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 OF AIMICUS CURIAE GERACI LAW L.L.C. IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICUS CURIAE*[1]

Geraci Law L.L.C. is the largest consumer bankruptcy firm in the Seventh Circuit, and one of the largest in the nation. With offices in Chicago, Milwaukee and Indianapolis, its 65 attorneys concentrate in consumer Chapter 7 and 13 filings. At any given time the firm administers about 12,000 pending Chapter 13 cases.

*Amicus* has a strong interest in the issues raised in this case. Whether a Chapter 13 filing requires a creditor to return seized collateral instead of keeping it and fighting its return, affect whether or not filing is a viable option, and would dramatically affect the practice of Chapter 13 bankruptcies moving forward.

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

## SUMMARY OF THE ARGUMENT

The issue before the Court is whether the automatic stay of 11 U.S.C. § 362(a) requires a creditor to comply with a debtor's request to return property of the estate to the debtor that the creditor had seized prior to the filing of the bankruptcy, or whether the debtor is required to take affirmative steps in the bankruptcy court to regain possession of the property.

The majority view, also held by the Seventh Circuit, is that the passive retention of property of the estate, rather than returning it to the debtor, is an act "to exercise control over property of the estate" in violation of 11 U.S.C. § 362(a)(3). The minority view espoused by Petitioner is that the creditor maintains possession of the property until the bankruptcy court enters an order requiring them to return it.

Respondents' brief sets out many statutory and textual reasons why this Court should affirm the decision of the Seventh Circuit. This amicus brief provides further support for the Seventh Circuit's decision, differentiates vehicles from other types of debt, and further analyzes Section 1306(b) and its legislative history to support a creditor being required to return property of the estate to the debtor. It also explains why that is necessary to provide a debtor with their fresh start.

## ARGUMENT

### I. The Majority Rule Correctly Interprets the Plain Language and Legislative Intent of the Bankruptcy Code.

#### A. The Seventh Circuit Recognized that Section 362(a)(3) Applies to All Property of the Estate, Whether in the Debtor's Possession or Not.

Congress' intent for the operation of Section 362(a)(3) of the Bankruptcy Code was clear. H.R. REP. 95-595 at 121 (1977). The statute provides that a Chapter 13 bankruptcy petition "operates as a stay, applicable to all entities, of…any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. 362(a)(3).

The Seventh Circuit emphasized the last clause: "or to exercise control." *In re Fulton*, 926 F.3d 916, 923 (7th Cir. 2019). This is the heart of the matter. Unlike many reasons for filing a Chapter 13, filing to protect a vehicle from a creditor is somewhat unique. A debtor's filing in the face of foreclosure or garnishment invokes only the first part of Section 362(a)(3). Most creditors act "to obtain possession" of property of the estate, whether it is property or payment. A creditor proceeding with a judicial foreclosure has no ability to "exercise control" over the debtor's home unless and until the house has been sold and the debtor has been evicted. That home has even passed out of status of "property of the estate" in many cases.

Similarly, a creditor suing for breach of contract can only "obtain possession" of funds from the debtor by filing a lawsuit, obtaining a judgment, and taking post-judgment steps to either seize funds from the debtor or garnish wages.

Vehicles, however, are different. For financed vehicles, if a debtor is behind, no judicial action is necessary for the creditor to come and seize the vehicle. U.C.C. § 9-609. Similarly, municipal entities may seize vehicles that are either financed or paid off, solely on the basis of fines being attached to the vehicle, even if the debtor is not the one who incurred them.

The Seventh Circuit recognized that refusing to return a debtor's vehicle is an act exercising control over property of the estate. *In re Fulton*, 926 F.3d at 923 (7th Cir. 2019). Furthermore, allowing a creditor to withhold the vehicle that a wage-earner needs to get to their job, transport the kids, purchase necessities, and get where they need to go in the absence of quick and reliable public transportation, is destructive, unfair, and is prohibited by the plain language of the Code. *See In re Fulton*, 926 F.3d at 923.

