No. 19-357

IN THE

Supreme Court of the United States

CITY OF CHICAGO,

Petitioner,

v.

ROBBIN L. FULTON, JASON S. HOWARD, GEORGE PEAKE, AND TIMOTHY SHANNON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 4

I. A CREDITOR DOES NOT VIOLATE THE AUTOMATIC STAY BY RETAINING POSSESSION OF PROPERTY LAWFULLY OBTAINED BEFORE BANKRUPTCY 4

A. Debtors' Construction Of §362(a)(3) Renders §542(a) A Nullity 4

B. Debtors' Construction Of §362(a)(3) Contravenes The Automatic Stay's Plain Language And Aim Of Preserving The Status Quo 7

C. Congress Did Not Intend The 1984 Clarifying Amendment To §362(a)(3) To Upend Existing Bankruptcy Practice 12

II. SECTION 542(A) PERMITS CREDITORS TO RAISE DEFENSES TO TURNOVER, AND THE CITY HAD GOOD-FAITH DEFENSES HERE 15

A. Section 542(a) Permits Creditors To Raise Defenses To Turnover, Including Lack Of Adequate Protection 15

B. The City Had Good-Faith Defenses To A Turnover Action 21

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Page(s)

Citizens Bank of Maryland v. *Strumpf*, 516 U.S. 16 (1995) 6, 7, 20

City of Chicago v. *Kennedy*, 2018 WL 2087453 (N.D. Ill. May 4, 2018) 21, 22

Cohen v. *de la Cruz*, 523 U.S. 213 (1998) 13

Hartford Underwriters Insurance Co. v. *Union Planters Bank*, 530 U.S. 1 (2000) 13

In re Avila, 566 B.R. 558 (Bankr. N.D. Ill. 2017) 21

In re Birney, 200 F.3d 225 (4th Cir. 1999) 10

In re Cowen, 849 F.3d 943 (10th Cir. 2017) 5, 14

In re Koch, 197 B.R. 654 (Bankr. W.D. Wis. 1996) 10

In re Kuehn, 563 F.3d 289 (7th Cir. 2009) 10

In re Larimer, 27 B.R. 514 (Bankr. D. Idaho 1983) 12

In re Soares, 107 F.3d 969 (1st Cir. 1997) 10

In re Young, 193 B.R. 620 (Bankr. D.D.C. 1996) 19

Mission Product Holdings, Inc. v. *Tempnology, LLC*, 139 S. Ct. 1652 (2019) 11

Nken v. *Holder*, 556 U.S. 418 (2009) 8, 10

Reconstruction Finance Corp. v. *Kaplan*, 185 F.2d 791 (1st Cir. 1950) 19

Ritzen Group, Inc. v. *Jackson Masonry, LLC*, 140 S. Ct. 582 (2020) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Taggert v. *Lorenzen*, 139 S. Ct. 1795 (2019) 16

United States v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983) 11, 17, 18, 19

STATUTORY PROVISIONS

11 U.S.C.
§105 ..... 5, 16
§362 ..... *passim*
§363 ..... 5, 12, 18, 19
§521 14
§542 ..... *passim*
§§542-550 11
§§544-545 19
§§547-549 19
§550 19
§§1128-1129 19

OTHER AUTHORITIES

H.R. Rep. No. 95-595 (1977) 8

H.R. Rep. No. 96-1195 (1980) 13

Tabb, Charles, *Law of Bankruptcy* §5.16 (4th ed. 2016) 18

Wedoff, Eugene R., *The Automatic Stay Under §362(a)(3)—One More Time*, 38 Bankr. L. Letter No. 7 (July 2018) 12

INTRODUCTION

The question presented in this case is whether §362(a)(3) of the Bankruptcy Code requires a secured creditor in lawful possession of its collateral to surrender the collateral to the debtor as soon as a bankruptcy petition is filed—without any judicial process or protection for the creditor's interests—or else face sanctions. The text, structure, and history of the Code provide a clear answer to that question: No. Turnover of property in which the estate has an interest is governed by a different provision of the Code, §542(a), which permits a creditor to assert defenses to turnover and obtain assurance that its interests will be adequately protected before surrendering its collateral. Basic principles of statutory interpretation and common sense forbid reading §362(a)(3), as Debtors do, to render §542(a) mere surplusage and its protections meaningless.

Debtors have no coherent response. They cannot explain how, on their reading, §542(a) serves any purpose at all. Nor can they explain why §362(a)(3) should be read to punish creditors for asserting the very defenses to turnover §542(a) provides.

