No. 19-357

IN THE

Supreme Court of the United States

CITY OF CHICAGO,

Petitioner,

v.

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

Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether creditors who seized property of a Chapter 13 debtor before the debtor's bankruptcy case was filed are prohibited from refusing to return the property to the debtor by Section 362(a)(3) of the Bankruptcy Code, 11 U.S.C. §362(a)(3), which stays "any act...to exercise control over property of the estate."

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INTRODUCTION

Relying upon *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), the Seventh Circuit held that a creditor violates the automatic stay imposed by 11 U.S.C. §362(a)(3) when the creditor, without any substantive defense, refuses to comply with its obligation to deliver seized property of the bankruptcy estate to a Chapter 13 debtor. (Pet.App.10a-14a.) The City of Chicago, which seized the debtors' cars before they filed for bankruptcy and refused to return them, argues that this long-standing rule should be overturned. (Pet.Br.1-5.) The City's position is that the automatic stay only "stops" a creditor from "doing something" and thus, does not require the creditor to take any steps to ensure that the creditor is in compliance with §362(a)(3), such as by returning seized property to a debtor. (Pet.Br.17-21.)

But the text of §362(a)(3) refutes the City's position. *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (courts should "begin…with the language of the statute itself"). Section 362(a)(3) stays, or to use the City's words, "stops" any act that "'exercise[s] control over property of the estate.'" (Pet.Br.18.) The only way to "stop" the exercise of control over tangible estate property, like the debtors' cars, is to relinquish the property to the party the Bankruptcy Code designates to hold it, which here is the debtors. 11 U.S.C. §§1303, 1306(b).

Holding that §362(a)(3) requires a creditor to return property it has seized before a bankruptcy filing is not only faithful to its text, but also to the "fundamental

canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (internal quotations, citations omitted); *accord Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 20 (1995). Bankruptcy Code §362(a)(3) works in tandem with §542(a) of the Code to serve the Code's "overall statutory scheme" of securing the bankruptcy court's "exercise of exclusive jurisdiction over *all* of the debtor's property." *Cent. Va. Cmty Coll. v. Katz*, 546 U.S. 356, 363-64 (2006) (emphasis added).

Bankruptcy Code §542(a) facilitates that exclusive jurisdiction by commanding that, except in circumstances all agree are inapplicable here, "an entity…in possession…of property" that "the trustee may use, sell, or lease under section 363" "*shall* deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." 11 U.S.C. §542(a) (emphasis added). By using the term "shall," Congress ensured that §542(a) made delivery of estate property at the start of a bankruptcy case "a mandate, not a liberty." *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018). As the leading treatise on bankruptcy explains, "[t]he failure of an entity in possession of estate property to turn over the property to the trustee would be a violation of section 362(a)(3) except as may otherwise be provided in section 542." 3 Collier on Bankruptcy, ¶362.03[5] (16th ed.)

The City admits that its argument for reversal hinges on reading §362(a)(3) in a vacuum divorced from §542(a). The City argues that "[t]he question presented here is whether the automatic stay *by itself* requires creditors to turn over lawfully repossessed property...." (Pet.Br.2.) But, as the majority of courts have held, §362(a)(3) cannot and should not be read "by itself." (Pet.App.11a ("[w]e observed that a majority of courts had found §542(a) worked in conjunction with §362(a))".)[1] Section 362(a)(3) is part of a larger statutory scheme that imposes an obligation on creditors in possession of estate property to return that property to the debtor. 11 U.S.C. §542(a). Section 362(a)(3)'s text therefore must be read in the "broader context" of §542(a) and the Bankruptcy Code's overall purpose of consolidating estate assets within the bankruptcy court's exclusive jurisdiction to facilitate the debtor's fresh start. *Robinson*, 519 U.S. at 341.

And it is within that "broader context" that the Seventh Circuit and the majority of other circuits have held that when a creditor fails to comply with its statutory obligation to deliver estate property to a debtor or trustee, the creditor acts to "exercise control"

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[1] The Seventh Circuit had so ruled in *Thompson v. GMAC*, 566 F.3d 699, 702 (7th Cir. 2009). Other circuit court decisions with the same result include *In re Weber*, 719 F.3d 72, 79 (2d Cir. 2013); *In re Rozier*, 376 F.3d 1323, 1324 (11th Cir. 2004) (per curiam); *In re Del Mission Ltd.*, 98 F.3d 1147, 1151 (9th Cir. 1996); and *In re Knaus*, 889 F.2d 773, 775 (8th Cir. 1989). Two decisions of Bankruptcy Appellate Panels are in accord. *See In re Sharon*, 234 B.R. 676, 684-86 (B.A.P. 6th Cir. 1999); *In re Carrigg*, 216 B.R. 303, 305 (B.A.P. 1st Cir. 1998).

over estate property in violation of the automatic stay. (Pet.App.14a(citing cases).) The Seventh Circuit's judgment should be affirmed.

STATEMENT OF THE CASE

A. Statutory Background

When Congress enacted the Bankruptcy Reform Act of 1978, it made two major changes in the treatment of debtors' property in bankruptcy cases. Recognizing that the bankruptcy courts' exclusive jurisdiction over estate property is a "[c]ritical feature[] of every bankruptcy," *Katz*, 546 U.S. at 363, Congress expanded both the definition of estate property and the protections for such property.

Congress expanded the definition of estate property to include all "legal or equitable interests of the debtor in property" "wherever located and *by whomever held*." 11 U.S.C. §541(a)(1) (emphasis added); *see* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, pt. I, at 17, pt. II, at 30 (1973) ("Commission Report"). And consistent with this broadened definition, Congress added §542, entitled "Turnover of property to the estate" to the Bankruptcy Code, which had no analogue in the prior Bankruptcy Act. *See United States v. Whiting Pools, Inc.*, 674 F.2d 144, 152-53 (2d Cir. 1982), *aff'd*, 462 U.S. 198 (1983). Section 542(a) generally commands:

> [A]n entity…in possession, custody, or control, during the case, of property that

> the trustee may use … *shall deliver* to the trustee, and account for, such property….

11 U.S.C. §542(a) (emphasis added). In Chapter 11, 12, and 13 cases, Congress gave control over this assembled property to the debtor, rather than to the trustee. *See* 11 U.S.C. §§1107(a), 1203, 1207(b), 1303, 1306(b).

At the same time, the Bankruptcy Code also introduced the automatic stay, §362, to protect estate property. Section 362(a) is recognized as one of the "fundamental debtor protections provided by the bankruptcy laws" because, among other things, it "permits the debtor to attempt a repayment or reorganization plan." H.R. Rep. No. 95-595, at 340 (1977). Relevant here, "[t]he stay bars … [the] exercise of control over the debtor's property" by unauthorized entities. *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, No. 18-938, 2020 WL 201023, at *4 (U.S. Jan. 14, 2020).

Finally, §363 allows a trustee in Chapter 7 cases or a debtor in Chapter 11, 12, and 13 cases to use estate property (except for cash and cash equivalents) in the ordinary course without the need for bankruptcy court approval. *See* 11 U.S.C. §§363(b), (c), 1303, 1304, 1306(b). If a creditor with a lien on estate property believes that a debtor's use of estate property will reduce the value of its interest, the creditor may ask the bankruptcy court to condition the debtor's use "as is necessary to provide adequate protection" of the creditor's interest. *Id.* §363(e). If the automatic stay results in the debtor possessing property without providing adequate protection, the creditor must seek relief from the stay.

Id. §362(d). Procedurally, the burden is on the creditor to ask for adequate protection, *id*; without a creditor request, neither §362 nor §363 impose any obligation on the debtor to offer adequate protection or to refrain from using the property. *Whiting Pools*, 462 U.S. at 204. Likewise, and contrary to the City's argument (Pet.Br.8), nothing in §542(a) conditions the obligation to return estate property upon the debtor or trustee first providing adequate protection of the property at issue. *See* 11 U.S.C. §542(a); *Whiting Pools*, 462 U.S. at 203-04.

B. Respondents' Chapter 13 Cases.

The Chicago Municipal Code permits the City to seize a car for unpaid parking tickets, failure to display a City tax sticker, and certain minor ("red-light") moving violations. (Pet.App.3a,24a.) The City imposes a monetary penalty on the car and its owner, not the driver who received the ticket, and thus it is primarily a revenue-generating device. (Pet.App.25a.) In 2016, the City amended its Municipal Code to create a "'possessory lien in favor of the City in the amount required to obtain release of the vehicle.'" (Pet.App.4a (quoting Municipal Code of Chicago §9-92-080(f)).) Before 2016, the City released impounded cars to individuals after they filed Chapter 13 petitions, but after 2016 it stopped doing so. (Pet.App.4a,24a.)

