No. 19-357

In The
# Supreme Court of the United States

CITY OF CHICAGO, ILLINOIS,

*Petitioner,*

v.

ROBBIN L. FULTON, *et al*.,

*Respondents.*

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

## BRIEF OF THE NATIONAL ASSOCIATION OF CHAPTER THIRTEEN TRUSTEES AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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## INTEREST OF THE *AMICUS CURIAE*

The National Association of Chapter Thirteen Trustees ("NACTT") is a non-profit, educational organization composed of consumer bankruptcy professionals.[1] Its membership represents a broad spectrum of participants in the consumer bankruptcy process including debtors' attorneys, creditors' representatives, and Chapter 13 standing trustees. The NACTT's voting membership is composed of private trustees appointed by the U.S. Department of Justice, Executive Office of the U.S. Trustee, *see* 28 U.S.C. § 586, and in the federal judicial districts of North Carolina and Alabama by the judiciary. Approximately 98% of the Chapter 13 standing trustees in the United States are voting members of the NACTT. O. Byron Meredith, a Chapter 13 Standing Trustee in the Southern District of Georgia and the current president of the NACTT, and the NACTT's Board of Directors, have directly authorized Henry E. Hildebrand, III, Chapter 13 Standing Trustee for the Middle District of Tennessee, to prepare and submit this brief on the NACTT's behalf.

Historically, Congress and federal courts have observed that the more efficient and effective Chapter 13 programs are those conducted by Chapter 13 standing

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[1] Pursuant to Supreme Court Rule 37.2(a), the NACTT states that all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, the NACTT states that no counsel for a party authored this brief in whole or in part and that neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of the brief. The NACTT is a non-profit association and has used its own resources in preparing this brief.

trustees who exercise a broad range of responsibilities in both the design and effectuation of Chapter 13 plans. *See Matter of Maddox*, 15 F.3d 1347, 1355 (5th Cir. 1994). A Chapter 13 trustee has a statutory responsibility to participate in the confirmation and administration of every Chapter 13 plan. *See* 11 U.S.C. § 1302. A Chapter 13 trustee, like bankruptcy trustees in general, is charged with a responsibility to the system and to maximize recoveries to creditors. The trustee is empowered to assert claims, avoid preferences and fraudulent transfers, collect property of the estate, and examine and object to creditors' claims in furtherance of the congressional goal of equitably distributing property of the estate to holders of allowed claims. *Maddox*, 15 F.3d at 1355; *In re Gustav Schaeter Company*, 103 F.2d 237 (6th Cir. 1939). The trustee represents the interests of all creditors by exercising various powers to ensure that the collection of the debtor's disposable income and disbursement of that money to creditors pursuant to a confirmed plan occurs according to the dictates of Congress, as set forth in the Bankruptcy Code. *Maddox*, 15 F.3d at 1355. Importantly, the trustees are in the best position to see the impact that the Chapter 13 process has on debtors and creditors. They can easily observe the impact that the loss of a debtor's transportation would have on the feasibility of a repayment plan.

The NACTT submits this brief not only to provide the view of the trustees, who are involved in most Chapter 13 bankruptcy matters, but also to offer the

perspective of practitioners in the consumer bankruptcy system.

## SUMMARY OF THE ARGUMENT

The NACTT agrees with the Debtors that the plain meaning of § 362(a)(3) prohibits a creditor from refusing to relinquish possession of property of the estate after the filing of the bankruptcy petition. And the NACTT would stress the importance to practitioners of consistency in the application of the "plain meaning" doctrine. For the busy parties involved in fast-moving consumer bankruptcy matters, being able to look first to the statute alone is valuable. Allowing legislative histories and historical practice to create ambiguities that the text itself does not have would be a disruptive departure from the Court's established framework for interpreting the Bankruptcy Code.