Debtors' failure to offer any intelligible account of the relationship between §362(a)(3) and §542(a) is itself fatal to their argument. But even setting §542(a) aside, Debtors' reading of the automatic stay provisions makes no sense. Debtors concede—as they must—that the automatic stay is meant to preserve the status quo. Yet they insist that §362(a)(3) requires creditors to *change* the petition-date status quo by surrendering collateral lawfully repossessed before bankruptcy.

Debtors maintain these contradictory positions only by distorting the concept of "status quo," and the meaning of "stay," beyond all recognition. According to

Debtors, the status quo is not the state of affairs existing when the bankruptcy petition is filed, but some other state of affairs not yet in existence. And the automatic stay is not a "stay" as the term is used elsewhere in the law—an order barring action until the parties' respective rights are adjudicated—but its opposite: a mandatory injunction giving the debtor the remedy of turnover before the court has decided whether the debtor has a right to that remedy. Debtors offer no support for these contentions because there is none.

Making their position yet more implausible, Debtors do not genuinely dispute that before 1984, neither the turnover provision nor the automatic stay required immediate surrender of collateral. The turnover provision has not changed. Debtors are thus forced to argue that Congress stripped creditors of the established right to raise defenses to turnover, not by amending the turnover provision, but by amending the automatic stay provision. But the amendment on which Debtors rely does not refer to turnover. Nor does it change the meaning of "stay." It merely clarifies that §362(a)(3) stays post-petition acts to exercise control over estate property even if they do not entail obtaining possession of that property. Debtors cannot point to any textual or contextual evidence of the sort this Court has required before reading such a minor, unheralded amendment to effect a radical change in existing bankruptcy practice.

Unable to respond meaningfully to any of these dispositive points, Debtors instead focus on issues of marginal relevance, while distorting the City's arguments and the facts.

For instance, Debtors spill considerable ink (Br. 34-35) arguing that §542(a) requires creditors to turn over

their collateral, and subjects them to sanctions for failure to do so, before they are entitled to any judicial process or to adequate protection. That question is not before this Court. The only question here is whether a creditor that fails to turn over lawfully repossessed property immediately upon the bankruptcy filing and instead asserts defenses to turnover may be sanctioned for violating the *automatic stay*. In any event, Debtors are wrong. The plain text of §542(a), this Court's precedent, and basic principles of equity forbid sanctioning a creditor for raising good-faith defenses to the turnover of its collateral. And the basic bargain of §542(a), as this Court has already held, is that a secured creditor may be required to surrender its collateral to serve the objectives of reorganization only if the estate can provide adequate protection for its interests.

Debtors also repeatedly claim (Br. 1-2, 38, 40) that the City had no good-faith defense to turnover here. While that is irrelevant to whether the City violated the automatic stay, it is also false. The City had possessory liens on the impounded cars. Existing precedent held that the City would lose those liens if it relinquished possession. The City therefore contended that, before it could be compelled to turn over the cars, it was entitled to adequate protection. While the Seventh Circuit ultimately held that turnover would not destroy the City's liens, that does not mean that the City's position was not in good faith.

Finally, Debtors and their amici object on policy grounds to the City's method of enforcing its traffic laws—while glossing over the significant changes the City made in 2019 in response to similar criticisms. Those arguments are wholly misplaced here. This case involves interpretation of a provision of the Bankruptcy Code that applies to all secured creditors in possession

of their collateral. That provision's meaning should not be distorted because Debtors are unhappy with one specific creditor's rights under non-bankruptcy law.

ARGUMENT

I. A CREDITOR DOES NOT VIOLATE THE AUTOMATIC STAY BY RETAINING POSSESSION OF PROPERTY LAWFULLY OBTAINED BEFORE BANKRUPTCY

Under the Bankruptcy Code's automatic stay provision, §362(a), a bankruptcy petition operates as a stay of certain post-petition acts to enforce claims against the debtor or estate. The automatic stay freezes the state of affairs that exists at the moment the petition is filed, pending further court order. It does not require creditors to surrender collateral already lawfully in their possession as of the bankruptcy filing. That is the express task of §542(a), which mandates turnover of such property if certain preconditions are met. Debtors' effort to blur these separate statutory provisions does violence to the language of each and to the overall structure and functioning of the Bankruptcy Code. It also flouts this Court's repeated admonition that the Code should not be read to overturn established pre-Code practice absent a clear intent to do so.

A. Debtors' Construction Of §362(a)(3) Renders §542(a) A Nullity

Perhaps the most glaring flaw in Debtors' reading of §362(a)(3) is that, by engrafting a turnover requirement onto the automatic stay, it renders the separate turnover provision surplusage. And it nullifies the defenses and procedural protections that the turnover provision expressly provides. Debtors have no meaningful response.