The four cases at issue here involve debtors who filed Chapter 13 petitions after the City seized their vehicles. (Pet.App.2a-3a.) In each case, the City refused to return the debtor's car notwithstanding the bankruptcy filing. (*Id.*)

1. *Robbin Fulton*. Robbin Fulton is the single mother of a pre-school-aged daughter; at the time of her bankruptcy filing, she worked at a Chicago area hospital. (Pet.App.4a; 18-02860 (Bankr. N.D. Ill.) ("FultonDkt.") Dkt.1,Sch.I.) Ms. Fulton used her car, a 2015 Kia Soul, "to commute to work, transport her young daughter to day care, and care for her elderly parents on weekends." (Pet.App.4a.) On Christmas Eve, 2017, the City seized her car for driving on a suspended license. (Pet.App.4a; JA143.) Ms. Fulton's license was suspended for unpaid parking tickets and non-moving violations. (JA195-206.) Ms. Fulton swore under oath that she had no prior notice of the tickets as they were incurred by her ex-husband. (FultonDkt.62-1.) Ms. Fulton contacted the City to obtain the release of her car, but was told she would have to pay approximately $4,000, which she could not afford to do. (JA143-44.)

On January 31, 2018, Ms. Fulton filed a Chapter 13 case. (Pet.App.4a.) The City filed an unsecured proof of claim for $9,391.20. (Pet.App.4a;JA165-77.)

On March 21, the bankruptcy court confirmed Ms. Fulton's Chapter 13 plan, which provided for payment over time to the City. (FultonDkt.20.) Specifically, Ms. Fulton committed to pay her creditors $450 per month for 36 months and to pay, in addition, any tax refunds she received in excess of $1,200. (JA180-81.) Ms. Fulton's net monthly income was $2,005.03, leaving her $1,555.03 to pay living expenses for herself and her daughter, including $900 in monthly rent. (Fulton Dkt.1,Schs.I,J.)

After the bankruptcy court confirmed her plan, Ms. Fulton again asked the City to return her car. (Pet.App.4a.) The City again refused. On April 27, it increased its claim to $11,831.20 and, for the first time, asserted its claim was secured by her car. (Pet.App.4a;JA195-206.)

On May 2, unable to obtain the return of her car, Ms. Fulton filed a motion for turnover. (Pet.App.4a;JA143-47.) The City defended on the basis that Ms. Fulton should have filed an adversary complaint rather than a motion. (Pet.App.5a.)

On May 25, the bankruptcy court ordered the City to return Ms. Fulton's car by May 29 and imposed a daily sanction of $100 if the City did not comply. (Pet.App.5a.) Instead of returning the car, the City filed a motion for a stay, which the bankruptcy court denied on June 6. (JA210-16.) The City then sought a district court stay, which the district court denied on September 10. (Pet.App.5a.) At that point, almost eight months after Ms. Fulton filed her bankruptcy case, the City finally returned her car. (*Id.*) At no time during that eight-month period or thereafter did the City initiate proceedings to obtain adequate protection under §363(e). (*Id.*) Nor has the City paid the sanctions.

2. *Timothy Shannon*. Timothy Shannon worked as a housekeeper earning $2,128 per month after taxes. (18-04116 (Bankr. N.D. Ill.)("ShannonDkt.")Dkt.1,Sch.J.) He drove a 1997 Buick Park Avenue with 130,000 accumulated miles worth $2,675. (Pet.App.102a.) On January 8, 2018, the City seized Mr. Shannon's car.

(Pet.App.5a.) Mr. Shannon filed a Chapter 13 bankruptcy case on February 15, 2018. (*Id.*)

As in Ms. Fulton's case, the City initially filed an unsecured claim for $3,160 in fines dating back almost 20 years. (*Id.*;JA312-22.) On May 1, the bankruptcy court confirmed Mr. Shannon's Chapter 13 plan. (Pet.App.5a.) The plan committed to pay creditors, including the City, $255 per month for 36 months plus any tax refunds in excess of $1,200, leaving Mr. Shannon with $1,873 per month to pay his living expenses. (JA325-26; ShannonDkt.1,Schs.I,J.)

Like Ms. Fulton, after he confirmed his plan, Mr. Shannon asked the City to return his car. (Pet.App.102a.) The City refused to do so unless Mr. Shannon amended his plan to treat the City as a secured creditor and pay it in full. (Pet.App.102a-03a.) The City also amended its claim, increasing it to $5,600 and asserting for the first time that it was secured. (Pet.App.103a;JA334-35.)

On June 12, Mr. Shannon moved for sanctions, which the bankruptcy court granted on September 7. (Pet.App.5a,101a-47a.) The bankruptcy court rejected the City's argument that it could ignore the confirmed plan and demand full payment of its claim as a condition to returning the car. (Pet.App.107-08a.) The court held the City was "bound by the terms of Shannon's confirmed plan" and ordered the City "to return Shannon's car immediately," but noted that the City was "free to file a motion seeking adequate protection of its

lien interest." (Pet.App.147a.) The City never did so. (Pet.App.6a.)

Following this order, the City returned Mr. Shannon's car four months after he had requested its return. (Pet.App.6a.)

3. *George Peake*. George Peake used his car, a 2007 Lincoln MKZ, to travel approximately 45 miles from his home to his job each day. (Pet.App.6a.) On June 1, 2018, the City seized his car for unpaid parking fines. (*Id.*) Mr. Peake filed a Chapter 13 bankruptcy case on June 9. (*Id.*)

On June 20, Mr. Peake filed a motion for sanctions after the City refused to return his car. (Pet.App.6a.) On August 15, the bankruptcy court granted the motion, directing the City to release the car to Mr. Peake within two days. (Pet.App.6a;JA270.) The City moved for a stay pending appeal, which the bankruptcy court denied. (JA276.)

The City nevertheless refused to release Mr. Peake's car, requiring him to move for civil contempt. (JA277-94.) Only after the City missed two additional deadlines for releasing Mr. Peake's car did the bankruptcy court impose monetary penalties of $100 per day between August 17 and 22, and $500 per day thereafter. (JA295-96.) This order resulted in the City finally releasing Mr. Peake's car. (Pet.App.6a.)

Similar to the Fulton and Shannon cases, the City never moved for adequate protection in Mr. Peake's case, nor has it paid the fines.

4. *Jason Howard*. When Mr. Howard filed his bankruptcy petition, he was unemployed, receiving monthly Social Security and SNAP benefits totaling $867. (Pet.App.7a; 17-25141 (Bankr. N.D. Ill.)("Howard Dkt.")Dkt.1,Sch.I.) Shortly before he filed his bankruptcy case, on August 9, 2017, the City impounded his 1975 Buick Regal, which had 150,000 miles on it and which Mr. Howard valued at $1,000. (HowardDkt.1, Sch.B;Pet.App.7a.)

On August 23, the City filed a secured proof of claim for $17,110.80. (Pet.App.7a.) On October 16, the bankruptcy court confirmed Mr. Howard's plan, which treated the City as an unsecured creditor. (*Id.*) In his plan, Mr. Howard committed to pay $100 per month for 60 months to his creditors, including the City. (HowardDkt.28.) The City did not object to the plan or appeal the confirmation order. (Pet.App.7a.) Instead, it "simply refused to release Mr. Howard's vehicle unless he paid 100% of its claim." (*Id.*)

Mr. Howard then attempted to amend his plan to satisfy the City's demands, stating in a revised income schedule that he would be receiving an additional $320 per month in family support and would pay his creditors $420 per month. (HowardDkt.36,37.) Rather than allow the plan amendment, the bankruptcy court issued a rule to show cause why the City should not be held in contempt for refusing to release Mr. Howard's car. (Pet.App.31a.) On April 19, 2018, the bankruptcy court fined the City $50 per day since August 22, 2017 for its "willful violation of the automatic stay." (Pet.App.40a-41a.)

The City never returned Mr. Howard's car. While the City's appeal was pending, Mr. Howard's Chapter 13 case was dismissed and the City disposed of the car. (Pet.App.7a.) Although Mr. Howard has not participated in the appeal, the Seventh Circuit concluded that the issues raised by his case were not moot because of the outstanding fines the bankruptcy court had ordered. (Pet.App.7a-8a.)

As in the other cases, the City never moved for adequate protection in Mr. Howard's case and never paid the fines.

C. The Seventh Circuit's Decision.

In a direct consolidated appeal from the four bankruptcy court orders, the Seventh Circuit affirmed, holding that when the City refused to return the debtors' cars, the City acted to exercise control over the cars in violation of §362(a)(3). (Pet.App.8a-17a.)

