No. 19-357

IN THE
Supreme Court of the United States

CITY OF CHICAGO

Petitioner,

v.

ROBIN L. FULTON, GEORGE PEAKE AND TIMOTHY SHANNON.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF *AMICI CURIAE* PROFESSORS JOHN A. E. POTTOW AND JAY LAWRENCE WESTBROOK IN SUPPORT OF RESPONDENTS.

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STATEMENT OF INTEREST

Amicus Pottow is the John Philip Dawson Collegiate Professor of Law at the University of Michigan Law School. He has spent decades studying the bankruptcy system and has briefed and argued cases before this Court before on the subject of bankruptcy law. Amicus Westbrook has also spent decades studying the bankruptcy system and has briefed cases before this Court. Amici are the primary co-authors of one of the leading textbooks on debtor-creditor law. *See* ELIZABETH WARREN, JAY LAWRENCE WESTBROOK, KATHERINE A. PORTER, & JOHN A. E. POTTOW, THE LAW OF DEBTORS AND CREDITORS (7th Edition, Wolters Kluwer 2014). Amici are members of the American College of Bankruptcy and International Insolvency Institute and have served on the U.S. delegation to the United Nations Commission on International Trade Law as expert advisers on insolvency law. Amici file this brief as part of their ongoing service to assist courts confronting important issues of bankruptcy law—here, the proper interpretation of the automatic stay under 11 U.S.C. § 362(a)—and to ensure the Court's opinion is narrowly focused thereon.[1]

[1] In accordance with Supreme Court Rule 37, counsel for Petitioner and Respondent have consented to this brief's filing. No counsel for any party authored this brief in whole or in part, and no party or their counsel made any monetary contribution toward the preparation or submission of this brief. No person other than the *amicus curiae* made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Court should follow the clear text of § 362(a)(3)'s bar to "any act . . . to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). In interpreting that clear text, the Court should first consider several important background practices of the bankruptcy system that provide context to the statute, including the use of trustees to administer estate property, the reality that in most bankruptcy estates the trustee or debtor is in possession of secured collateral (not the secured party), and that lower courts near-unanimously agree that enforcing liens through exercising possessory rights to force repayment violates other paragraphs of the automatic stay beyond § 362(a)(3).

As to the text of § 362(a)(3) itself, the Court should reject the untenable distinction between "active" and "passive" acts in interpreting the term "act," eschewing such a recipe for litigation and potentially ridiculous results. Nor should the Court accept various glosses on "to exercise control" offered by the City and its supporting amici: the UCC-specific usage of "control" either has no bearing on § 362(a)(3) or supports respondents' interpretation; the pre-Code historical practices are irrelevant in the face of unambiguous text; and there is no surplusage problem created for § 542(a) by following the natural reading of "to exercise control over property of the estate" in § 362(a)(3).

More specifically on the final point, § 542(a)'s turnover obligation to "account for[] such property, or

the value of such property," 11 U.S.C. § 542(a), provides plenty of non-redundant work for that section to do alongside a proper reading of § 362(a)(3) when a secured party (or anyone) remains in possession of estate property postpetition. Nor does § 542(a) impose any "preconditions" that require resolution before prompt compliance with a trustee's demand for turnover; a rule that would require a trustee in every case seeking to use the turnover power to procure a court order first would be gratuitous, cumbersome, and senselessly burden bankruptcy dockets while burning through estate resources.

Finally, the two additional arguments relied upon by the City and its supporting amici make no sense. An alternative rule to § 362(a)(3) (and § 542(a)) premised upon drawing a distinction between *possessing* property and *possessing possession* of property would make it impossible for trustees to administer their estates. Similarly, this Court's opinion in *Citizens of Maryland Bank v. Strumpf*, 516 U.S. 16 (1995), which pertains to a creditor's right to offset mutual monetary obligations, has no relevance to this case; it is simply a red herring.

ARGUMENT

I. THE COURT SHOULD CONSIDER BACKGROUND CONTEXT OF BANKRUPTCY PRACTICE TO SITUATE ITS ANALYSIS OF THE CLEAR TEXT OF § 362(a)(3).

Before presenting their primary argument, Amici offer three introductory points to lay an operational context for the Court regarding aspects of the bankruptcy system.

First, the majority of bankruptcy cases are administered by a panel trustee under chapter 7. To be sure, debtors can remain in possession in chapters 11, 12, and 13, 11 U.S.C §§ 1107, 1203, 1303 (2020), but the modal bankruptcy case has a trustee. *See* ADMIN. OFFICE OF THE U.S. COURTS, BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT REPORT (2018). This means all the arguments advanced by the City and its supporting amici concerning the scope of §§ 362, 363, and 542, for example, should be considered not just in light of their effect upon reorganizing debtors, but upon the countless panel trustees appointed to administer the hundreds of thousands annual consumer and business chapter 7 cases. This specific case is about car-owning consumer debtors in reorganization, but these Code provisions more generally apply to the trustees who represent unsecured creditors. Every burden placed on panel trustees means delay and expense for the unsecured creditors within a limited-resource

bankruptcy estate where, by definition, there is not enough money to go around.