### B. The Plain Language and Legislative History of Section 1306(b) Indicate that Property of the Estate must be Returned to the Debtor.

When interpreting the Bankruptcy Code, the inquiry must begin with the language of the Code itself. *Ransom v. FIA Card Servs. N.A.*, 562 U.S. 61,

68 (2011). When the statutory text is plain and does not lead to an absurd result, the sole function of the courts is to enforce the plain language of the statute. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). When a court interprets a statute, it must assume that Congress said what it meant in the statute, and meant what it said. *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992).

The language of Section 1306(b) is clear: "Except as provided in a confirmed plan or order confirming a plan, the debtor ***shall remain in possession of all property of the estate***." 11 U.S.C. §.1306(b) (emphasis added). The use of the word "shall" in a statute indicates a requirement to do something, whereas the use of "may" implies discretion. *Kingdomware Techs., Inc. v. United States*, 136 S.Ct. 1969, 1977 (2016). When a statute distinguishes between "may" and "shall," it is generally clear that "shall" imposes a mandatory duty. *Id.* Under Section 1306(b), the sole exceptions to the rule that the debtor must remain in possession of all property of the estate are that a confirmed plan or confirmation order states otherwise. This Court has held that when the Bankruptcy Code has enumerated exceptions, courts are not permitted to create additional ones. *Law v. Siegel*, 134 S.Ct. 1188, 1196 (2014). Therefore, Section 1306(b) plainly requires the debtor to have possession of all property of the estate prior to confirmation.

The question then becomes, what does it mean for the property to "remain" in the debtor's possession? The Bankruptcy code does not define the term "remain." When a term is undefined in a statute, a

court gives it its ordinary meaning. *Hall v. United States*, 132 S.Ct. 1882, 1887 (2012). Merriam-Webster defines "remain" as "to stay in the same place or with the same person or group; to continue unchanged."[2] Consequently, in order for property of the estate to remain in the debtor's possession, it must first be in the debtor's possession.

Additional evidence that the property must be returned to the debtor upon filing is found in Section 303(g). Section 303(g) states the requirements for a debtor to regain possession of their property from a trustee's possession. 11 U.S.C. § 303(g). Nowhere else does the Code refer to the debtor being able to regain possession of property of the estate. If Congress includes specific language in one section of a statute but omits that language in another section, it is presumed that Congress was doing so intentionally. *Russello v. United States*, 464 U.S. 16, 23 (1983). The court will "refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship." *Id.* By requiring a debtor to be in possession of all property of the estate, but not provide a mechanism to regain possession from another entity, Congress indicated its intent that property of the estate that was not in the debtor's possession at filing should be returned to the debtor.

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[2] *Remain, Dictionary,* Merriam-Webster, https://www.merriam-webster.com/dictionary/remain, (accessed March 9, 2020). Remain: "to stay in the same place or with the same person or group: to continue unchanged."

The legislative history of the Bankruptcy Code further supports this interpretation. Prior to the Bankruptcy Code taking effect in 1978, Congress discussed the need for the debtor to maintain possession of property of the estate. "Section 1303 of Title 11 gives the debtor exclusive rights to use collateral and Section 1306(b) of Title 11 mandates the debtor to remain in possession of all property of the estate before confirmation of a plan." H.R. REP. 95-595 at 276 (1977). The intent here cannot be clearer; only the debtor has the right to possess and use property of the estate prior to plan confirmation.

## II. Allowing a Creditor to Retain Possession of Property of the Estate Until the Debtor acts to Regain Possession Frustrates the Underlying Policies of the Bankruptcy Code.

At the core of federal bankruptcy law are two underlying policies; ensuring a "fresh start" for debtors, and obtaining an equitable distribution for creditors in the maximum possible amount. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 563 (1994). Both of these policies would be frustrated should the Court reverse the decision of the Seventh Circuit.