In reaching this conclusion, the Seventh Circuit rejected the primary legal argument that the City makes here—that refusing to return the cars was not an "act" to "exercise control" over the cars. The Seventh Circuit explained that the 1984 amendment to §362(a)(3), which added the prohibition on exercising control over estate property, necessarily involved more than seizures of a debtor's property while a bankruptcy case was pending since §362(a)(3) already stayed acts "'to obtain possession'" of estate property. (Pet.App.10a.) Broadening the reach of §362(a)(3) to address property seized before the bankruptcy filing was consistent with

"'[t]he primary goal of reorganization bankruptcy'" of "'group[ing] *all* of the debtor's property together in his estate such that he may rehabilitate his credit and pay off his debts.'" (Pet.App.9a.) The Seventh Circuit then turned to the meaning of the word "control" and concluded that "'[h]olding onto an asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use of an asset all fit within th[e] definition, as well as within the commonsense meaning of the word.'" (*Id.*)

The Seventh Circuit also considered the effect of §542(a) in concluding that "'turnover of a seized asset is compulsory.'" (Pet.App.11a.) It concluded that the "status quo in bankruptcy is the return of the debtor's property to the estate" and that by refusing to return the cars, the City was "actively resisting §542(a) to exercise control over debtors' vehicles," in violation of the automatic stay. (Pet.App.14a.) The Seventh Circuit recognized that the City wanted to retain the cars "not because it wants the vehicles but to put pressure on the debtors to pay their tickets," which is "precisely what the stay is intended to prevent." (*Id.*) The Seventh Circuit also noted that collection of vehicle fines constituted 9% of the City's operating budget, and concluded that the City's vehicle seizures were not based on protection of public safety. (Pet.App.24.)

The Seventh Circuit then rejected the City's policy argument that if §362(a)(3) required the City to return a debtor's car at the start of the bankruptcy case, the City would lack the opportunity to seek adequate protection of its interests. (Pet.App.14a-15a.) Noting that the City did not seek adequate protection in any of these four

cases, the Seventh Circuit cited procedures available to the City to seek emergency adequate protection if necessary. (Pet.App.15a-16a.)

Finally, the Seventh Circuit found no merit in the City's policy argument that §542(a) and §362(a)(3) imposed too great a burden on the City. Instead, "any burden is a consequence of the Bankruptcy Code's focus on protecting debtors and on preserving property of the estate for the benefit of *all* creditors." (Pet.App.16a.) The Seventh Circuit explained that the City, like any other creditor, "needs to satisfy the debts owed to it through the bankruptcy process[.]" (Pet.App.26a-27a.)

SUMMARY OF THE ARGUMENT

The issue before the Court is whether a creditor "acts" "to exercise control" over property of a Chapter 13 bankruptcy estate—and so violates the automatic stay under §362(a)(3)—if the creditor refuses the debtor's request for return of estate property that the creditor had seized before the bankruptcy case was filed. The question arises in the Chapter 13 cases of four debtors whose cars the City was holding when the debtors filed their bankruptcy cases. There is no dispute that the cars were property of the debtors' bankruptcy estates. *See* 11 U.S.C. §541(a). The City does not deny that it was exercising control over the cars when the cases were filed and the City admittedly refused to return the cars to the debtors while their cases were pending. (Pet.Br.10-13.) The more specific question then, is whether the City's refusal to return the debtors' cars when the debtors asked for them back was an "act" to

exercise control over estate property, prohibited by §362(a)(3).

The City did indeed act. Section 362(a)(3) prohibits two distinct kinds of conduct in connection with estate property. First, it stays any act "to obtain" the property—a specific, discrete event. But the second prohibition, staying any act "to exercise control" over the property, deals with a continuing course of conduct. When presented with the debtors' requests for return of their cars, the City had to act, either by releasing the cars and ending its control over them, or by denying the debtors access to the cars and so continuing to exercise its control over the property. The Seventh Circuit's decision below rested on what the City agrees (Pet.Br.17-18) is the "commonsense meaning" of "control"—"[h]olding onto an asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use of an asset." (Pet.App.9a (quoting *Thompson v. GMAC*, 566 F.3d 699, 702 (7th Cir. 2009)).)

Section 362(a) operates in conjunction with another provision of the Bankruptcy Code, §542(a). That provision protects the rights of a trustee to use estate property during the case. It commands that an entity in possession or control of such property "shall deliver" the property to the trustee. 11 U.S.C. §542(a). The City has acknowledged that §542(a) extends this protection, with the requirement of delivery, to Chapter 13 debtors, who exercise the trustee's property rights under §1303 and §1306(b). (Pet.Br.6.) The City's refusal to return the debtors' cars was an "act" violating §542(a), as the Seventh Circuit again held: "In refusing to return the

vehicles to their respective estates, the City was not passively abiding by the bankruptcy rules but actively resisting §542(a) to exercise control over debtors' vehicles." (Pet.App.14a.)

The City seeks to avoid the clear language of both §362(a)(3) and §542(a) by reading into those provisions limitations the provisions do not contain. In the City's view, the automatic stay does no more than freeze the relationship between debtors and creditors as of the moment before the bankruptcy filing, and so the stay purportedly requires no post-filing action on the part of creditors. (Pet.Br.18-21.) This argument would neuter §362(a)(3)'s prohibition on "exercis[ing] control" over estate property. The only way to "stay" or "stop" the exercise of control is to relinquish control. But, under the City's view that all §362(a)(3) does is preserve the pre-bankruptcy status quo, a creditor would not be required to relinquish its hold on estate property.

Section 362(a)(3) contains no language limiting creditor responsibility in this manner. Further, several other provisions of §362(a) require creditors to take action changing the pre-bankruptcy status quo in order to implement the balance between debtor and creditor interests that the Code establishes. For example, under §362(a)(1), which stays the continuation of collection proceedings, a creditor may not sit back and allow pre-bankruptcy collection proceedings to continue, but must instead take affirmative action to stop them. And to avoid collecting a prepetition claim, stayed by §362(a)(6), a creditor may have to take action such as releasing academic transcripts.

The City (and one of its *amici*) also suggests that §362(a)(3) only stays acts to exercise control over intangible property, and that, for physical objects, §362(a)(3) only prohibits acts to obtain possession. (Pet.Br.30-31;BrubakerBr.17-23.) Section 362(a)(3)'s text, however, flatly contradicts this limitation on §362(a)(3), staying "acts" both "to obtain possession" and "to exercise control" to *all* estate property equally. 11 U.S.C. §362(a)(3).

The City further argues that a prerequisite to the obligation to deliver estate property under §542(a) is the entry of a court order. The City ignores both the absence of any requirement for a court order in §542(a) and the presence of a court order requirement in §542(e) for disclosing documents relating to a debtor's property or financial affairs.

Finally, the City argues that, before delivery of property is required under §362(a)(3) and §542(a), the debtor must show that the creditor's interest in the property would be adequately protected. (Pet.Br.43-44.) But there is nothing in either provision making the debtor's right to the return of property dependent on adequate protection. To the contrary, the provisions of the Bankruptcy Code that address adequate protection—§362(d) and §363(e)—place the procedural burden on the creditor to ask for adequate protection, something the City never did here. Instead, what the City did is exactly what *Whiting Pools* prohibited: it withheld seized property from a debtor's efforts to reorganize rather than following the Bankruptcy Code's

procedures and moving for adequate protection itself. 462 U.S. at 211-12.

The City's conduct here violated a central purpose of the Bankruptcy Code—advancing effective reorganization, both of households in Chapter 13 and businesses in Chapter 11. *Id.* at 208. Applying §362(a)(3) and §542(a) consistently with their language is necessary to honor this purpose.

ARGUMENT

I. A Creditor Violates The Automatic Stay When It Refuses To Return Estate Property To The Debtor.

A. The Majority Rule Is Consistent With Section 362(a)'s Text And Its Context And Purpose Within The Code.

The majority of courts have held that a creditor violates §362(a)(3) when it refuses to return estate property to the debtor. (Pet.App.14a (citing cases).) The majority interpretation of §362(a)(3) is grounded in the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders*, 551 U.S. at 666; *accord Robinson*, 519 U.S. at 341. The analysis begins with §362(a)(3)'s text: §362(a)(3) "stay[s]…any act to obtain possession of property of the estate or…to exercise control over property of the estate." 11 U.S.C. §362(a)(3). The ordinary meaning of "exercise control" is

"'to exercise restraining or directing influence over'" or "to have power over.'" *Thompson*, 566 F.3d at 702 (citing Merriam-Webster's Collegiate Dictionary (11th ed. 2003)). The ordinary meaning of "stay" is to "stop." *Stay*, Merriam-Webster's Collegiate Dictionary. Thus, the words of §362(a)(3) stop creditors from exercising restraint over property of the estate.