Second, many if not most debtors have secured debt. *See* Robert M. *et al.*, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L. J. 349, 366-67 (2008) (discussing data from the Consumer Bankruptcy Project, including incidence of consumer secured debt). The vast majority of that collateral is in the possession of the debtor upon filing. Sometimes, as here, a secured creditor has removed possession of that collateral from the debtor by the filing date, but most of the time the property is still in the hands of the debtor. One reading of the briefs in this case suggests a battle of sorts between secured creditors and debtors, where the right to adequate protection payments is cast as a grand compromise to a secured creditor's sacrifice of parting with collateral when demanded turnover by a trustee. Pet'r's Br. 35 ("In substance, § 542(a) of the Code therefore contemplates a trade."). But the empirical baseline is that most adequate protection motions are brought under § 362(d), when the secured creditor does not have possession of the collateral during the case. *See* 11 U.S.C. § 362(d)(1) (allowing stay to be lifted "for cause, including "lack of adequate protection"). Indeed, "lift stay" motions, the bread and butter of bankruptcy court litigation, are so frequent that courts often provide detailed descriptions and instructions guiding unrepresented creditors through the process. *See, e.g.*, United States Bankruptcy Court, Eastern District of Michigan, *How to File a Motion for Relief from the Automatic Stay*,

https://www.mieb.uscourts.gov/how-file-motion-relief-automatic-stay (last visited March 9, 2020).

Accordingly, any suggestion that a secured creditor in possession of collateral incurs great imposition by having to adjudicate an adequate protection dispute only after possession returns to the hands of the debtor is false; upon turnover the creditor finds itself *in the exact same position* as most other secured creditors, who all process their lift-stay motions through § 362(d) just fine while the trustee or debtor enjoys possession. In effect, then, the City is seeking a leg up and preferential treatment that accords it litigation advantage not shared by most other secured creditors in the bankruptcy system.

Finally, repossession is one way to enforce a secured creditor's lien upon default, UCC 9-609(a) ("Secured Party's Right to Take Possession After Default"). It is also functionally a necessary antecedent to private sale and foreclosure of personal property under (near-universal) Article 9 of the Uniform Commercial Code, UCC 9-610 ("Disposition of Collateral After Default"), as few buyers will buy collateral they can't see and their seller doesn't have. But enforcement by repossession does not require private sale. For example, the creditor can lease out the collateral, collecting rents to apply toward the outstanding indebtedness. *See id.* at 610(a) (allowing leasing and licensing of repossessed collateral).

For consumer collateral in particular, the power of repossession in enforcing the lien is thus not to take the first step toward a private foreclosure sale of the

collateral but to focus the debtor's mind on curing the default. Few lenders want to sell used cars at a loss; they want their loans to perform. They want repayment and loan reinstatement, so much so that the internet is rife with advice for borrowers of how to seek a reinstatement quote from their lender to make their backpayments and get their cars back. *See, e.g.*, Reinstatement and Payoff, JUSTIA, https://www.justia.com/foreclosure/reinstatement-and-payoff/ (last visited Mar. 9, 2020). If the debtor comes up with the back payments, the lender can and often does simply allow reinstatement of the loan and return of the collateral to the debtor rather than exercise its right to sell. Thus, enforcement of the lien through retention of repossessed collateral, not foreclosure sale, is often the primary means to cajole repayment after default of secured debt. Indeed, the City in this case candidly admitted it would release the cars to the debtors as soon as they paid their debts. Pet'r's Br. 10 ("[T]he City may impound vehicles and hold them until fines and penalties are satisfied.").

This perhaps is the most significant contextual point to consider before addressing § 362(a)(3): *the City's conduct—refusing to take action until the debtor's debt is repaid—is literally a textbook example of an automatic stay violation.* It is "an act to collect, assess, or recover a claim," 11 U.S.C. § 362(a)(6). *See, e.g.*, *Andrews University v. Merchant*, 958 F.2d 738, 741 (6th Cir. 1992) (automatic stay violation for refusal to release academic transcript until outstanding debt paid) (collecting cases), *discussed in* WARREN *et al.*, at 72; *see also Scroggins v. Roman*

Catholic Church (In re Scroggins), 209 B.R. 727, 729-30 (Bankr. D. Ariz. 1997) ("A large number of cases stand for the proposition that a college or educational institution violates the automatic stay imposed by 11 U.S.C. § 362 if the institution withholds a debtor's transcripts because the debtor is in default on a pre-petition debt.").[2] To be sure, the stay violation is grounded under a different paragraph than § 362(a)(3), namely, § 362(a)(6), but this passive conduct violates the stay nonetheless. (Collateral retention also violates § 362(a)(4) because it is an "act to create, perfect, *or enforce* any lien against property of the estate." 11 U.S.C. § 362(a)(4) (emphasis added).)[3]

Amici bring this final point of introductory context to the Court's attention in part to implore it to avoid broad pronouncements about the scope of the bankruptcy stay and be clear, if it so decides to resolve this case under § 362(a)(3), that it is not addressing §§ 362(a)(4), (6). Note that these paragraphs are

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[2] Congress intended the stay to "give[] the debtor a breathing spell from his creditors" and to "stop[] all collection efforts, all harassment, and all foreclosure actions." S. REP. No. 989 (1978).