Debtors argue (Br. 46) that the amendment to §362(a)(3) was not "redundant" of §542(a)'s turnover provision because, by making a failure to turn over property a violation of the automatic stay, it provided a means of enforcing §542(a). But §542(a) was already enforceable through a court order and, if necessary, contempt sanctions under §105(a). *In re Cowen*, 849 F.3d 943, 950 (10th Cir. 2017); Pet. Br. 37-38, 40-41; U.S. Br. 23-25. And had Congress believed an additional statutory damages remedy was necessary, it would presumably have added that remedy to §542 itself, rather than resorting to oblique language in §362(a)(3).

In any event, Debtors' argument about remedy misses the point. Their reading of §362(a)(3) renders §542(a) surplusage because it creates a new, sweeping turnover obligation that subsumes the existing obligation under §542(a). If, as Debtors urge, §362(a)(3) requires entities in possession of any property in which the estate has an interest to turn that property over to the debtor immediately, on pain of sanctions, there is no work left for §542(a) to do.

Worse, Debtors' interpretation of §362(a)(3) nullifies the substantive limitations §542 places on the turnover obligation and the protections it provides creditors. In Debtors' view, a creditor's retention of any property repossessed pre-petition is an unlawful "act … to exercise control" over estate property. It follows that creditors must *always* turn over such property or face sanctions under §362, even where §542(a) would not require turnover—for instance, where the property cannot be used under §363 because the creditor's interest cannot be adequately protected, or the property is of inconsequential value or benefit to the estate. But that cannot be correct: "It is an elementary rule of construction that 'the

act cannot be held to destroy itself.'" *Citizens Bank of Maryland* v. *Strumpf*, 516 U.S. 16, 20 (1995).

Evidently recognizing the incoherence of that position, Debtors make the entirely unsupported claim (Br. 46-47) that debtors are "unlikely" to seek turnover under §362(a)(3) where creditors have defenses under §542(a). In the same breath, however, they concede (Br. 47) that debtors "could" demand turnover of property that is of "'inconsequential value'" and not subject to turnover under §542(a). Debtors claim (Br. 48) that in such cases, "courts would recognize the §542(a) exception as a defense to a motion to enforce the stay under §362(a)(3)." But that "defense" to the automatic stay is nothing more than Debtors' convenient invention. It appears nowhere in §362(a)(3), which neither makes any distinction based on the value of estate property nor refers in any way to §542(a). Debtors' resort to this kind of ad hoc, atextual work-around to salvage their interpretation is an obvious red flag signaling that their interpretation cannot be correct.

At the end of the day, Debtors cannot reconcile the turnover obligation they attempt to read into §362(a)(3) with the actual turnover obligation in §542(a), and thus cannot provide any coherent account of the relationship between the two provisions. Debtors vaguely assert (Br. 48-49) that the two provisions "work in tandem" to marshal estate property. But that generality conflates the very different functions the two different provisions serve. The automatic stay bars post-petition acts to enforce claims against estate property, preserving the rights in property the debtor had on the petition date. By contrast, the turnover provision enables the estate to access property that the debtor did not have the right to possess on the petition date because it was in the lawful possession of a creditor—if and only if the

property has net value to the estate and the estate can provide adequate protection of the creditor's interest. While the automatic stay and the turnover provision (along with the avoidance provisions) play complementary parts in marshaling the estate, their functions are distinct. Collapsing the two does violence to Congress's careful design of the Bankruptcy Code.

This Court's decision in *Strumpf* is instructive. In *Strumpf*, as here, the debtor advanced a reading of the automatic stay that would have nullified an express defense to turnover—there, §542(b)'s exception of debts subject to setoff from its general requirement to pay debts owed to the estate. This Court rejected that reading, explaining that "it would be an odd construction" of the automatic stay "that required a creditor … to do immediately" what the turnover provision "specifically excuses it from doing." 516 U.S. at 20; *see also id.* at 21 ("[W]e will not give §362(a)(3) … an interpretation that would proscribe what [§542(b)] … permit[s]."). Debtors' effort to distinguish *Strumpf* on its facts (it involved a debt under §542(b) rather than a car under §542(a)) is unavailing. *Strumpf* turned on basic statutory interpretation principles that apply equally to both subsections of the turnover provision. Just as §362(a)(3) cannot require what §542(b) excuses—payment of a debt subject to setoff—it cannot require what §542(a) excuses: turnover of property without adequate protection of the creditor's interest.