The City's position highlights concerns with an absolute rule, one that would require *unconditional* turnover of property of the estate—even, for example, property that is uninsured. As the court below noted, however, options for emergency stay relief or adequate protection address many of these concerns. (Pet. App. 15a-16a.) That the City or any creditor elects not to use the tools that are available to them does not mean that those tools do not exist. The NACTT would add that the Court's approach in *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995), offers a ready model for any rare cases in which compliance with the

requirements of the automatic stay would truly "eviscerate" the creditor's right to request stay relief or adequate protection. If a risk of irrevocable loss of the creditor's interest in property is significant enough that relinquishing possession of the property would deprive the creditor of an opportunity to request stay relief or adequate protection, *Strumpf* might support a temporary retention of property—but only for the period of time necessary to obtain a bankruptcy court's determination on a promptly filed request for emergency relief. And nothing in the *Strumpf* approach supports shifting the burden of requesting the relief from the creditor.

The automatic stay of acts to deny to debtors possession of property of the estate is part of a broader framework. Debt reorganizations offer a promise of a better result for parties collectively than an immediate liquidation, and a debtor's ability to utilize property of the estate is often critical to the success of the endeavor. That is especially true when the property is an automobile in a Chapter 13 case. The prototypical Chapter 13 case involves a working debtor trying to restructure debts and repay creditors from postpetition earnings. A vehicle is often the linchpin of the plan, the piece without which the entire effort—and the benefit to the other creditors it would provide—would collapse.

## ARGUMENT

### I. The value of the "plain meaning" rule is diminished if the Court allows legislative history or past practice to undermine the terms of the statute.

The Court's established approach to interpreting the Bankruptcy Code is to look first to the text of the statute itself and "when the statute's language is plain . . . to enforce it according to its terms" unless doing so would lead to an absurd result. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). One real benefit of this approach—especially for practitioners—is that it focuses attention on the statute itself rather than the jumble of other potential evidence of congressional intent, such as legislative histories and past practice. For the rule to have this value, of course, the statute's plain meaning must control even if the legislative history or historical practice might introduce some uncertainty.

As the Debtors explain in their brief, by its ordinary meaning, § 362(a)(3) prohibits a creditor from refusing to relinquish possession of property of the estate. Indeed, for many years, virtually every appellate court to consider the language agreed on this straightforward reading of the statutory text.[2] It was

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[2] *See Knaus v. Concordia Lumber Co., Inc. (In re Knaus)*, 889 F.2d 773 (8th Cir. 1989); *Cal. Emp't Dev. Dept. v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147 (9th Cir. 1996); *Expeditors Int'l of Wash., Inc. v. Colortran, Inc. (In re Colortran, Inc.)*, 165 F.3d 35 (9th Cir. 1998); *Motors Acceptance Corp. v. Rozier (In re Rozier)*, 376 F.3d 1323 (11th Cir. 2004) (per curiam); *Weber v. SEFCU (In re Weber)*, 719 F.3d 72 (2d Cir. 2013); *Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699 (7th Cir. 2009). In all but

only years after a consensus emerged that the Tenth Circuit disagreed directly with the consensus view,[3] and the court's rejection of the majority view relied on some of the contextual clues the City cites in this case. *WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943, 949-50 (10th Cir. 2017).

The City and minority courts do, of course, make a plain meaning argument. They contend that, because 11 U.S.C. § 362(a)(3) only prohibits any "act" to exercise control over property of the estate, it does not proscribe a creditor's passively holding an asset. But this textual argument puts a real spin on what is happening in

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one of these cases (*Thompson*), the lower appellate decisions by district courts and bankruptcy appellate panels reached the same conclusion as the courts of appeals. Other appellate opinions following the majority approach include: *Abrams v. Southwest Leasing & Rental, Inc. (In re Abrams)*, 127 B.R. 239 (B.A.P. 9th Cir. 1991); *STMIMA Corp. v. Carrigg (In re Carrigg)*, 216 B.R. 303 (B.A.P. 1st Cir. 1998); *Nissan Motor Acceptance Corp. v. Baker*, 239 B.R. 484 (N.D. Tex. 1999); *TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676 (B.A.P. 6th Cir. 1999); and *Mitchell v. BankIllinois*, 316 B.R. 891 (S.D. Tex. 2004).