[3] Note that there is wide overlap in the scope of the various paragraphs of § 362(a). Paragraph (a)(6) is probably the "heart" of the automatic stay, which bars any act to collect a claim. § 362(a)(6). A violation of § 362(a)(6) will likely, as here, violate other provisions of the stay as well, but not always. For example, a third party responding to a secured-creditor friend's request to hold or even hide collateral would likely be engaging in a § 362(a)(3) violation but not attempting to collect a debt under § 362(a)(6).

lurking in this case, however. For example, the debtors argued in the courts below that the automatic stay's violation could be grounded in myriad parts of § 362(a), and indeed the bankruptcy court found violations of § 362(a)(4) and § 362(a)(6). Pet. App. 113a–15a. In consolidated appeal, however, the Seventh Circuit explicitly held that it did not need to address the §§ 362(a)(4) and 362(a)(6) arguments in light of its finding of a violation of § 362(a)(3), Pet. App. 14a, which is perhaps not surprising given the existence of binding Seventh Circuit precedent, *Thompson v. General Motors Acceptance Corp.*, 566 F.3d 699 (7th Cir. 2009), expressly holding retention of collateral a violation of § 362(a)(3).[4] (The City

[4] Amici were curious at how the City would argue no violation of §§ 362(a)(4) and 362(a)(6). In its brief before the Court of Appeals, Appellant's Br. 48-49, the only authority the City offered for its startling position was two law review articles authored by the City's supporting amici, *see* Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part I)*, 33 No. 8 BANKRUPTCY LAW LETTER 1, at 7 (2013); Thomas E. Plank, *The Creditor in Possession Under the Bankruptcy Code: History, Text, and Policy*, 59 MD. L. REV. 253, 316 (2000), an unpublished court opinion, *In re Garcia*, 740 F. App'x 163, 164 (10th Cir. 2018), and a "superseded" Restatement of Law from 1941 (RESTATEMENT (FIRST) OF SECURITY § 72 cmt. a (1941)). (The FOREWORD to the latest RESTATEMENT OF LAW (THIRD): SURETYSHIP AND GUARANTY (1996) instructs that it "should be regarded as completely superseding Division II of the Restatement of Security. Division I of that Restatement has long been largely superseded by Article 9 of the Uniform Commercial Code.")

sought to persuade, unsuccessfully, the Seventh Circuit to overrule that precedent.)

The scope of the question presented, which broadly invokes § 362 and not any specific subsection or paragraph therein, Pet. (i), formally permits this Court to affirm on the alternative ground of the stay's violation being found under §§ 362(a)(4) and/or (6) on the undisputed facts. Sup. Ct. R. 14.1(a) ("Only the questions set forth in the petition, *or fairly included therein*, will be considered by the Court.") (emphasis added). Amici recognize, however, that it would be unusual for the Court to exercise its discretion thus in light of the focus on § 362(a)(3) in the opinion below and the briefing. Moreover, they believe the City's interpretation of § 362(a)(3) cannot be sustained, and is indeed dangerous to the operation of the bankruptcy system, and so join in advocating affirmance on the reasoning of the opinion below with its focus on § 362(a)(3). They flag the lurking §§ 362(a)(4) and (6) issues in an attempt to be comprehensive and assist the Court in its deliberations.

II. The Court Should Follow the Clear Text and Most Natural Reading of § 362(a)(3).

The City concedes that its argument entirely hinges on the interpretation of the words "an act," admitting that the *Thompson* court's interpretation of "to exercise control" to include retention of collateral and refusal to return "make[s] sense." Pet'r's Br. 18. Its supporting amicus agrees, conceding that "exercise control" in isolation "plausibly . . . encompass[es] the

City's passive retention of vehicles that it seized pre-bankruptcy." U.S. Br. 7.