Two other Bankruptcy Code sections provide important context for §362(a)(3). The first is §541(a), which defines "property of the estate." Section 541(a)(1) makes "all legal or equitable interests of the debtor in property" "wherever located and *by whomever held*" "property of the estate." 11 U.S.C. §541(a) (emphasis added). Based upon this text, this Court has long held that property of the estate includes property that a creditor seized from a debtor before the debtor filed for bankruptcy. *Whiting Pools*, 462 U.S. at 206-07.

The second section is §542(a), which directs what is to happen to property held by others after a bankruptcy filing. Section 542(a) unambiguously states that any entity holding property of the estate "shall deliver" that property to the trustee (in a Chapter 7 case) or the debtor (in a Chapter 11, 12, or 13 case). 11 U.S.C. §§542(a), 1107(a), 1203, 1207(b), 1303, 1306(b); *see also Whiting Pools*, 462 U.S. at 206-09.

Read together, §362(a)(3) stays, or stops, creditors from exercising control, or restraint, over property of the estate, which §541(a)(1) defines to include property held by a creditor. Logically, the only way for a creditor to stop controlling property it is holding is to relinquish

its control to someone else. The antonyms of exercising control are to "let go" and "lose."[2] Section 542(a) establishes the party to whom the creditor should relinquish control.

Holding that §362(a)(3) protects both property of the estate and the right of the proper party under the Code to hold that property accords with §362(a)(3)'s role in the Code. The automatic stay is "'one of the fundamental debtor protections provided by the bankruptcy laws.'" *MidAtlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986) (quoting H.R. Rep. No. 95-595, 340 (1977)). It protects a debtor's property once the bankruptcy petition is filed and the estate is created. *Id.* Reading §362(a)(3) to protect rights in property that §541(a) creates and §542(a) marshals to the debtor or trustee is consistent with §362(a)'s purpose.

Thus, the Seventh Circuit correctly concluded that a creditor violates §362(a)(3) when it refuses a debtor's request to return estate property is in accord with "the words of [§362(a)(3)]," "their context," and "their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders*, 551 U.S. at 666.[3]

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[2] *See* Thesaurus.com, "Exercise Control," available at thesaurus.com/browse/exercise%20control (last visited March 4, 2020).

[3] The debtors do not contend that either §362(a)(3) or §542(a) require turnover of property without a request by the trustee or debtor. A trustee may determine to abandon property of the estate, and debtors may choose to surrender collateral rather than retain

B. The City's Contrary Interpretation Of §362(a)(3) Fails.

The City begins its analysis by conceding the ordinary meaning of §362(a)(3)'s operative text. (Pet.Br.17-18; *see also* U.S.Br.12.) It then grudgingly acknowledges that the Seventh Circuit's finding of a stay violation "might make sense" if §362(a)(3) stated that "'creditors may not exercise control over property of the estate.'" (Pet.Br.17-18.) But it attempts to minimize these concessions by claiming that two other words in §362(a)—"stay" and "act"—alter the ordinary understanding of what it means to "exercise control." (Pet.Br.18.)

The City argues that a "stay" must stop something new from taking place and that an "act" requires affirmative action; thus, the City reasons that §362(a) only stops a future act that alters the status of estate property as it existed immediately before the petition date and that "improve[s] the position the creditor held on the petition date." (Pet.Br.19-20.) The City reasons that because it already had control of the cars on the petition date, it did not "act" to improve its position when it refused to return the debtors' cars, and so did not violate §362(a)(3). (Pet.Br.20-21.) This argument fails for multiple reasons.

First, the premise underlying the City's argument—that the exercise of control over estate property is a

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the property and pay the claim that it secures. 11 U.S.C. §§521(a)(2), 554, 1325(a)(5)(C).

static, one-time event—effectively removes the word "exercise" from the statutory text. Section 362(a)(3) distinguishes between "any act *to obtain possession* of property of the estate" *or* "any act...*to exercise control* over property of the estate." 11 U.S.C. §362(a)(3) (emphasis added). These two parts of §362(a)(3) using different words, prohibit different conduct. *See Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1037 (2019) (interpreting the Fair Debt Collection Practices Act so as to avoid making one of its provisions superfluous).

There is a substantial difference in meaning between obtaining possession of estate property and exercising control over it. Obtaining possession is a discrete event, but exercising control involves ongoing conduct. An entity might continuously "exercise" control over property for many years; it cannot "obtain" possession of property continuously over time.

Indeed, the distinction between obtaining possession and exercising control is the basis for Congress's amendment of §362(a)(3) in 1984, which added the stay of exercising control over estate property. In response, the City argues that the purpose of the 1984 amendment, which added §362(a)(3), was to extend the stay to intangible property, and so the stay of acts to "exercise control" should apply only to property that cannot be physically possessed. (Pet.Br.29-32;BrubakerBr.17-23.) This is groundless because Congress did not state in §362(a)(3) that the stay of exercising control applied only to intangible property.

In *Union Bank v. Wolas*, this Court rejected a similar attempt to add qualifying language to the text of another provision of the Bankruptcy Code. 502 U.S. 151, 162 (1991). There, the argument was that §547(c)(2)—the ordinary course of business defense to a preference claim—should be qualified so that it applied only to a preference action seeking to avoid a payment made on account of short-term rather than long-term debt. *Id.* at 152. Although there was some legislative history to support this limitation on the defense, the text of §547(c)(2), like §362(a)(3) here, contained no such qualifying language. *Id.* at 157. As this Court explained, "even if Congress adopted the 1984 amendment to redress particular problems of specific short-term creditors," the Court was still required to give effect to the statute's plain meaning which drew no such distinction. *Id.* at 157-58.

The same result is even more appropriate here, as there is no legislative history that supports the City's proposed limitation on the reach of §362(a)(3). Further, the City's argument is dubious since, without the amendment, an entity controlling intangible estate property could reasonably be said to have taken possession of the property. *See, e.g.*, *In re Computer Commc'ns, Inc.*, 824 F.2d 725, 728 (9th Cir. 1987) (holding creditor's termination of a contract in 1980 violated §362(a)(3)'s prohibition on obtaining estate property). But even if the amendment did confirm §362(a)(3)'s application to intangible property, its more significant effect was adding a stay of the *exercise* of control over *all* estate property.

The difference between "obtaining possession" and "exercise[ing] control" is essential to fully protect estate property. Staying a creditor from obtaining possession of property has no effect on a creditor who obtained the property before the stay was entered. But exercising control is ongoing; §362(a)(3) requires that the exercise of control be stopped. Continuing to exercise control over estate property is an act violating the stay under §362(a)(3), and this stay applies to all property of the estate, with no distinction between tangible and intangible property.

Put another way, if Congress had intended the "exercise" of "control" to occur only one time, at the moment the creditor first achieved possession of estate property, Congress would have written §362(a)(3) to state that it stayed any act "to obtain" control of estate property. Instead, by using the verb "exercise" as opposed to the verb "obtain," §362(a)(3)'s text explicitly applies to acts "exercise[ing] control" that are ongoing and continuing. Because the City continued to "exercise control" over the cars during the bankruptcy cases by refusing to return the cars, there was a post-petition "act" violating the stay.

Second, the City argues that the "acts" the stay prohibits are limited to new affirmative conduct and do not include acts of omission, or what it terms "passive" conduct. From this premise the City concludes that its refusal to return the cars was "passive possession" and "'doing nothing,'" rather than an act violating the automatic stay. (Pet.Br.20.) The principal flaw in this argument is, again, that continuing to exercise control is

affirmative conduct. But even if viewed as a "passive" act, the text of §362(a)(3) draws no distinction between acts of omission and other acts; it stays *all* "act[s]."

By seeking to add words to §362(a)(3) to limit its reach to affirmative action, as opposed to acts of omission, the City again seeks to add an improper limit to the text of §362(a)(3) by imposing an ambiguous qualifier that will be the subject of endless litigation. *Union Bank*, 502 U.S. at 157-58; *accord EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015). For example, is paying a security guard to watch the car, active or passive conduct? Is that an "act" or merely preserving what the City views as the status quo? Would it matter if the guard was added because of thefts in the area? Drawing the line between what is active and passive conduct will be unadministrable. In fact, under the City's proposed rule, the City can be said to have engaged in new acts here by keeping the cars under lock and key, refusing to return the cars when asked, and demanding payments outside of the debtors' chapter 13 plans. (Pet.App.4a-5a,45a,102a-103a.)

Further, the attempted expansion is even more improper than it was in *Union Bank* because, with respect to §542(a), unlike §547(c)(2), there is *no* legislative history that even remotely supports the City's attempts to rewrite the statute. Accordingly, this Court should reject the amorphous distinction between "active" and "passive" acts that the City attempts to write into §362(a)(3).