[3] The D.C. Circuit earlier rejected an assertion of a stay violation for an exercise of control over property of the estate in *United States v. Inslaw, Inc.*, 932 F.2d 1467 (D.C. Cir. 1991), but that case presented unusual issues because the property over which the creditor allegedly exercised control was intangible personal property, which the creditor claimed a contractual right to use. The principal concern of the court of appeals was that treating the creditor's assertion of its rights as a stay violation would deny the creditor its right to assert its claim of ownership. *See id*. at 1472-73. The opinion did not directly disagree with the majority interpretation regarding tangible property that the creditor agrees belongs to the debtor, even citing the majority's *Knaus* opinion favorably. *See id*. at 1472.

these cases. The creditors are not just passively retaining property; they are actively refusing demands to recover property of the estate. A creditor's retention of the property gives it an unbalanced advantage over a debtor simply seeking to retain and use her car.

The Court, similarly, need not conclude that the "stay" means something other than "stop"—here, it requires the creditor to stop preventing the debtor from obtaining possession of property of the estate. The pretense in the argument that the creditor's retention of property is passive is obvious when one considers what would happen if a debtor appeared at an impound lot and attempted to take possession of a vehicle. Nothing recommends a rule that would require debtors to provoke a physical "act" of resistance just to establish what is clearly implicit in a creditor's refusal to honor a debtor's claim for possession of a tangible asset.

What gives the minority interpretation any traction at all, then, is not the text of the statute. It is, rather, evidence from a deep review of the legislative history and past bankruptcy practice. The City, for example, notes that the amendment to § 362(a)(3) that Congress eventually enacted as part of a larger bill in 1984 originated years earlier in a bill purporting to make only technical corrections, clarifications, and minor substantive changes. Allowing this kind of historical evidence of legislative intent to create ambiguity that does not exist in the statutory text would be disruptive. The Court has rejected such arguments in the past (even concerning the same 1984 legislation, in fact). *See Union Bank v. Wolas*, 502 U.S. 151, 157-58

(1991) ("[E]ven if Congress adopted the 1984 amendment to redress particular problems of specific short-term creditors, it remains true that Congress redressed those problems by entirely deleting the time limitation in § 547(c)(2). The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.").

The City and minority courts also argue that the legislative history of the 1984 bill provides no indication of an intent to change past practice.[4] But the Court has never held that Congress must telegraph changes to existing bankruptcy practice. When "the statutory language plainly reveals Congress' intent," the Court need not look for confirmation in the legislative history. *Penn. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990). (Congress has also amended the Bankruptcy Code, including § 362 specifically, numerous times since a consensus developed in the courts. The lack of any congressional effort to override the majority interpretation over the last 20 years or more may

[4] The favored quote in this regard is drawn from *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), in which the Court said: "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Id*. at 468. In context, the "elephants in mouseholes" quip plainly refers to the clarity of the statutory text and does not suggest a requirement that Congress develop legislative history to effect significant change to practice. Here, the disputed revision was hardly hidden: § 362(a) sets out the automatic stay and is thus exactly where one would expect to find provisions governing the scope of the stay.

be as telling as any lack of legislative history to support it at the outset.)

The City's deep dive into bankruptcy history is intriguing scholarly material.[5] (The City's arguments, in fact, are generally consistent with a theory developed in pair of academic articles from 2013.[6]) But this kind

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[5] The historical evidence does not uniformly support the minority approach. For example, in the same legislation that added "exercise control" to § 362(a)(3), Congress also added language indicating that property of the estate includes specified property, not just wherever located, but also "by whomever held." Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 441, 456, 98 Stat. 333. The amendment to § 541 to expressly include property held by others in the same legislation that amended § 362(a)(3) to prohibit acts to exercise control over property of the estate supports the majority view of § 362(a)(3).