In contending the text does not apply to exercising dominion over the debtors' repossessed cars, the City and supporting amici advance the following interpretive arguments about "control": (1) "control" should be restricted to non-tangible property, as it sometimes is in the Uniform Commercial Code, Pet'r's Br. 30-31; Brubaker Br. 17; (2) the whole phrase "to exercise control" should not be read to overrule pre-Code practice, which allegedly accorded secured creditors the right to resist turnover prior to obtaining adequate protection, Pet'r's Br. 25-29; Brubaker Br. 17; and (3) the whole phrase must be read to permit passive retention of property to avoid plunging § 542(a) into the abyss of surplusage, Pet'r's Br. 29; Brubaker Br. 19; U.S. Br. 30. A fourth, overarching argument is added to this mix that focuses on the antecedent term "any act" (which is what § 362(a)(3) stays) to contend that the City's conduct did not violate the stay because it is passive, not active, and hence not an "act." Pet'r's Br. 20; U.S. Br. 21. None of these arguments accords with best principles of textual interpretation or the normal functioning of commercial law practices.

A. An Attempt To Distinguish "Active" from "Passive" Conduct in Stay Violations Would Inject Disastrous Litigiousness and Delay into the Bankruptcy System and Yield Ridiculous Results.

To begin, the City makes too much of the Bankruptcy Code's phrasing "stay of . . . any act," 11 U.S.C. § 362(a)(3), suggesting passive conduct is not an "act" and hence cannot trigger the bar. The United States goes further, albeit without any citation to authority, by suggesting that no other paragraph of § 362(a) bars passive conduct. U.S. Br. 17 ("It would thus be particularly anomalous to read the 'exercise control' prong of Section 362(a)(3) as the sole component of the automatic stay that requires a creditor to take an affirmative act by forcing the creditor to turn over property that it possessed pre-bankruptcy."). The United States is simply wrong, as any bankruptcy textbook makes clear. *See, e.g., Andrews*, 958 F.2d, at 741 (refusal to give debtor transcript violates § 362(a)(6)).

So, too, is the City wrong. The crux of its argument is that "stay" intends to invoke negative obligations only, suggesting positive obligations require the specific terminology of injunctions. Pet'r's Br. 18-20. This view is mistaken. First, the more benign reason Congress uses "stay" in § 362(a) but "injunction" in § 524(a)(2) is for the simple reason that the stay is designed to be temporary, in operation only during the bankruptcy case's duration, whereas the post-discharge injunction of § 524 is to be permanent. Given

this distinction between temporary (stay) and permanent (injunction) relief, it is difficult to imagine what preferred terminology the City would have had Congress use in § 362(a)—other than that which it chose, the broadest possible application to a "stay" of "any act."

But the City is more importantly wrong in suggesting the automatic stay of bankruptcy simply means "freeze." *Id.* 16-17. Leaving aside the question-begging nature of the proper characterization of the status quo to be frozen, the City's approach would render the cessation of collection practices policed by the automatic stay meaningless. Consider the ridiculous results that would arise under this approach. For example, a hired thug applying thumbscrews to encourage a non-paying debtor to cough up would be allowed upon the bankruptcy petition's filing to stand up, walk away, and leave the hapless debtor's thumbs pinned.

Of course, if forced to pigeonhole the thumbscrewing freeze into an "act," we perhaps might say that the *walking away*, or the *leaving on of the screws*, or even the *closing of the ears* to the debtor's postpetition howls of pain all might constitute the triggering "act," the automatic stay seeks to target, but why would Congress want to require such a litigation effort? Is the proper "status quo" really a debtor with thumbs half-screwed, or is it better conceived as a debtor who has free use of his thumbs before the collection conduct began?

Similarly, if a car is impounded, but after filing bankruptcy the debtor uses a spare set of keys to try drive the car back home, is it a sufficiently affirmative act to close the gate before the debtor can get off the compound? To change the locks on the car before the debtor shows up? To put a boot on the car? To refuse to answer the debtor's phone calls? To use caller ID to screen those phone calls? This can go on *ad infinitum*, and the one thing bankruptcy trustees do not have on their side is time. This is why the simpler—and less litigious—solution is recognizing what bankruptcy courts in the trenches already know: what the City downplays as merely passive, non-act conduct, such as retaining possession of an impounded debtor's car until she pays (or leaving it affixed to the tow truck), or withholding a debtor's academic transcript, or refusing to remit taxes, violates the stay, regardless how a metaphysical debate on whether that action is better characterized as active or passive resolves. *See, e.g.*, *In re Del Mission Ltd.*, 98 F.3d 1147 (9th Cir. 1996) (tax authority's retention of refund and refusal to remit funds to debtor violates the stay).

B. The UCC-Specific Usage of "Control" to Pertain to Primarily Intangible Property Is Inapposite to the Amendment that Added "Exercise Control" to § 362(a)(3).

Law professor amici make much of the use of "control" in the Uniform Commercial Code and its focus therein on certain types of intangibles. *See* Brubaker Br. 18; *see also* UCC 9-314(a) (prescribing "control" as a means of perfecting certain intangibles).