Certainly the failure to act can violate a legal duty. *See, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 370 (2010) ("we agree that there is no relevant difference 'between an act of commission and an act of omission' in this context"); *accord In re Fretz*, 244 F.3d 1323, 1330 (11th Cir. 2001) ("acts of omission designed to evade payment or collection of taxes are sufficient to satisfy §523(a)(1)(C)" of the Bankruptcy Code) (citations omitted).

Courts agree that creditors may violate other provisions of the automatic stay by failing to act. For example, numerous courts have held that when a school refuses to provide a debtor with a transcript of her grades, the school is engaged in an "act" "to collect a debt" which violates §362(a)(6). *See, e.g.*, *In re Kuehn*, 563 F.3d 289, 294 (7th Cir. 2009); *In re Merchant*, 958 F.2d 738, 741 (6th Cir. 1992). Similarly, §362(a)(1), which stays the continuation of proceedings to collect claims against the debtor, has repeatedly been interpreted to require the creditor who initiated the proceedings "to inform other courts" of the bankruptcy and take the actions necessary to ensure the stay is effectuated. *See, e.g., In re Soares*, 107 F.3d 969, 978 (1st Cir. 1997); *In re Koch*, 197 B.R. 654, 660 (Bankr. W.D. Wis. 1996) ("relying primarily on §362(a)(1) and (2), courts have consistently placed an affirmative duty on garnishing creditors to stop garnishment proceedings once notified of the bankruptcy filing and to return any funds garnished in violation of the stay to the estate"), *abrogation on other grounds recognized by In re Rieck*, 439 B.R. 698 (Bankr. W.D. Wis. 2010).

Likewise, in *Aldy v. Valmet Paper Machinery*, the Fifth Circuit rejected an argument of the sort the City makes here and held that "an omission is an act." 74 F.3d 72, 76 (5th Cir. 1996). It concluded that a failure to warn was an "act" under the Foreign Sovereign Immunities Act, which denied immunity to a foreign sovereign when its alleged liability was based on a commercial "act" outside of the United States. *Id.*; *see Miller v. Strahl*, 239 U.S. 426, 433 (1915) (assessing liability for "acts of omission"); *Helmers v. Anderson*, 156 F.2d 47, 52 (6th Cir. 1946) ("[a] failure to perform a legal duty at the time required is equivalent...to an affirmative act").

Here, the City continued to possess something it was not legally entitled to keep. And the City did something to retain the debtors' cars: it refused to deliver the cars and it kept the cars locked and guarded in its auto pounds where the debtors could not access them. The City took these actions knowing that the cars were critically important to the success of the debtors' Chapter 13 plans. As the Seventh Circuit concluded, the City affirmatively decided to use the leverage that withholding the debtors' cars created to demand greater payment of its claims, "precisely what the stay is intended to prevent." (Pet.App.14.) The Seventh Circuit's conclusion that the City "acted" here in violation of §362(a)(3) was legally and factually correct.

Third, the City's crabbed reading of the word "stay" in §362(a) also is inconsistent with §362(a)'s text. Relying upon *Nken v. Holder*, 556 U.S. 418 (2009), the City argues that the automatic stay is comparable to a stay pending appeal or a prohibitory injunction, which does

not alter the parties' positions as they existed before the stay went into effect, but simply prevents future action to implement the order subject to appeal. (Pet.Br.18-19.) On this basis, the City asserts that its control over the debtors' cars, being in place before the filing of the debtors' bankruptcy cases, was part of the status quo that the automatic stay protected. *Nken*, however, contradicts the City's argument.

Nken addressed whether a stay of a removal order pending an appeal was an injunction subject to the strict limits for injunctions imposed under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. 556 U.S. at 423-24. In concluding that a stay pending appeal was not the same as an injunction, the Court stated: "Whether such a stay might technically be called an injunction is beside the point; that is not the label by which it is generally known. The sun may be a star, but 'starry sky' does not refer to a bright summer day." *Id.* at 430. By the same logic, the Bankruptcy Code's automatic stay is not the same as a stay pending appeal. *Nken's* description of how a stay pending appeal works, which description forms the basis of the City's constricted reading of the word "stay" as used in §362(a)(3), is therefore "beside the point." *Id.*

Instead, the meaning of "stay" as used in §362(a)(3) should be informed by the "specific context" in which the Bankruptcy Code uses this word. What §362(a)(3) stays, or stops, is an "act" to "exercise control." When the exercise of control is the possession of tangible property, the only way to "stop" exercising control is to relinquish

that control by returning the property to the person entitled to control it.

The City has no answer to how one "stays" or "stops" the exercise of control over a debtor's property if not by relinquishing it. One of its *amici*, the United States, agrees that the only way to stop "exercis[ing] control" over estate property is to relinquish control. (U.S.Br.12-13.) But it nonetheless argues that Congress could not have intended to impose this obligation on creditors because this result could be accomplished by the creditor "leaving [the cars] unlocked and unguarded in the lot, or by giving them to the first passerby that expressed interest." (*Id.*) But the Government's argument itself recognizes that §542(a) establishes a debtor's right to receive the relinquished property. (*Id.*)

The City's argument that a stay maintains the status quo flounders by using the wrong definition of the status quo. The City assumes that the status quo is what was happening immediately before the bankruptcy filings. But immediately before a bankruptcy filing, creditors are able to collect their claims, prosecute their lawsuits, set off their debts against any property of the debtor they are holding, and take a whole host of actions that they cannot take once a bankruptcy case is filed. Thus, the automatic stay does alter the status quo as it existed before bankruptcy to the detriment of those creditors who were winning the race to recover from a debtor's assets. This makes the situation different from a stay pending appeal discussed in *Nken*. When a stay pending appeal is entered, the status quo is generally the entry of a judgment, but collection has not yet occurred. The

appeal stay keeps that same status in place while the litigation proceeds on appeal.

The automatic stay, however, does something quite different. Instead of maintaining a pre-bankruptcy filing status quo, the automatic stay sets a new baseline as of the moment the petition is filed. Among other things, that new baseline, or post-bankruptcy status quo, is the marshalling of all of the debtor's property into the appropriate hands, consistent with *Katz*, 546 U.S. at 363-64 and *Whiting Pools*, 462 U.S. at 206-07. By refusing to return the cars to the debtors, the City was acting contrary to the status quo as established by the debtors' bankruptcy filings and violating the automatic stay.

Finally, the City's argument that §362(a) only stays acts "that would improve the position the creditor held on the petition date" (Pet.Br. 20-21) misses the point of §362(a)(3). Like the stay preventing continued collection actions, the stay of control over estate property operates to reduce the advantage that some creditors have over others. By staying creditor lawsuits, §362(a)(1) assures that all creditors may be paid on a pro rata basis, a change from the pre-bankruptcy situation that is definitely not in the interest of the creditor winning the race to the courthouse and likely to be paid more. Similarly, §362(a)(3) puts all of the estate property in the hands of the Chapter 13 debtor. This result increases the likelihood that all creditors will be paid through a completed plan, and removes the obstacles to completing a plan that would exist if a debtor is deprived of necessary property—like a car to drive to work.

But, even if §362(a)(3) only stayed acts that are intended to improve the creditor's position, when a creditor, like the City, actively resists its obligation to comply with §542(a), it necessarily acts to improve its position relative to other creditors who are complying with the law. The City's conduct here is a textbook example. The cars at issue were extremely important to the debtors, three of whom needed the cars to get to work. However, to the City, the value it might receive from selling the cars was substantially less than the debt it was owed. By withholding the cars, and refusing to return them until the debtors paid the City outside of their confirmed Chapter 13 plans more than the cars were worth, the City was exercising control over estate property to leverage a greater payment for itself. (Pet.App.4a-6a,45a-46a,103a.) As the Seventh Circuit correctly concluded, what the City did here is "precisely what the stay is intended to prevent." (Pet.App.14a.)

C. The Seventh Circuit Correctly Rejected The City's Legislative History Arguments.

In an effort to countermand §362(a)(3)'s text, the City makes four unavailing legislative history arguments.

First, the City contends that prior to 1984, creditors could refuse to deliver property until a debtor sued to get it back and that Congress did not intend to change this pre-Code practice when it amended §362(a)(3). (Pet.Br.25-27.) As an initial matter, this Court does not need to reach this argument because §362(a)'s text is plain. *Union Bank*, 502 U.S. at 157-58. Whatever the

pre-Code practice was, "it cannot overcome [§362(a)(3)'s] language." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 10 (2000) (citations omitted). As this Court has explained, historical practice "is a tool of construction" that "informs [the Court's] understanding of the Code." That practice is "not an extratextual supplement." *Id.*

The City's historical argument also is inaccurate. Prior to 1984, at least one court did in fact hold that §542(a) was self-executing so that the failure to deliver estate property was "probably contumacious." *In re Larimer*, 27 B.R. 514, 516 (Bankr. D. Idaho 1983).