B. Debtors' Construction Of §362(a)(3) Contravenes The Automatic Stay's Plain Language And Aim Of Preserving The Status Quo

In addition to nullifying key provisions of §542(a), Debtors' reading of §362(a)(3) contradicts §362's plain language indicating that it is a "stay" of post-petition

acts, along with its established purpose of preserving the status quo.

Section 362 provides that the filing of a bankruptcy petition operates as a "stay" of various acts, including "any act" to "obtain possession of" or "exercise control over property of the estate." 11 U.S.C. §362(a)(3). "Stay" is not defined in the Bankruptcy Code, so it must be given its well-established legal meaning: an order temporarily "halting," "postponing," or "suspend[ing] … alteration of the status quo," by "preventing some action before [its] legality … has been conclusively determined." *Nken* v. *Holder*, 556 U.S. 418, 428-429 (2009). A "stay" is distinct from a mandatory injunction, which requires a party to take action that alters the status quo. Pet. Br. 18-19.

The automatic stay's role is to "maintain[] the status quo and prevent[] dismemberment of the estate during the pendency of the bankruptcy case." *Ritzen Grp., Inc.* v. *Jackson Masonry, LLC*, 140 S. Ct. 582, 589 (2020). The automatic stay freezes the state of affairs on the petition date by temporarily barring creditors from taking any further action to enforce claims against the debtor's assets, so that the assets' value can be maximized and distributed in accordance with creditors' respective rights and priorities. H.R. Rep. No. 95-595, at 340-341 (1977); Pet. Br. 21-23. It therefore stays a wide range of post-petition actions that would alter the status quo existing on the petition date, including the "commencement or continuation … of a judicial … action," "the enforcement … of a judgment," or "any act to collect … a claim." 11 U.S.C. §362(a)(1)-(2), (6).

Section 362(a)(3)'s "stay" of any post-petition "act" to "obtain possession of … or to exercise control over property of the estate" serves the same function: It

forestalls creditors from taking post-petition actions that would alter the petition-date status quo with respect to possession and control of estate assets. The automatic stay thus bars secured creditors from repossessing their collateral post-petition. And it bars creditors who repossessed their collateral pre-petition from taking any further acts to alter or interfere with the debtor's property rights, such as foreclosing on and selling the collateral (as secured creditors typically would absent the stay). It thereby preserves the status quo. But it does not require creditors to surrender property lawfully repossessed pre-petition and thereby *alter* the status quo. That is the function of the turnover provision.

In response, Debtors focus on the word "act," arguing (Br. 24-29) that "act" may encompass an omission or failure to act.[1] Because "stay" can mean "stop," Debtors seemingly argue that the automatic stay commands creditors to "stop failing to act," thus requiring them to take affirmative action to turn over property in their possession on the petition date. The problem is that no one familiar with the ordinary legal meaning of "stay" (as Congress certainly was) would refer to an order to turn over property as a "stay" of the "act" of "exercising control" over property—especially when the Bankruptcy Code already had a separate provision addressing turnover.

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[1] This discussion targets a straw man. Contrary to Debtors' representations (*e.g.*, Br. 25), the City's argument does not turn on a "distinction between 'active' and 'passive' acts." The point is not that §362 does not extend to "'passive' acts"—whatever those may be. It is that §362 is, by its terms, a "stay" of post-petition acts that would alter the status quo on the petition date and thus does not encompass retention of property lawfully repossessed pre-petition.

Debtors are thus forced to argue (Br. 28) that the word "stay" in §362 does not carry its ordinary legal meaning, dismissing *Nken* as irrelevant because the "automatic stay is not the same as a stay pending appeal." But the relevant point of *Nken* is simply that a "stay" halts or postpones some action to preserve the status quo. 556 U.S. at 428-429. Debtors offer no contrary authority. They cannot identify a single instance in which the word "stay" has been used to mean what they would have it mean here—a mandatory injunction altering the status quo.

Debtors argue (Br. 26) that §362 has been construed to require creditors to take affirmative action in other contexts. But the cases they cite merely confirm that the automatic stay prevents post-petition alterations of the status quo—it does not require them. In *In re Kuehn*, 563 F.3d 289 (7th Cir. 2009), for example, the creditor conditioned release of a transcript on payment of its claim outside the bankruptcy process, violating §362(a)(6)'s stay of any post-petition "act to collect … a claim." *Id.* at 294. Similarly, in *In re Soares*, 107 F.3d 969 (1st Cir. 1997), a foreclosure judgment entered post-petition was held void under §362(a)(1)'s stay of post-petition "continuation" of foreclosure actions. And in *In re Koch*, 197 B.R. 654 (Bankr. W.D. Wis. 1996), the creditor violated the same provision by accepting wages garnished post-petition. *Id.* at 660.[2]