The initial difficulty with suggesting Congress's 1984 amendments intended to use this UCC-specific meaning of "control" is that the UCC's Article 9 was not revised to use these terms until reforms initiated during the 1990s. *See* American Law Institute, *Comment 1 to Revised Article 9 § 9-314* (1998). More importantly, on its own terms, the UCC talks only about control simpliciter. *See, e.g.*, UCC 9-314(a) ("*Perfection by Control.* A security interest in investment property, deposit accounts, letter-of-credit rights, electronic chattel paper, or electronic documents may be perfected by control of the collateral . . . ."). The UCC does *not* say the "exercise of control," just "control."

This diction is textually significant because it means one could sensibly talk about "obtaining" control, to use the pre-1984 language of the Bankruptcy Code, were one interested exclusively in the initial acquisition phase of that control. If so, then Congress's choice to add the term "to exercise" before "control" in 1984 to § 362(a)(3) must mean Congress wanted to reach activity beyond the mere obtaining of control, as the phrase "obtain possession of" was already in the statute (i.e., Congress could have just added "or control" after "obtain possession"). The conspicuous addition of the longer term "or to exercise control over," creates the logical textual inference that "exercise" of control (in contrast to mere "obtaining" control) intends application to ongoing dominion, not just the one-off act of acquiring that dominion *ab initio*.

Accordingly, giving content to the verb "to exercise" before "control" requires these amici either to contend "to exercise control over" does not cover ongoing retention of control (a position for which they offer no support from the UCC), or to submit that Congress intended a different, broader level of stay protection for intangible than tangible estate property—with the former protected from stay violations due to initial acquisition *and* ongoing retention of control but the latter protected *only* from the one-off step of acquisition of possession but not ongoing retention conduct. Suffice it to say, no theory has been offered by amici to support such a bizarre hypothetical congressional intent.

Thus, the Court should read "to exercise control over" in its ordinary sense of dominion. *Control*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th Edition 2003) (defining as "to exercise restraining or directing influence over" or "to have power over"). The UCC provides no basis to restrict it to intangible property. Indeed, consider the widespread example of ignition interruption switches ("kill switches"), which by work of a few computer keystrokes send out a remote control signal that disables a delinquent debtor's car from starting. Leaving the kill switch on so the debtor cannot drive is surely exercising control, in a dramatic way, of the debtor's car, just as surely as it is in no way possession of that eminently tangible collateral. Were amici's UCC-specific definition of "control" accepted to restrict that word's reach to intangible property only in § 362(a)(3), presumably no kill switch conduct would violate the automatic stay—

even if a creditor responded petulantly to a bankruptcy petition's filing by immediately pressing the button in an open act of defiance to the trustee.

As for the "scarce" legislative history of the 1984 amendments, *In re Denby-Peterson*, 941 F.3d 115, 126-127 (3d. Cir. 2019), it provides no support for a UCC-specific reading of "control." The city's supporting amici make great hay out of Congress' characterization of those amendments as "technical" (perhaps implying that the label "technical" can negate clear text that litigants find unwelcome), U.S. Br. 10–11, and further emphasize the legislative history declaration that "[e]very effort has been made to . . . maintain existing policy intact." H.R. REP. No. 96-1195, at 2. *See also* 126 CONG. REC. 31,152 (1980) (floor statement of Sen. DeConcini in conjunction with Senate's concurrence in House amendments to S.658) ("The bill before us today is basically one of technical and conforming type amendments that are totally unobjectionable and reflect the congressional intent that may not always have been clear regarding the Code.").

These comments shed no light. Even leaving aside that they were to a prior bill and not the actual package of amendments enacted, the problem is they can be consistent with two hypothetical narratives that motivated Congress to act in 1984, as follows.

Narrative A: "The Code only talks about obtaining *possession* of property of the estate, and since only tangible property is possessable, perhaps we should clarify it covers intangible property as well, by adding

the word *control*, otherwise electronic chattel paper will be unprotected from coverage under § 362(a)(3)."

Narrative B: "The Code only uses the term 'obtain possession of,' which could lead someone to make a technical argument that it bars only the one-off *acquisition* of the property and not its *ongoing retention*, so let's add 'or exercise control' to clarify any ongoing conduct, no matter how passive, is captured."

Both these hypothetical motivations could have led to the addition of the phrase "or to exercise control over" to § 362(a)(3). True, the exercise of control may subsume obtaining possession, leaving the initial phrase with perhaps less work to do, Pet'r's Br. 30, U.S. Br. 16, but it would probably not be the first time that Congress added a statutory patch while allowing pre-existing textual barnacles that could have been scrubbed at the same time to remain. Moreover, the epithet surplusage seems exaggerated: the reach of "any act to obtain possession" might cover *pre-control* possession transition acts—e.g., hiring a repo company to tow the car—that might not fall under the scope of the exercise of control over the property. Thus, "intra-tow," a debtor's car might be in the control of neither the debtor nor the creditor but nonetheless be in the midst of an act to obtain possession. (This issue's resolution probably turns on principles of agency law unnecessary to resolve here.)