Second, the City argues that Congress could not have intended that §362(a)(3) apply to a refusal to return estate property because this addition was included in a bill that was originally titled "An Act to Correct Technical Errors, Clarify and Make Minor Substantive Changes to Public Law 95-598 (the Bankruptcy Reform Act of 1978)." (Pet.Br.28-29.) Ultimately, however, the amendment to §362(a)(3) was made by the Bankruptcy Amendments and Federal Judgeship Act of 1984, which was much more than a technical amendments bill. Pub. L. No. 98-353, §441(a)(2), 98 Stat. 333, 371 (1984). Regardless, "the technical nature of the amendment... does not alter the wide-ranging effect of the statutory text[.]" *Freytag v. Comm'r*, 501 U.S. 868, 875 (1991).

Here, as the Seventh Circuit correctly concluded, the 1984 amendment to §362(a)(3) had to be more than a technical correction that did not change the law. (Pet.App.10a.) "[T]he mere fact that [in 1984] Congress

expanded the provision to prohibit conduct above and beyond obtaining possession of an asset suggests that it intended to include conduct by creditors who seized an asset pre-petition." *Thompson*, 566 F.3d at 702.

Third, the City argues that it is implausible that Congress would have amended §362(a)(3) so that it could be used to enforce §542(a). (Pet.Br.27-29.) But §542(a) marshals estate property and §362(a) is the Code provision that protects estate property from wrongful creditor interference. *Ritzen*, 2020 WL 201023, at *4. Thus, an amendment to strengthen the protections for property subject to delivery under §542(a) was reasonably placed within §362(a).

Fourth, the City argues that if possessing property is an act to exercise control, §362(a)(3)'s "obtain possession" language would be surplusage because obtaining possession of a tangible asset is tantamount to controlling it. Therefore, the City argues that the 1984 amendment should be read to apply only to intangible property that cannot be physically possessed. (Pet.Br.29-32.) This argument, ironically, contradicts the City's contention that the amendment was not intended to make substantive changes, but as explained above, it is also groundless. Finally, even if there is some redundancy here, "[r]edundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, a court must give effect to both." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (citations omitted). There is no repugnancy here.

II. Section 362(a)(3) Should Be Read In The Context Of §542(a) Which Commands Delivery Of Estate Property To A Debtor Or Trustee.

The City's arguments for ignoring the interplay between §362(a)(3) and §542(a) are unavailing. The unstated linchpin of the City's argument is that §542(a)'s turnover requirement is not self-executing. (Pet.Br.32-43.) According to the City, a creditor has no obligation under §542(a) to return estate property until a bankruptcy court orders it to do so. Based on this incorrect understanding of when the obligation to return property is triggered under §542(a), the City reasons that a creditor who refuses to return property is not exercising control over the property because it is entitled to retain the property until a court orders otherwise. (Pet.Br.32-43.) Like its construction of §362(a)(3), the City's construction of §542(a) is contrary to §542(a)'s text. *See* 3 Collier on Bankruptcy, ¶362.03[5] (16th ed.)

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

The text of §542(a) unambiguously states that any entity holding estate property "shall deliver" that property to the trustee (in a Chapter 7 case) or the debtor (in a Chapter 11, 12, or 13 case). 11 U.S.C. §§542(a), 1107(a), 1203, 1207(b), 1303, 1306(b). The City's argument that the turnover obligation §542(a) imposes on a creditor is not triggered until a court orders

turnover ignores §542(a)'s unambiguous text in three fundamental ways.

The first problem with the City's reading of §542(a) is that the City ignores Congress's use of the verb "shall." As this Court has repeatedly explained, when Congress uses "shall" in connection with an action, it means that the action is mandatory. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). "[T]he word 'shall' is ordinarily the language of command." *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001). "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Kingdomware*, 136 S. Ct. at 1977.

Section 542(a)'s operative language commands that any "entity" in possession of estate property "*shall deliver*" that property "to the trustee" or to the debtor in a Chapter 11, 12, or 13 case. 11 U.S.C. §542(a) (emphasis added). The commanding nature of Congress's use of "shall" in §542(a) is underscored by the fact that another part of §542—§542(e)—states that the court "may" order certain parties holding documents related to the debtor to deliver those documents to the trustee. As this Court noted in *INS v. Cardoza-Fonseca*, "'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" 480 U.S. 421, 432 (1987) (citation omitted).

Here, this principle is even more relevant, since the exclusion of relevant language concerns two subparts of a single section, not two different sections of the same statute. When a statute distinguishes between "shall" and "may" in its subparts, as §542(a) and §542(e) do here, "it is generally clear that 'shall' imposes a mandatory duty." *Kingdomware Techs.*, 136 S. Ct. at 1977. Thus, by arguing that a creditor is not commanded to comply with §542(a)'s turnover requirements, despite Congress's clear decision to place an unconditional command in §542(a), the City flouts a fundamental principle of statutory construction.

The second problem with the City's reading of §542(a) is that it reads requirements into the statute that Congress did not include. It is axiomatic that "'[n]othing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*).'" *Shea v. Kerry*, 961 F. Supp. 2d 17, 29 n.3 (D.D.C. 2013) (quoting Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 93-100 (2012)), *aff'd*, 796 F.3d 42 (D.C. Cir. 2015). Although the City pays lip service to Congress's use of the mandatory "shall" in §542(a), conceding that it "[i]mposes [a] [m]andatory [d]uty [t]o [t]urn [o]ver" (Pet.Br.36), the City argues that this mandatory obligation *only* comes into existence *after* the debtor obtains a court order directing turnover. (Pet.Br.36-41.)

But §542(a) does not expressly state, or even hint, that a court order is a prerequisite to turnover. If Congress wanted to impose that requirement, it could have easily done so by inserting the phrase "*after notice*

and hearing" or "*after entry of a court order*" before the command "*shall deliver*." In fact, there are *75 instances* in the Bankruptcy Code where Congress provides that an action is required or permitted only after "notice and hearing." (*See* 1a-4a, *infra*.) Notably, one of those instances occurs within §542. Subpart (e) states:

> [s]ubject to any applicable privilege, *after notice and a hearing, the court may order* an attorney, accountant, or other person that holds recorded information,...relating to the debtor's property or financial affairs, *to turn over or disclose such recorded information to the trustee*.

11 U.S.C. §542(e)(emphasis added).

If, as the City argues, Congress had intended that a creditor could wait to comply with §542(a) until a court orders compliance, it would have drafted §542(a) as it drafted §542(e), providing explicitly that "notice and hearing" and a court order were prerequisites for delivery. But instead of doing what it did in subpart (e) and 74 other times in the Bankruptcy Code (*see* 1a-4a, *infra*), Congress used the command "shall deliver to the trustee" without qualification. 11 U.S.C. §542(a). By asking this Court to add the additional requirement of filing suit and obtaining an order into §542(a)'s text, the City violates the basic rule of statutory construction that courts may not add language to a statute that Congress itself did not include. *See, e.g.*, *Abercrombie & Fitch*, 135 S. Ct. at 2033; *Shea*, 961 F. Supp. 2d at 29 n.3.

Finally, the City's construction of §542(a) ignores its prefatory clause, which states: "*Except as provided* in subsection (c) or (d) of this section...." (emphasis added). Had Congress wanted to add the exception that a creditor could retain estate property until a court ordered its return, Congress would "'ha[ve] done so clearly and expressly'" with the other exceptions it did include in §542(a). *Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 453 (2007) (quoting *FCC v. Nextwave Pers. Commc'ns Inc.*, 537 U.S. 293, 302 (2003)).

B. The City's Attempts To Dismiss §542(a)'s Text Are Unavailing.

The City's responses to the clear text of §542(a) are not convincing.

First, the City dismisses §542(a)'s use of the unconditional command "shall" by arguing that even if §542(a) "impose[s] 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." (Pet.Br.37.) This argument side-steps the point.

When the conditions of the statute are met—and they were met here—the creditor has a "mandatory" duty *before* the entry of a court order to deliver the debtor's property. A creditor holding seized property is not entitled to retain the property until ordered to deliver it. While a court order may be necessary if the

creditor is recalcitrant, as the City was here, it is not a prerequisite or a condition to the duty being imposed.

Second, the City compares §542(a) to the avoiding powers set forth in §§544-545 and §§547-549 of the Code and argues that these statutes do not command the recipient of an avoidable transfer to return that transfer to the estate without a court order, and thus §542(a) should be read the same way. (Pet.Br.39.) But the City's comparison is misplaced. Unlike §542(a), these Code sections do not state that an "entity" that has received an avoidable transfer "shall deliver the transferred property to the trustee" without exception. Instead, they provide that a trustee "may avoid" certain types of transfers. 11 U.S.C. §§544(b), 545, 547(b), 548(a), 549(a). Recovery of the property, however, is under §550, which does require a court proceeding. 11 U.S.C. §550. The avoidance provisions are at all parallel to §542(a).