Indeed, Debtors ultimately acknowledge (Br. 29-30), as they must, that the automatic stay is designed to pre-

[2] The same principle explains cases cited by amici (NCBRC Br. 11, 14), such as *In re Birney*, 200 F.3d 225 (4th Cir. 1999), which held that the post-petition attachment of a lien on the debtor's property (even by operation of law), violated §362(a)(5)'s stay of acts to create liens, *id.* at 227-228.

serve the "status quo." They attempt to evade the force of that point by inventing a new meaning for "status quo." According to Debtors, the status quo that the automatic stay protects is not the state of affairs that *actually exists* when the petition is filed, but the state of affairs that they believe *ought to exist*, with any contested property rights resolved in the debtor's favor. Again, Debtors offer no support for this upside-down interpretation of a common and easily understood legal concept.

Debtors' interpretation also violates the basic principle that a bankruptcy filing does not expand the debtor's rights in property. If a creditor lawfully repossessed collateral before bankruptcy and thus had legal right to possession, the collateral comes into the estate subject to that same limitation. The automatic stay does not change that. The Bankruptcy Code does grant the estate the power to recover possession of collateral or other property transferred to third parties pre-petition in some circumstances, subject to defenses protecting those parties' interests. But that power is set forth in the Code's avoidance and turnover provisions, not the automatic stay. *See* 11 U.S.C. §§542-550; *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 205 & nn.10 & 15 (1983); *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1663 (2019); Pet. Br. 23-25; Brubaker Br. 23-29. The automatic stay preserves the debtor's property rights on the petition date, leaving to other provisions of the Bankruptcy Code (such as §542(a)'s turnover power) the work of altering that status quo to facilitate the Code's broader objectives.

C. Congress Did Not Intend The 1984 Clarifying Amendment To §362(a)(3) To Upend Existing Bankruptcy Practice

Debtors' construction of §362(a)(3) also fails because it reads the 1984 addition of the "exercise control" language to reverse long-standing bankruptcy law and practice, without any indication Congress intended such a dramatic change.

Debtors do not dispute that until 1984, the automatic stay was understood as a status-quo-preserving stay of debt-collection, rather than a mandatory injunction requiring creditors to surrender property lawfully in their possession on the petition date. Turnover was governed, instead, by §542 (and its pre-Code precursors). And as Debtors' counsel has conceded, that provision did not require secured creditors to turn over property immediately upon the bankruptcy filing or face sanctions: "Before the 1984 expansion of §362(a)(3), if a creditor was unwilling to return collateral, the debtor would have to seek a court order requiring turnover under §542(a), and in response the creditor could request adequate protection under §363(e)." Wedoff, *The Automatic Stay Under §362(a)(3)—One More Time*, 38 Bankr. L. Letter No. 7, at 2 & n.12 (July 2018) ("*Wedoff*").[3]

According to Debtors, the 1984 amendment took all these protections away, overturning decades of contrary bankruptcy practice. But this Court has repeatedly held that it "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indica-

[3] The single case Debtors cite (Br. 32) is not to the contrary. The entity in possession was not a secured creditor seeking adequate protection, and it asserted no statutory defense to turnover. *In re Larimer*, 27 B.R. 514, 516 (Bankr. D. Idaho 1983).

tion that Congress intended such a departure." *Cohen* v. *de la Cruz*, 523 U.S. 213, 221 (1998).[4] Debtors cannot point to any such indication here, clear or otherwise.

As Debtors concede, the "exercise control" language originated in a technical-amendments bill intended to "clarify" the newly enacted Bankruptcy Code's provisions while "maintain[ing] existing policy intact." H.R. Rep. No. 96-1195, at 2 (1980). And while that language was ultimately enacted as part of a later bill, Debtors cite nothing suggesting that the identical language in the enacted bill reflected a different intent. Indeed, *Cohen* refused to construe another technical amendment enacted in the same 1984 legislation to alter the "established scope" of long-standing bankruptcy practice where Congress did not "make unmistakably clear its intent" to do so. 523 U.S. at 221-222.

Accordingly, there is no reason to read a radical new turnover requirement into the "exercise control" amendment: Congress did not amend the actual turnover provision or make any reference to turnover in §362, nor did it even hint at any such intent in the legislative history. The far more plausible explanation is that Congress added the "exercise control" language to clarify that the automatic stay bars post-petition actions to dismember the estate even if those actions are not readily described as "obtaining possession" of estate property. Pet. Br. 30-32. The amendment thus clarified, for example, that the automatic stay prevents creditors from exercising control over the estate's in-

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[4] Debtors' reliance (Br. 32) on *Hartford Underwriters Insurance Co.* v. *Union Planters Bank*, 530 U.S. 1 (2000), is misplaced. *Hartford* declined to read the term "trustee" to include other parties based on "questionable" evidence of any established pre-Code practice. *Id.* at 10-11.

tangible property interests (such as a creditor's pursuit of a derivative action). *In re Cowen*, 849 F.3d 943, 949-950 (10th Cir. 2017); Pet. Br. 30-32; Brubaker Br. 17-23.