Under Petitioner's theory, a debtor whose vehicle was seized by a creditor prior to a Chapter 13 being filed would be required to take affirmative steps to attempt to regain possession. The delay caused by this process, as opposed to the creditor being required to return the vehicle to the debtor, would impact the debtor negatively, both directly and indirectly.

First, the debtor would be required to file an adversary proceeding in the bankruptcy court. The adversary would need to be served and a status date set, which would substantially delay the ability of the debtor to regain possession of the property of the estate. This would increase attorney fees paid by the debtor for the additional work. Furthermore, a lien-holder who repossessed a vehicle would be able to add its attorney fees for defending the adversary onto the balance the debtor would be required to pay pursuant to the typical finance agreement. The additional attorney fees would lead to either the debtor being forced to increase their plan payment (potentially beyond what they can afford), or decrease the amount available to general unsecured creditors.

This result, as a matter of public policy, is absurd. Congress could not have intended to give creditors the power to continue exercising control over property of the estate after commencement of a case, while still providing those creditors with adequate protection and remedies to obtain possession in the event of default through stay relief. Instead, Petitioner argues, the debtor is required to wait for the completion of an adversary proceeding before regaining property of the estate that is instrumental to the debtor in obtaining a "fresh start." This approach incentivizes creditors to repossess a debtor's property because the creditor can continue to exert control over a powerless debtor after commencement of the case.

In fact, the legislative history supports the proposition that the legislature was aware of creditors attempting to avoid the effects of the bankruptcy laws

while taking advantage of the debtor. H.R. REP. 95-595 at 117 (1977). "Creditors have developed techniques that enable them to avoid the effects of a debtor's bankruptcy, and bankrupts have suffered accordingly." *Id.* Creditors continuing to exercise control over a debtor's property, in violation of the stay, would provide creditors a new way to avoid the effects of a debtor's bankruptcy and frustrate the debtor's fresh start.

Second, a debtor who is unable to regain possession of their car may be unable to work, leaving them unable to fund their plan, or needing to pay for alternative transportation, which may not leave enough to fund the plan. Often, debtors file Chapter 13 primarily because they need their vehicle back immediately. If they are unable to do so, it is likely that many of them may opt for a Chapter 7 instead, preventing the general unsecured creditors from receiving anything.

Chapter 13 allows a debtor to retain property while repaying creditors. *Harris v. Viegelahn*, 135 S.Ct 1829, 1835 (2015). As this Court has acknowledged, the payments in a Chapter 13 plan are often made from a debtor's future earnings. *Id.* (internal citations omitted). The Bankruptcy Code requires a debtor to use their future earnings or income to fund the plan. 11 U.S.C. 1322(a)(1). A statute is "interpreted consonant with 'the provisions of the whole law, and … its object and policy.' " *Holloway v. United States*, 526 U.S. 1, 9 (1999) (internal citation omitted). Accordingly, since plan payments are intended to come from a debtor's future earnings, it is evident that bankruptcy was never

intended to create barriers for a debtor being able to work.

> The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much if not more than it is a property right. To preserve its free exercise is of the utmost importance, not only because it is a fundamental private necessity, but because it is a matter of great public concern. *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934).

The legislative history of the Code agrees. "To deny an individual a license to work after a bankruptcy… would negate the beneficial effects of the protections of the bankruptcy laws, and would prevent rather than facilitate a fresh start." H.R. REP. 95-595 at 286 (1977).

Preventing a debtor's access to their vehicle after a Chapter 13 is filed serves no purpose other than providing the creditor with leverage to exploit for more favorable treatment in the Chapter 13 plan. This cuts against one of the central objects of bankruptcy dating back to the U.S. Constitution, "to relieve unfortunate and honest debtors from perpetual bondage to their creditors." Joseph Story, Commentaries on the Constitution of the United States § 1101 (2d ed. 1851). If the disruption to the wage-earner is minimized by requiring prompt return of a recently seized vehicle, Chapter 13 will, as

Congress intended, return a greater benefit to debtors and a greater dividend to creditors.

## CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

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