In contrast to the avoidance provisions, there are sections of the Bankruptcy Code that are generally comparable to §542(a), such as §341(a), which states the "United States trustee *shall* convene and preside at a meeting of creditors;" §342(b), which states that the clerk "*shall* give" a written notice to certain debtors; and §521, which states the debtor "*shall*" file certain documents and undertake certain actions. 11 U.S.C. §§341(a), 342(b), 521. There is no credible argument that these statutory provisions, which impose mandatory self-executing duties on debtors and others in connection with the administration of bankruptcy cases, can be ignored until a court orders compliance. In total, there are 47 similar provisions in the Code which employ this

same structure of commanding that a party "shall" do something in aid of the administration of the bankruptcy case. (*See* 5a-7a *infra*.) Holding that these parties have no obligation to undertake these acts until ordered by a court would burden the courts with unnecessary litigation and interfere with a "'chief purpose of the bankruptcy laws': 'to secure a prompt and effectual' resolution of bankruptcy cases 'within a limited period.'" *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1803 (2019) (quoting *Katchen v. Landy*, 382 U.S. 323, 328 (1966)).

Section 542(a), which uses the same language and structure as provisions like §341(a), §342(b), and §521 should be read the same way. Like the provisions that set out the duties of various parties in a bankruptcy case, §542(a) serves the very important purpose of marshalling estate assets and allowing debtors to use those assets to facilitate the debtor's fresh start. *Whiting Pools*, 462 U.S. at 203-09. Forcing debtors to wait months to get their property back would imperil their ability to earn the wages necessary to fund their Chapter 13 plans.

These cases illustrate the point. The City aggressively fought to keep the debtors' cars, retaining one for almost eight months, and another for four months. (Pet.App.5a-6a.) The City held these cars even though the requirements of §542(a) were met, while taking no action to obtain adequate protection of its lien interests. (Pet.App.5a-7a.) Instead, the City used the delay to leverage the debtors into paying more than the City was otherwise entitled to receive, "precisely what the stay is intended to prevent." (Pet.App.14a.)

Third, the City cites a footnote in *Whiting Pools* which listed the three conditions to delivery of property set forth in §542(a). As this footnote states:

> Section 542 provides that the property be usable under §363, and that turnover is not required in three situations: when the property is of inconsequential value or benefit to the estate, §542(a), when the holder of the property has transferred it in good faith without knowledge of the petition, §542(c), or when the transfer of the property is automatic to pay a life insurance premium, §542(d).

462 U.S. at 206 n.12.

The City argues that these conditions "make it evident that the turnover provision cannot be 'self-effectuating,'" and instead require a court to find that the conditions are met before any duty to comply is triggered. (Pet.Br.37) The Court's point in listing these conditions, however, actually contradicts the City's reading of § 542(a). The Court was explaining that none of §542(a)'s conditions applied to allow the creditor to withhold possession of the debtor's property in *Whiting Pools*, just as in the debtors' cases. 462 U.S. at 206. Later in the opinion, the Court emphasized: "§542(a) simply requires the [creditor] to seek protection of its interest according to the congressionally established bankruptcy procedures, *rather than by withholding the seized*

property from the debtor's efforts to reorganize." 462 U.S. at 212 (emphasis added).

Fourth, the City argues that Congress did not intend §542(a) to be self-executing because the House Report for the 1978 Bankruptcy Code stated that the procedure for turnover "'will be dealt with by the Rules of Bankruptcy Procedure.'" (Pet.Br.40 (citing H.R. Rep. No. 95-595, at 293, 297 (1977).) Based on this legislative statement, the City erroneously concludes that Congress intended a rule like current Bankruptcy Rule 7001 to be read into §542(a) and so there is no duty to turnover estate property until a debtor or trustee obtains a court order. (Pet.Br.39-40.) Each step of this argument fails.

As an initial matter, this Court has held that 28 U.S.C. §2075 precludes the Bankruptcy Rules from "'abridg[ing], enlarg[ing], or modify[ing] any substantive right'" found in the Code. *See Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 453-54 (2004) (holding Rule 7001(6)'s summons requirement cannot override substance of 11 U.S.C. §523(a)(8)); *see also Roell v. Withrow*, 538 U.S. 580, 587 & n.5 (2003) (holding implied consent to proceed before a federal magistrate was effective even though Fed. R. Civ. P. 73(b) required a statement of consent, because the governing statute, 28 U.S.C. §636(c), did not require express consent). Because §542(a) does not require an order for turnover to be effective, the Bankruptcy Rules cannot impose that requirement.

Even if legislative history could override §2075, the history the City cites would not do so. The statement the City quotes is found in an appendix to a general discussion of how the Supreme Court's rulemaking authority would operate under the Bankruptcy Code. (Pet.Br.40 quoting H.R. Rep. No. 95-595, at 293, 297.) Under the prior Bankruptcy Act, the Supreme Court had the authority to issue rules that superseded Act provisions. H.R. Rep. No. 95-595, at 292. The 1978 Code repealed this power. 28 U.S.C. §2075. The legislative history the City relies upon discusses this change, stating "the Supreme Court may continue to promulgate rules of practice and procedure for bankruptcy cases, but [the 1978 law] repeals the provision that permits rules to supersede Acts of Congress." H.R. Rep. No. 95-595, at 292. Given this statement, Congress did not intend the Bankruptcy Rules to amend §542(a) substantively.

Moreover, the cited appendix listed 322 different types of events that would occur under the Code, including the turnover of estate property, but it did not link any particular rule to any designated event. *See* H.R. Rep. No. 95-595 at 293-308. At the end of the appendix, the House Report qualifies this list by stating that "the rules may not affect substantive rights." *Id.* at 308. Thus, nothing about this appendix supports the City's statement that Congress intended a rule like Rule 7001 (or any other rule for that matter) to be read into §542(a) so as to alter its substance. Furthermore, if the City's point is that this history suggests that §362(a)(3) does not protect property subject to §542(a) because matters related to §362 are typically brought by motion and not by complaint, the appendix also contains the

following qualifier: "in many instances, a motion or application will suffice." H.R. Rep. No. 95-595 at 308. The legislative history therefore defeats this argument as well.

Likewise, the City's citation to 28 U.S.C. §157, which describes "'orders to turn over property'" as "'core'", does not help its argument. (Pet.Br.39.) Section 157 does not indicate anything with respect to whether Congress intended §542(a) to be self-executing. All §157 addresses is whether a bankruptcy court can enter judgment if a dispute arises over whether property should be returned. For example, if the trustee in a Chapter 7 case contended that property claimed by a third party was actually owned by the debtor, §157 sets out Congress's position that a bankruptcy court has jurisdiction to issue a final judgment in the matter. But, the fact that the Bankruptcy Rules and Judicial Code contain rules governing the conduct of litigation when litigation becomes necessary to recover estate property does not mean that a court order is prerequisite to the turnover obligation in the first instance. That is akin to arguing that parties to a contract are free to ignore contract terms until a suit is brought to compel compliance. The presence of procedures to force persons to do what the law requires them to do on their own does not excuse performance in accordance with the law until those procedures are commenced.

Finally, the City argues that a lawsuit is prerequisite to the obligation to comply with §542(a) because that allegedly was the practice before the Code was enacted. (Pet.Br.40-41.) But, again, pre-Code

practice cannot alter §542(a)'s text. "[W]hile pre-Code practice, 'informs [the Court's] understanding of the language of the Code,' it cannot overcome that language. It is a tool of construction, not an extratextual supplement." *Hartford Underwriters*, 530 U.S. at 10 (citations omitted). That is precisely what the City is attempting to do here: impose an "extratextual supplement" that §542(a)'s text does not support.[4]

* * *

The City's attempts to minimize and rewrite §542(a) fail. By its unambiguous terms, §542(a) compels any person holding estate property to deliver that property to the trustee (in Chapter 7 cases) or the debtor (in Chapter 11, 12, and 13 cases).

III. Bankruptcy Code §362(a)(3) And §542(a) Work Together To Protect The Bankruptcy Court's Exclusive Jurisdiction Over Estate Property.

The City, joined by the Government, contends that §362(a)(3) plays no role in protecting rights established by §542(a). (Pet.Br.32-41;U.S.Br.19-20.) They first argue

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[4] Although the Court does not need to delve into pre-Code history to reject the City's argument, the City's contention that Congress intended §542(a) to require a court order as a prerequisite to turnover cannot be squared with the fact that Congress both expanded §541's definition of estate property and added §542, which did not exist under the prior Act, based on the recommendation of the Commission on Bankruptcy Laws that doing so would reduce litigation over estate property. *See* Commission Report at 30, §2-201.

that the meaning given by the majority decisions would make §542(a) redundant of §362(a)(3) since both would require turnover of estate property. Their second argument is that §363(a)(3) is incompatible with §542(a), because it would require turnover of all estate property held by the creditor, while §542(a) excludes certain property from its delivery command. Neither of these arguments is well-grounded.