Debtors and amici contend (Resp. Br. 23; Kuney Br. 30-32) that such a clarification was unnecessary because some courts had applied the "obtain possession" clause to intangible property interests. But that demonstrates exactly why clarification was appropriate. Intangible property cannot literally be possessed, but creditors' attempts to control intangible property were nonetheless an issue. The amendment relieved courts from the need to indulge the legal fiction that intangible property can be possessed by addressing the issue expressly in language that plainly covered it.

Contrary to Debtors' claim (Br. 22-23, 33), the City does not contend that the amendment applies *only* to intangible property; it plainly applies to tangible property too. What the amendment added that was arguably lacking is a stay of "nonpossessory conduct that would nonetheless interfere with the estate's authority over a particular interest," such as "a creditor in possession who improperly sells property belonging to the estate." *Cowen*, 849 F.3d at 949-950.

Had Congress intended the 1984 amendment to bar the retention of lawful possession of property obtained before bankruptcy, it could have easily said so. *See* 11 U.S.C. §521(a)(6) (providing debtor "shall not retain possession of personal property" securing claims in certain circumstances). But it did not. Nor did it offer any other indication that a technical, clarifying amendment to the automatic stay provision was intended to work a radical change to decades of practice under the turnover provision.

II. SECTION 542(A) PERMITS CREDITORS TO RAISE DEFENSES TO TURNOVER, AND THE CITY HAD GOOD-FAITH DEFENSES HERE

Debtors devote many pages (Br. 34-45) to arguing that §542 is "self-executing" and requires turnover immediately upon the bankruptcy filing, without permitting the creditor to assert defenses to turnover and await adjudication of those defenses. As an initial matter, that argument is largely beside the point. Even if failing to turn over collateral lawfully repossessed prepetition violates the turnover provision, it does not violate the automatic stay—and that is the only question presented here.

In any event, Debtors are wrong. To be sure, §542(a)'s turnover obligation is mandatory when the statutory preconditions for turnover are met. But §542(a) does not operate as an injunction in the way the automatic stay does. Rather, it permits creditors to raise defenses to turnover—including the defense that the estate cannot provide adequate protection of the creditor's interest—and have the bankruptcy court rule on those defenses. Where a creditor asserts a defense in good faith, the creditor should not be subject to sanctions for failure to comply with the turnover provision. And that is precisely what occurred here. Contrary to Debtors' claims, the City had good-faith defenses to turnover in each of these cases.

A. Section 542(a) Permits Creditors To Raise Defenses To Turnover, Including Lack Of Adequate Protection

1. Debtors contend at length (Br. 34-45) that the turnover obligation is a mandatory duty that becomes effective upon the bankruptcy filing. The City does not

disagree. Congress' use of the word "shall" unmistakably imposes a mandatory duty of turnover when §542(a)'s requirements are met.

But Debtors also take the position (Br. 34-38) that §542(a) is "self-executing," requiring creditors to turn over property in their possession immediately, *before* the bankruptcy court adjudicates any defenses to turnover they may have. That is wrong. Section 542(a) contains express statutory defenses to turnover. Thus, when a creditor disputes in good faith that §542(a)'s requirements are met, the creditor must be afforded the right to assert those defenses and to retain possession unless and until the court determines that the creditor falls within the scope of §542(a)'s obligation. Pet. Br. 33-38. Even if the creditor ultimately does not prevail, its failure to comply with the statutory mandate before judicial determination of the statute's applicability should not subject it to sanctions. Perhaps a creditor with no good-faith defense to turnover could be sanctioned under §105(a) for refusing to comply with §542(a)'s mandate even before a court enters a turnover order. But a creditor surely cannot be held in contempt for failure to comply with §542(a) in cases in which there is a "fair ground of doubt" as to whether the statute's requirements were met. *Taggert* v. *Lorenzen*, 139 S. Ct. 1795, 1801-1802 (2019); U.S. Br. 31-32. Rather, creditors are entitled to obtain a judicial ruling as to whether they are obligated to turn over their collateral and to seek adequate protection for their interests in that collateral before they can be punished for failing to turn it over.

