore a violation of the automatic stay. Likewise, failing to dismiss a judicial action to foreclose on a tax lien—not just staying the action—could be classified as a violation.

This is not a speculative concern, as one circuit court has held that a government’s “knowing retention” of personal property violated the automatic stay. The Ninth Circuit has held that the automatic stay required a state government to release disputed tax payments after the debtor filed for bankruptcy. In *In re Del Mission Ltd.*, 98 F.3d 1147 (9th Cir. 1996), the Ninth Circuit held that the State of California’s Employment Development Department and State Board of Equalization had violated the automatic stay by failing to turn over disputed tax payments in its possession. The State had required the trustee of a chapter 7 debtor to pay all outstanding taxes as a condition of approving the sale of the debtor’s liquor license. 98 F.3d at 1149. The trustee paid under protest, but the bankruptcy court held that the State

²¹ *See id.*

violated the stay in demanding payment. *Id.* at 1150. The bankruptcy court ordered the State to repay the disputed taxes, but the State refused. The Ninth Circuit held that the State's continued retention of the tax payments violated § 362(a)(3). *Id.* at 1151.²² The Circuit specifically held that the retention was "an 'act ... to exercise control over the property of the estate.'" *Id.* (quoting 11 U.S.C. § 362(a)(3)). Just as the Seventh Circuit did below, the Ninth considered this passive retention to nevertheless be an *act* to exercise control.

Del Mission illustrates the potential impact to local municipalities if retention of property seized pre-bankruptcy filing that is arguably estate property (*e.g.* the disputed tax payments) is held to violate the automatic stay. Adopting the immediate-release rule makes all local government liens vulnerable to *de facto* cancellation by the filing of a bankruptcy petition, thereby undermining a crucial enforcement mechanism for many core government interests.

CONCLUSION

The Court should reverse the Seventh Circuit's decision and hold that the automatic stay provision does not require a municipality to immediately release a debtor's asset that was lawfully possessed prior to the filing of the petition.

²² To be clear, the Ninth Circuit held that there were two separate violations of the automatic stay: *first*, the State of California's effort to collect the delinquent taxes, and *second*, the State's "knowingly retaining the disputed taxes." *Del Mission*, 98 F.3d at 1152.

Respectfully submitted,

AMANDA KELLAR KARRAS
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION
51 Monroe St., Suite 404
Rockville, MD 20850

LISA E. SORONEN
STATE & LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 515
Washington, D.C. 20001

ALEXANDRA E. DUGAN
BRADLEY ARANT BOULT
CUMMINGS LLP
1600 Division St.
Ste. 700
Nashville, TN 37203

SCOTT BURNETT SMITH
Counsel of Record
BRADLEY ARANT BOULT
CUMMINGS LLP
200 Clinton Avenue West
Huntsville, AL 35801
(256) 517-5100
ssmith@bradley.com

STEPHEN C. PARSLEY
BRADLEY ARANT BOULT
CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, AL 35203

Counsel for Amici Curiae

February 10, 2020