First, §362(a)(3) is far from redundant. Before Congress added its stay of acts to exercise control over estate property, there was no express mechanism in the Bankruptcy Code to enforce the delivery requirement of §542(a). The Government's brief suggests that parties seeking the delivery of estate property might ask courts to fashion a remedy under §105(a) of the Code, which allows a court to enter "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." (U.S.Br.23.) However, the process of seeking relief under §105(a) is both less certain and likely more costly, in both time and expense, than a motion to enforce the automatic stay, which, in addition to being supported by a well-developed body of case law, provides individual debtors with a right to damages for a willful stay violation. 11 U.S.C. §362(k).

Second, although there are differences in scope between §362(a)(3) and §542(a), these differences are both minor and easily reconciled. The three limits on property subject to the delivery requirement in §542(a) are very unlikely ever to apply to property of the estate that a debtor seeks to obtain under §362(a)(3). Sections 542(c) and (d) address circumstances in which the

property to be delivered is no longer in the hands of the person who would otherwise be required to deliver it. 11 U.S.C. §542(c), (d). Section 542(c) provides that if a party holding property without knowledge or notice of the bankruptcy case has transferred estate property to someone other than the trustee in good faith, the transfer is treated as if it had been made to the debtor and is not subject to turnover under §542(a). Similarly, Section 542(d) allows a life insurance company to make automatic payments from a policy toward premiums without being subject to turnover under §542(a). Neither of these exceptions authorize a person holding estate property to retain it after a debtor or trustee asks to have it returned. The only potentially applicable limit, set out in §542(a) itself, is for property of "inconsequential value or benefit to the estate." Theoretically, a party entitled to possession of estate property could demand to receive it from a third-party even if the property was arguably of inconsequential value. But the likelihood of such a dispute is very small, given that property of inconsequential value cannot, by its nature, fund a debtor's rehabilitation.

To the extent there is redundancy, this Court has held that "[r]edundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, … a court must give effect to both." *Germain*, 503 U.S. at 253 (internal citations omitted). If there is conflict, the proper resolution is not to discard one of the provisions, but to treat both as effective to the extent possible, and give precedence to the more specific provision. *See id.; Busic v. United States*, 446 U.S. 398, 406 (1980) ("[A] more

specific statute will be given precedence over a more general one, regardless of their temporal sequence."). Thus, in the unlikely event there are disputes over whether property is of inconsequential value or benefit to the estate, courts would recognize the §542(a) exception as a defense to a motion to enforce the stay under §362(a)(3).

Third, the City and Government ignore the fundamental interplay between §362, which protects estate property, and §541 and §542 which establish what *is* estate property that §362 protects. Rather than acting independently of each other, §362(a)(3) and §542(a) work in tandem to protect the bankruptcy court's exclusive jurisdiction over estate property. *See* 3 Collier on Bankruptcy, ¶362.03[5] (16th ed.)

Section 542(a) establishes that the bankruptcy estate "includes property of the debtor that has been seized by a creditor prior to the filing of a petition for reorganization." *Whiting Pools*, 462 U.S. at 209. The automatic stay, which is "'one of the fundamental debtor protections provided by the bankruptcy laws,'" protects that property once the bankruptcy petition is filed and the estate is created. *MidAtlantic Nat'l Bank*, 474 U.S. at 503 (quoting H.R. Rep. No. 95-595, 340 (1977)). Section 362(a) does so by "permit[ing] the debtor to attempt a repayment or reorganization plan" using that property while also ensuring that creditors do not interfere with estate property during the bankruptcy case. H.R. Rep. No. 95-595, at 340; *accord Whiting Pools*, 462 U.S. at 208-09. Thus, adopting the argument that §362(a)(3) has nothing to do with protecting the property that §542(a)

brings into the bankruptcy estate would eviscerate "one of the fundamental debtor protections." *MidAtlantic Nat'l Bank*, 474 U.S. at 503.

Finally, holding that §362(a)(3) protects the estate's rights in property held by creditors also does not, as the City argues, improperly expand the debtor's interests in that property. (Pet.Br.23-24.) In *Raleigh v. Illinois Department of Revenue*, this Court held that while "[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation," that general rule is "subject to any qualifying or contrary provisions of the Bankruptcy Code." 530 U.S. 15, 20 (2000). With respect to property held by creditors, Congress made a policy decision when it enacted §541(a) to define estate property to include property "by whomever held"; Congress simultaneously added a new provision to the bankruptcy laws, §542(a), that gave a debtor the right to possess property that had been seized pre-bankruptcy. *Whiting Pools*, 674 F.2d at 152-53. Sections 541(a) and 542(a) are "qualifying" or "contrary" provisions that alter the right to possession as it exists under state law.

Furthermore, because §362(a) protects *all* estate property, not just the property in the debtor's possession on the petition date, it acts to protect the right to possession Congress granted to debtors in §542(a). *Mission Product Holdings, Inc. v. Tempnology, LLC*, which the City cites (Pet.Br.23), is not to the contrary. 139 S. Ct. 1652 (2019). It recognizes that the Bankruptcy Code does expand property interests in certain circumstances. *Id.* at 1663.

Thus, rather than containing redundant or disabling provisions, §362(a)(3) and §542(a) work in tandem to protect the bankruptcy court's exclusive jurisdiction over estate property.

IV. The Seventh Circuit's Decision Is Wholly Consistent With *Strumpf*.

The City also contends that the Seventh Circuit's decision is inconsistent with this Court's ruling in *Strumpf*. (Pet.Br.42-43.) The City would read *Strumpf* as holding that a creditor does not violate the automatic stay when it refuses to return property to a debtor. (*Id.*) But *Strumpf* addressed a different subsection of §542: §542(b), which is not involved here. Significantly, in reaching its conclusion that the stay was not violated in *Strumpf*, the Court expressly distinguished its holding from the factual circumstances present here. 516 U.S. at 21.

In *Strumpf*, the debtor owed money to the bank where he also kept a checking account. *Id.* at 17. After the debtor filed for bankruptcy, the bank froze the account and filed a motion for stay relief so that it could offset its loan balance against the checking account. *Id.* at 17-18. The debtor argued that when the bank froze his account, the bank violated the automatic stay because §362(a)(7) barred "the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor[.]" *Id.* at 17.

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

Central to the Court's ruling was the fact that a bank account "consists of nothing more or less than a promise to pay"; put differently, a bank account is not a pot of money that belongs to the depositor. *Id.* at 21. Because a bank account is a contractual promise to pay, §542(b), not §542(a), was the applicable turnover provision. Section 542(b) requires entities that owe a debt to the debtor, like a bank owes to its depositors, to pay such debt "except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor." 11 U.S.C. §542(b). The Court reasoned that "[i]t would be an odd construction of § 362(a)(7) that required a creditor with a right of setoff to do immediately that which §542(b) specifically excuses it from doing as a general matter: pay a claim to which a defense of setoff applies." *Strumpf*, 516 U.S. at 20.

Because the text of §542(b) expressly excused the bank from paying what was due, the Court also rejected the debtor's argument that the bank had exercised control over property of the estate in violation of §362(a)(3). *Id.* at 21. The Court explained that the debtor's reliance on §362(a)(3) "rests on the false

premise that petitioner's administrative hold took something from respondent, or exercised dominion over property that belonged to respondent." *Id.* The Court stated: "That view of things might be arguable if a bank account consisted of money belonging to the depositor and held by the bank," but because a bank account is only a "promise to pay," the bank was not exercising control over estate property. *Id.* Instead, the bank was "merely" refusing to "perform its promise." *Id.*

The City's argument ignores both the textual differences between §542(a) and §542(b) and the critical differences between a car and a bank account. Unlike §542(b), which expressly allowed the bank to protect its setoff rights under §553, §542(a) contains no exception to the obligation to return estate property that would allow a creditor to retain the property notwithstanding §542(a)'s mandate.

An additional distinction between §542(a) and §542(b) is that, unlike the promise to pay that a bank account represents, a car is tangible personal property. Thus, as *Strumpf* expressly stated, its holding in no way protects a creditor who withholds property from the trustee or debtor in violation of §542(a), as opposed to temporarily refusing to honor a promise to pay money. *Id.*

Strumpf's harmonization of §362(a)(7) with §542(b) has relevance here: the automatic stay affecting property of the estate must be interpreted consistently with the turnover provisions of §542, just as the Seventh Circuit did below.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be affirmed.

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Respectfully submitted,

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