Indeed, if anything, Narrative B intuitively seems more consistent with a "technical" correction undesigned to change much—certainly more so than a concern that the entire swath of the intangible

economy had been left outside the scope of the automatic stay's protection under § 362(a)(3).[5] In sum, there is no reason to believe the 1984 amendments had anything to do with intangible-focused definition of "control" that would work its way into Article 9 over a decade later.

C. Pre-Code Practice Presents No Obstacle to Applying the Code's Clear Text.

As for the pre-Code practice, it is largely irrelevant given the 1978 overhaul's sweeping expansion of bankruptcy court jurisdiction. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("Critical features of every bankruptcy proceeding are the exercise of exclusive jurisdiction"); *see also* 28 U.S.C. § 1334(e)(1) (2020) (vesting exclusive jurisdiction over all property of the debtor "wherever located"). No longer were secured creditors quasi-outsiders to the estate, with byzantine practices of summary and plenary jurisdiction: everything was to be governed by one bankruptcy court, at once, together, and automatically. Bankruptcy Reform Act of 1978, Pub.L. No. 98-353 (1978). However interesting the historical practice was, it has little bearing on the interpretation of the clear text that Congress chose to enact in 1978 for § 362(a)(3) and to amend in 1984 (at least in the

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[5] "Exercise control" also mops up additional scenarios, consistent with *either* narrative, such as the kill switch, just as it covers a lender who insists truthfully that she's not in possession of the collateral—but whose good friend is and is deeply solicitous to his lender-buddy's interests.

absence of a statutory ambiguity, which is noticeably absent here).

D. The Natural Reading of § 362(a)(3) Creates No Surplusage Problem with § 542(a).

Finally, the City and its supporting amici give short shrift to the non-redundant operation of § 542(a) created by the natural reading of § 362(a)(3). For example, § 542(a) turnover operates as a mandatory obligation not just on secured creditors but on any entity—e.g., a third-party bailee who happens to be holding estate property but is not otherwise a party to the bankruptcy (such as a shipper, consignee, or even parking valet). So while it is true that stay-violating conduct under § 362(a)(3) may also violate turnover obligations under § 542(a) (and vice-versa), that in no way renders § 542(a) meaningless. The simplest way to observe § 542(a)'s non-redundancy vis. § 362(a)(3) is the affirmative duty to account it places on its subjects. 11 U.S.C. § 542(a) ("An entity . . . shall deliver to the trustee, *and account for*, such property or the value of such property . . . .") (emphasis added). Holders of estate property, be they creditors or not, must account to the trustee for property loss or devaluation.

Indeed, a glib example taken from the United States' brief, ironically intended to demonstrate a weakness of the debtors' arguments, actually helps to show a distinction between §§ 362 and 542:

> A creditor could cease to "exercise" that form of "control" simply by abandoning property that it had seized pre-bankruptcy, rather than surrendering it to the debtor or trustee. The City might, for example, simply relinquish "control" over respondents' cars by leaving them unlocked and unguarded in the lot, or by giving them to the first passerby that expressed interest.

U.S. Br. at 12.

The United States is almost correct. Were a party who found itself in possession of bankruptcy estate property to abandon it on the street in a fit of panic, there would be probably no violation of § 362(a)(3) (no exercise of control). But there almost certainly would be a violation of § 542(a)(1) for accountable loss of value to the estate by theft or vandalism.[6] Hence, § 542(a)'s directive to account provides it with plenty of non-redundant work to do beyond § 362(a)(3).

The City more broadly appears to misunderstand the functioning of a "utility provision" like § 542, which applies not just to secured creditors in possession of estate property (a small slice of potential targets), but to anyone: creditors (secured and unsecured), third parties (bailees, employers, lost-and-found operators), and even debtors (when a trustee is operating the estate)—anyone who happens to find property of the estate in their hands. They are supposed to turn that property over expeditiously to

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[6] Note § 542(c) relieves a good-faith transferor of the estate's property of this duty to account. 11 U.S.C. § 542(c)

the trustee (or debtor in possession in chapters 11, 12, and 13) upon demand, backed up by the court's § 105(a) power to compel compliance.