[6] Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part I): Origins and Evolution of the Turnover Power*, 33 Bankr. L. Letter No. 8 (Aug. 2013); Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who Is "Exercising Control" Over What?*, 33 Bankr. L. Letter No. 9 (Sept. 2013). Professor Brubaker also argues that the right of possession of property is not included in property of the estate when a creditor has seized property prepetition. This conclusion, however, is inconsistent with several provisions of the Bankruptcy Code. First, the Code specifies that the estate includes property "wherever located and *by whomever held*." 11 U.S.C. § 541(a) (emphasis added). Second, although the Code specifies that property of the estate includes property recovered under avoidance powers, it does not similarly include the right of possession accorded by § 542. 11 U.S.C. § 541(a)(3). If the right of possession were initially excluded from the estate, the Code would presumably provide for it to be included in the estate once recovered, in the same way it provides for property brought into the estate by the trustee to be included. Third, § 542(a) itself only requires turnover of property a trustee may use, sell, or lease under § 363, and § 363 only allows a trustee to use, sell, or lease *property*

of hidden meaning is exactly what the "plain meaning" doctrine is supposed to prevent.

## II. Even if creditors are entitled to withhold possession of property of the estate in rare cases, the argument for doing so justifies only temporary action.

The City raises the specter of secured creditors at the mercy of abusive debtors. Despite not having made any effort itself to request adequate protection in the cases on appeal, the City argues that an absolute version of the majority rule would strip creditors of their rights to obtain adequate protection of their interests in repossessed property.

The Seventh Circuit in its opinion below notes options creditors have when relinquishing possession of property might place their interests in the property in immediate jeopardy, including seeking emergency stay relief or adequate protection. (Pet. App. 15a-16a.) Courts also have the power to retroactively annul the stay in appropriate circumstances. *See* Eugene R. Wedoff, *The Automatic Stay Under § 362(a)(3)—One More Time*, 38 Bankr. Law. Letter No. 7 (July 2018). Even if these measures might be inadequate in rare cases, these concerns would not justify more than a brief refusal to relinquish possession of property of the estate without court approval.

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*of the estate*. This Court's holding in *United States v. Whiting Pools*, 462 U.S. 198 (1983), therefore, implies the conclusion that the right of possession is property of the estate. Otherwise, § 542(a) would not have required the IRS to relinquish its possession.

The Court has provided a framework for balancing requirements of § 362(a) against a creditor's right to request stay relief. In *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995), the Court held that a bank's "temporary" refusal to pay an amount due to the estate (by virtue of a checking account deposit) while the creditor sought stay relief for a setoff did not violate the prohibition on exercising "the setoff of any debt owing to the debtor" under 11 U.S.C. § 362(a)(7). The Court found the bank's administrative hold acceptable because denying it would "eviscerate" § 542(b)'s exception to the duty to pay a debt to the estate when the debt is subject to setoff, requiring the creditor "to do that which § 542(b) specifically excuses it from doing." *Strumpf*, 516 U.S. at 20.

Relinquishing possession of property of the estate clearly does not implicate these concerns in every case. In the run-of-the-mill case, relinquishing possession certainly reduces the secured creditor's leverage in negotiations with the debtor or trustee, but it does not *eviscerate* the creditor's ability to separately obtain adequate protection or stay relief. In unusual circumstances, however, requiring a creditor to turn over property immediately might present at least a risk that the creditor could lose its interest in the property before the court has had an opportunity to order it protected. In those circumstances, *Strumpf* might support withholding possession of the property.

But the *Strumpf* opinion, at most, supports withholding possession for a very limited time. The opinion repeatedly refers to the bank's administrative hold as

a "temporary" measure to allow the bank an opportunity to request stay relief. In the context of property at risk of loss, the time required to obtain a determination on stay relief or adequate protection should be brief because the Code provides specific procedures for requesting emergency relief. *See* 11 U.S.C. § 362(f) (permitting a court, "with or without a hearing," to "grant such relief from the stay . . . as is necessary to prevent irreparable damage to the interest of an entity in property"); 11 U.S.C. § 363(e) (permitting a court, "with or without a hearing," to "prohibit or condition [the] use, sale, or lease [of property] as is necessary to provide adequate protection" of the creditor's interest in the property).