Indeed, this Court has already held that, while §542(a) applies to collateral in the lawful possession of secured creditors, it conditions turnover of that collateral on protection of the secured creditor's interests.

Whiting Pools, 462 U.S. at 203-204. *Whiting Pools* rejected the argument that secured creditors' collateral is not estate property at all and thus not subject to turnover under §542(a), observing that the "reorganization effort would have small chance of success … if property essential to running the business were excluded from the estate." *Id.* at 203. But the Court explained that the secured creditor must receive adequate protection of its lien before being required to surrender its collateral, noting that Congress "chose … to include such [collateral] in the estate and to provide secured creditors with 'adequate protection' of their interests" in exchange. *Id.* at 204. "At the secured creditor's insistence, the bankruptcy court must place such limits or conditions on the trustee's power to … use … property as are necessary to protect the creditor." *Id.*

Perversely, Debtors and their amici rely on a misreading of *Whiting Pools* to argue (Resp. Br. 41-42; Kuney Br. 12-14, 19-20) that §542(a) requires creditors to turn over their collateral immediately, without any judicial process. They draw this conclusion from *Whiting Pools*' statement that "[§]542(a) … 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. But that statement means only that secured creditors are not immune from turnover under §542(a). Nothing in *Whiting Pools* remotely suggests that creditors must relinquish possession of lawfully repossessed collateral before they can assert defenses to turnover or seek adequate protection of their interests.

To the contrary, the fundamental point of *Whiting Pools* is that §542(a) grants a debtor the power to "draw[] [repossessed collateral] into the estate" only *in*

exchange for "the right to adequate protection" that the "Bankruptcy Code provides secured creditors," which "replace[s] the protection afforded by possession." 462 U.S. at 206-207. Turnover is thus conditioned on adequate protection, including "pay[ment] … before the turnover occur[s]." *Id.* at 201-202 & n.7. As the Court explained, an "explicit limitation[] on the reach of §542(a)" is "that the property be usable under §363." *Id.* at 206 & n.12. And collateral is not usable under §363 absent adequate protection, because §363(e) requires that, when the debtor proposes to use collateral, "the court … shall prohibit or condition such use … as is necessary to provide adequate protection of [the creditor's] interest" in the collateral. 11 U.S.C. §363(e); *Whiting Pools*, 462 U.S. at 204.

Debtors and amici assert (Resp. Br. 6, 17; Kuney Br. 19-21) that §363(e) puts "the burden … on the creditor to ask for adequate protection." But that burden is met by requesting adequate protection in response to a turnover proceeding, as Debtors' counsel has acknowledged. *Wedoff* 2 & n.12. And the debtor bears the "burden of proof on the issue of adequate protection" to establish that it can use property under §363. 11 U.S.C. §363(p)(1).

Amici also claim (Pottow Br. 22) that §542's requirement that property be usable under §363 does not incorporate §363(e)'s adequate-protection requirement, reasoning that "*all* property can be used … under §363." That is incorrect; §363 *limits* use of estate property to protect creditors' interests. Tabb, *Law of Bankruptcy* §5.16 (4th ed. 2016). For example, 11 U.S.C. §363(c)(2) provides that the debtor "may not use … cash collateral" unless the secured creditor consents or the court authorizes it. Likewise, a debtor cannot obtain turnover of any collateral unless §363(e)'s ade-

quate-protection conditions are met. *In re Young*, 193 B.R. 620, 625-626 (Bankr. D.D.C. 1996).[5]

2. Debtors make a handful of additional arguments supporting the contention that creditors are not entitled to any process under §542(a). Those arguments are equally meritless.

First, Debtors point out (Br. 36-37) that Congress did not insert the phrase "after notice and a hearing" in §542(a), as it did in other Code provisions. That is neither here nor there. The Code typically requires "notice and a hearing" for actions that affect creditors' collective interests, such as the sale of estate assets or the confirmation of a plan of reorganization. 11 U.S.C. §§363(b), 1128-1129. By contrast, when the Code grants trustees rights to seek relief against third parties, as in the avoidance provisions and §542(a), it often does not require "notice and a hearing," although a court order is clearly required if the third party disputes the trustee's entitlement to relief. *Id.* §§544-545, 547-549; Pet. Br. 39.[6]

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[5] Certain amici also wrongly argue (Kuney Br. 15-18) that pre-Code practice required turnover before the creditor obtained adequate protection. To the contrary, the principal case on which amici rely, *Reconstruction Fin. Corp.* v. *Kaplan*, 185 F.2d 791 (1st Cir. 1950), emphasized that the turnover order there required protections (replacement liens) that "safeguarded" the secured creditor's interest, *id.* at 793-794, 797-798. As *Whiting Pools* put it, "[n]othing in the legislative history evinces a congressional intent to depart from that practice." 462 U.S. at 208; *see id.* at 207-208 & n.16 ("§542 … codif[ied] … *Kaplan*").