To that end, the City overreads a footnote in this Court's opinion in *United States v. Whiting Pool, Inc.*, 462 U.S. 198 (1983), by suggesting that certain "preconditions" to turnover must be adjudicated as necessary antecedents to swift compliance with a trustee's demand. Pet'r's Br. 7 (discussing *Whiting Pool*, 462 U.S. at 206 n.12 (1983)). It is true that the turnover and accounting obligations of § 542(a) only apply to property that, for example, the trustee can "use, sell, or lease under § 363," 11 U.S.C. § 542(a), but it is not instructive to consider that restriction a meaningful impediment, let alone a condition, to turnover for the simple reason that *all* property can be used, sold, or leased under § 363.[7] 11 U.S.C. § 363(b), (c). The rules in § 363 pertain mostly to whether the property is to be used in the ordinary course of business, not in the ordinary course of business, or involves cash collateral; their inclusion of use in the ordinary course of business *and* use not in the ordinary course of business exhausts the universe of possible uses. *Id.*

The City's attempt to squeeze the requirements of § 363(e) into § 542(a)—as a precondition to compliance no less—is even more off the mark. It's not just that

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[7] The reference to property that can be used under § 363 in § 542(a) is not redundant, however, because it serves to anchor the extension of turnover's reach to § 522-exempt property. 11 U.S.C. § 542(a).

there is no "363 debate" in a turnover demand, as all property of the estate is eligible for use under § 363. Instead, there is a more fundamental problem to casting § 363(e) as a precondition to § 542(a) turnover: the trustee *may*, but is *not obligated*, to use, sell or lease property under § 363. That is, a trustee can store the property in a lockbox until ready to do something with it. Accordingly, there would be no basis for an adequate protection motion under § 363(e) unless and until the trustee (or debtor in possession) proposes to use, sell, or lease the property under § 363, i.e., engage in conduct with respect to the property that might jeopardize the secured creditor's lien—and that decision might be months away from a turnover demand.

Thus, the suggestion that compliance with § 363(e) is incorporated by reference into § 542(a) as a necessary precondition to turnover makes no sense when a § 363(e) fight might be unripe or inapposite at the time of a § 542(a) turnover request. For example, if the trustee just intends to hold onto the collateral (say, seasonal business inventory during the offseason in logical belief the market is best during season), the secured creditor has no remedy under § 363(e); that Code section has no application. The proper remedy for concerns of delay would be found under the lift-stay provisions of § 362(d), which neither the City nor its supporting amici have argued can be shoehorned into § 542(a). If the City tries to counter that the trustee's merely passive "holding on" to the property constitutes "use" under § 363 that would trigger a § 363(e) right to adequate protection, it will probably have to revisit

its opposition to characterizing mere retention of estate property by a secured creditor as an "act" to exercise control under § 362(a)(3).

As for the final alleged § 542(a) condition—that the property not be of "inconsequential value or benefit," 11 U.S.C. § 542(a), U.S. Br. at 23, it is also another functionally irrelevant constraint. The bankruptcy system is premised upon trustees *abandoning* such property so as not to burden them and their resource-limited estates. *See* 11 U.S.C. § 554(a) (allowing abandonment by trustee of burdensome property of "inconsequential value and benefit"). Trustees who have such property in their estates never issue turnover demands under § 542; they bring abandonment motions under § 554. The reference in § 542(a) to such property does nothing more than relieve holders from accounting obligations, not work as some important adjudicative precondition to compliance with a turnover demand.

Thus, despite the City's and its supporting amici's protestations, § 542(a) is not relegated to surplusage by following the clear text of § 362(a)(3). Nor does it contain preconditions that must be satisfied sufficient to justify the creation of a judicially-crafted requirement of finding adequate protection prior to compliance with a trustee's demand. Indeed, the Court could use this case as an opportunity to clarify that the obligations of § 542(a) are "self-executing." (Congress' intent here is clear when contrasting the procedure under 11 U.S.C. § 542(e), which requires a court hearing as precondition to relief.) Interpreting compliance with a mandatory statutory obligation to

await the trustee's procurement of a court order adds no benefit and imposes affirmative costs of trustee time and delay in recovery for unsecured creditors.

While sometimes trustees need resort to orders under § 105(a) when creditors or third parties are recalcitrant in their turnover duties (and those orders fall within the core jurisdiction of the bankruptcy courts, *see* 28 U.S.C. § 157(b)(2)(E)), the provision of remedial rules for miscreants should not serve as justification to water down a mandatory obligation into an "only if you make me" duty. Imposing a duty on the trustee to get a court order in every turnover case would crowd dockets and crush an already overburdened system for no ready benefit. In fact, properly prosecuted, turnover orders against creditors and third parties are adversary proceedings, which require issuance of a complaint and full judicial process. Fed. R. Bankr. P. 7001 ("[A] proceeding to recover . . . property" from a non-debtor is an adversary proceeding); *id.* 7004 (requiring summons and complaint to initiate adversary proceeding); *id.* 7012 (providing a minimum of thirty days to provide an answer). Why would Congress want to add this elaborate procedure onto all cases where estate property must be chased? Certainly *Whiting Pools* commands no such system-delaying result.

Accordingly, try as they may, the City and its supporting amici simply cannot overcome the clear textual meaning of "to exercise control over property of the estate" as including ongoing possession and dominion over a car to the exclusion of the bankruptcy trustee.

III. THE COURT SHOULD REJECT THE ALTERNATIVE APPROACH PREMISED ON DISTINGUISHING "POSSESSION OF PROPERTY" FROM "POSSESSION OF POSSESSION OF PROPERTY."