The Code, moreover, generally places the burden of requesting adequate protection and stay relief on the creditor. *See TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 683-84 (B.A.P. 6th Cir. 1999) (noting that the Code provides for stay relief and, except for cash collateral, adequate protection only on request of the party seeking relief). Allowing a creditor to withhold possession of property of the estate (other than, perhaps, cash collateral) beyond the minimum time necessary to obtain a court determination on a prompt request for emergency relief would allow the creditor to obtain the relief sought without making the request that the Code requires.

## III. The stay of acts to prevent a debtor from taking possession of property of the estate is consistent with the broader statutory framework.

Because statutory analysis is a "holistic endeavor," *Czyzewski v. Jevic Holding Corp*., 137 S. Ct. 973, 985 (2017), the courts in the majority rightly examine § 362(a)(3) in the broader context of the Bankruptcy Code. Especially for debt reorganization cases, the majority's interpretation fits neatly into the larger framework.

The City and its amici contend that the automatic stay serves only to maintain the status quo, but the automatic stay "serves several goals," including offering debtors "breathing room during the period of financial reshuffling." *Smith v. State of Maine Bureau of Rev. Servs. (In re Smith)*, 910 F.3d 576, 580 (1st Cir. 2018) (internal quotation omitted). It "permits the debtor . . . to be *relieved of the financial pressures* that drove him into bankruptcy." H.R. Rep. 95-595, 340, 1978 U.S.C.C.A.N. 5963, 6296-97 (emphasis added). Especially when the property at stake is a debtor's vehicle, the denial of access to the property can be a source of intense financial pressure. *See A Car Is A Necessity*, Pew Research Center (Sept. 13, 2010), https://www.pewresearch.org/fact-tank/2010/09/13/a-car-is-a-necessity/ (finding that "an overwhelming[] number of Americans consider a car a necessity in life"); Pamela Foohey, Robert M. Lawless & Deborah Thorne, *Driven to Bankruptcy*, 55 Wake Forest L. Rev. (forthcoming 2020) (manuscript at 20), https://papers.ssrn.com/sol3/papers.

cfm?abstract_id=3451565 (finding support for the "intuition that people [in bankruptcy] will hold onto their means of transportation if they can").

The issue is not just debtor protection. "The object of the automatic stay provision is essentially to solve a collective action problem." *United States v. Inslaw, Inc.*, 932 F.2d 1467, 1473 (D.C. Cir. 1991). The stay prevents creditors from acting individually in ways that might be detrimental to creditors collectively. Preventing actions that obstruct reorganizations are entirely consistent with this purpose.

A central premise of the reorganization provisions of the Bankruptcy Code is that allowing a debtor to use property of the estate to generate new income may provide a better return to creditors than an immediate liquidation. In a personal reorganization under Chapter 13, the item of property that is often central to the plan is the debtor's vehicle. Chapter 13 originated from an effort to provide "wage earner" relief, *see* Timothy Dixon & David Epstein, *Where Did Chapter 13 Come from and Where Should It Go?*, 10 Am. Bankr. Inst. L. Rev. 741, 746 (2002), and the prototypical Chapter 13 debtor is still a working person who proposes to pay creditors from postpetition earnings rather than from a liquidation of prepetition assets. Those without vehicles "risk being locked out of the economy." David A. King, Michael J. Smart & Michael Manville, *The Poverty of the Carless: Toward Universal Auto Access*, J. Planning Educ. & Research (2019), https://doi.org/10.1177/0739456X18823252; *see also* Rolf Pendall et al., *Driving to Opportunity: Understanding the Links among*

*Transportation Access, Residential Outcomes, and Economic Opportunity for Housing Voucher Recipients* 3 (2014), https://tinyurl.com/sxszl4b (noting a "drastic divergence in the relative advantage between those who have access to automobiles and those who do not"). A debtor's vehicle, therefore, is often crucial to the success of a Chapter 13 plan. Allowing a single creditor to hold the plan hostage by refusing to relinquish possession of critical property of the estate would undermine the broader bankruptcy framework.

## CONCLUSION

For the foregoing reasons, the NACTT requests that the Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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