[6] Debtors say (Br. 39) that, when a transfer is avoided, property is recovered under §550, which expressly contemplates a judicial proceeding. But avoidance of many transfers (such as liens) is accomplished exclusively through §§544-545, 547-549, without resort to §550.

Second, Debtors argue (Br. 39-40) that other Code provisions directing that parties "shall" perform specified duties are "self-executing." But Debtors cite provisions such as U.S. trustees' duty to convene creditors' meetings and court clerks' duty to issue notices, which do not involve adjudication of a party's rights in property and thus require no process. They also point to a debtor's duty to surrender estate property to a Chapter 7 trustee, but that duty is unconditional; there are no defenses to it as there are to turnover of a creditor's collateral. The provisions Debtors cite thus hardly suggest that §542(a) provides no process for creditors.

Third, Debtors argue (Br. 42-44) that, under the Rules Enabling Act, the Federal Rules of Bankruptcy Procedure cannot substantively modify §542(a). The City never argued to the contrary. It merely pointed (Pet. Br. 40) to the legislative history's comment that the "[p]rocedure for … turnover" would be "dealt with by the Rules" as further evidence that Congress contemplated that §542(a) would entail some judicial process.

Finally, Debtors contrast (Br. 35-37) §542(a) with §542(e), which provides that "after notice and a hearing" the court "may" order disclosure of information relating to the debtor. That provision simply recognizes the need for notice before a court orders disclosure of potentially privileged information. The more relevant comparison is between §542(a) and §542(b), which directs that an entity "shall" pay a debt owed to the debtor, without any "notice and hearing" requirement. Like §542(a), §542(b) includes express statutory defenses to payment. That is why this Court held in *Strumpf*, 516 U.S. at 20-21, that §542(b) is not "self-executing." Rather, "§542(b) … permit[s] the temporary refusal of a creditor to pay a debt that is subject to setoff." *Id.* The same analysis applies to §542(a).

B. The City Had Good-Faith Defenses To A Turnover Action

Contrary to Debtors' claim (Br. 27, 31, 40), the City had fair and reasonable arguments that Debtors' cars—which were subject to possessory liens—were not subject to turnover absent adequate protection of the City's interest. Precedent at the time held that surrender of property subject to a possessory lien would destroy the lien. *See In re Avila*, 566 B.R. 558, 562-563 (Bankr. N.D. Ill. 2017) (holding that surrender of a vehicle before receipt of adequate protection would forfeit secured status); *City of Chicago* v. *Kennedy*, 2018 WL 2087453 (N.D. Ill. May 4, 2018) (same). The City accordingly made a good-faith argument that it was entitled to adequate protection of the value of the liens it would lose when the cars were turned over. Although the Seventh Circuit ultimately held that turnover would not destroy the City's liens, Pet. App. 20a-21a, that does not suggest the City's position was not asserted in good faith.

Debtors mischaracterize the City's assertion of defenses to turnover as improper attempts to pressure them to pay pre-petition debts. That is not so. The City merely attempted to negotiate a consensual resolution of potential turnover proceedings under §542(a) by communicating what it would accept as adequate protection of its possessory lien. Bankr. N.D. Ill. No. 18-02860, Dkt. 27, at 2-3. The law is clear that, while creditors may not seek to collect payment *outside* the bankruptcy process (§362(a)(6)), secured creditors do not violate the stay by seeking to reach agreement on how their secured claims will be treated in the bank-

ruptcy. *Kennedy*, 2018 WL 2087453, at *4 n.8; Pet. Cert. Reply 7-8.[7]

Debtors' and their amici's attempts to impugn the City's conduct during the bankruptcy cases should thus be ignored—as should their assault on the City's enforcement of its traffic laws. They are merely distractions from the actual question presented: whether a secured creditor's failure to turn over collateral lawfully repossessed pre-petition—before any turnover proceedings and regardless of any defenses the creditor has to turnover—violates the automatic stay. For the reasons set out above, it does not.

CONCLUSION

The Seventh Circuit's judgment should be reversed.

[7] Amici (Pottow Br. 7-10) are thus wrong to suggest the City violated other stay provisions prohibiting acts to collect debts or enforce liens (11 U.S.C. §362(a)(4), (6)). Nor should this Court reach that question, which the Seventh Circuit did not address. Pet. App. 14a n.1; Pet. Cert. Reply 6-9.

Respectfully submitted.

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APRIL 2020