The alternative argument that no turnover obligation even arises here because the City is not, and never has been, in possession of property of the estate, Pet'r's Br. 25, is unsound and should be rejected. The argument is premised upon a conception that the City is not in possession of debtors' cars (which are property of their estates), but only in possession of *possession* of debtors' cars (which possession, as a discrete property right, is not property of their estates, given that possession lies lawfully with the City post-impoundment). With respect, there is no indication anywhere in the history of the Bankruptcy Code or bankruptcy practice that Congress intended to conceive of "possession of possession" of collateral as discrete from possession of the collateral. Bologna can only be sliced so thin before it becomes pulp. Among other problems with this wildly unprecedented approach is that the bankruptcy system would grind to a halt. This is because the logical conclusion of this reasoning is that a secured creditor who has repossessed collateral could secret it away from the trustee, even hide it, because the trustee has no right to possession.

The secured creditor's response to a thus-stymied trustee—"That's OK, the estate still *owns* the underlying asset, you just can't *possess* it for purposes

of marketing it and selling it to pay the estate's claims!"—would likely be cold comfort, just as administering the estate would become impossible. To be sure, it might work if the lien on the collateral were so great that there would be no value left over for the estate, but in that case, the trustee would abandon the property and not want it. By contrast, in cases where there is equity in the collateral for the estate to realize, there is no way the trustee could responsibly do her job to liquidate that value for the benefit of creditors without being able to possess the res. The Court should read possession of property of the estate to mean exactly what it says and Congress intended: possession of the thing itself, not possession of possession of the thing.

IV. *STRUMPF* IS A RED HERRING.

Finally, the City's suggestion that this Court's opinion in *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995), creates tension with the straightforward reading of "to exercise control over property of the estate" in § 362(a)(3) is also misplaced. First, as this Court made clear in *Strumpf*, setoff has its own rules in §§ 362(a)(7) and 553 premised upon conceiving a deposit account as a contractual obligation to pay money upon demand, not a sequestered dollar-sign-adorned bag of cash. *Id.* at 18-19. Thus, one does not "repossess" such cash upon default (let alone sell it at a foreclosure sale), one offsets it. Unlike repossessing a car, here the cash is in the bank account all along (under the "control" of

the bank, to be sure, but § 362(a)(7)'s more specific rules may supersede § 362(a)(3)'s more general ones).

Moreover, the "freeze" this Court sanctioned in *Strumpf* as not a setoff was necessary to allow the bank to preserve its setoff right. Once bank funds are withdrawn or commingled, the substantive right of setoff is destroyed. *See, e.g., In re Lifestyle Furnishings, LLC*, 418 B.R. 382 (Bankr. D. Idaho 2009) (finding creditor's inadvertent release of funds to trustee constituted waiver of setoff right). Not so with returning possession to the debtor of her car. The lien stays on. While the parties disagree as to the caselaw, *see* Brubaker Br. 31; Resp't Br. 50–52, the debtors are correct as to the majority rule. Moreover, in the unlikely event a lien on tangible property were destroyed by compliance with § 542(a), the bankruptcy court could issue a retroactive order under § 105(a) protecting the lien's status or even surcharge the collateral with an equitable lien in favor of the thus-aggrieved creditor. Accordingly, nothing in *Strumpf* impedes affirmance of the opinion below. Its holding on what constitutes a setoff, and its reasoning on the need to preserve the substantive right when a creditor also owes the debtor offsetting debts, has nothing to do with whether holding onto a tangible car constitutes exercising control over property of a bankruptcy estate.[8]

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[8] *Strumpf* has a confusing passage of dictum in its final paragraph that purports to opine on the scope of §§ 362(a)(3) and (6). *Strumpf*, 516 U.S. at 21. The paragraph quotes both

CONCLUSION

The Court should affirm the decision below due to the violation of § 362(a)(3). In the alternative, it could affirm within the scope of the question presented that the undisputed facts, namely, the City's concession it would return the cars upon payment of the debts, demonstrate as a matter of law violations of §§ 362(a)(4) and/or (6).

Dated: MARCH 2020

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paragraphs, but then only analyzes § 362(a)(3)—§ 362(a)(6) appears to become forgotten—in rejecting the contention that the refusal to pay a contractual debt owing the estate is an exercise of dominion or control over property of the estate (which would invoke § (a)(3)). *Id.* It is dictum because earlier the Court expressly holds that it is not deciding the scope of the automatic stay but only whether the freeze was a setoff. *Id.* at 19 ("All that concerns us is whether the refusal *was a setoff*."). In any event, the passage presents no impediment to affirmance in this case and is consistent with respondents' position. (The dictum may actually be incorrect if the debt owing is characterized as a property interest in the nature of an account receivable—intangible property qua chose held by the debtor—but that question need not be resolved by the Court presently.)

Respectfully submitted,

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