No. 24-494

IN THE

Supreme Court of the United States

AMERICAN WARRIOR, INC., *et al.*,

Petitioners,

v.

FOUNDATION ENERGY FUND IV-A, L.P., *et al.*,

Respondents.

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

AMICI CURIAE BRIEF OF LAW PROFESSORS RALPH BRUBAKER JACK WILLIAMS, GEORGE KUNEY, DIANE LOURDES DICK, JULIET MORINGIELLO, STEPHEN LUBBEN, KARA BRUCE, AND DAVID KUNEY IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

Your amici are a group of law professors, consisting of the following: Ralph Brubaker, (James H.M. Sprayregen Professor of Law, University of Illinois); Jack Williams (Professor of Law, Georgia State University); George Kuney (University of Tennessee College of Law); Diane Lourdes Dick (Charles E. Floete Distinguished Professor of Law, Iowa College of Law); Juliet Moringiello (Associate Dean for Academic Affairs and Professor of Law, Widener University Commonwealth Law School); Stephen Lubben, (Harvey Washington Wiley Chair in Corporate Governance & Business Ethics, Seton Hall University School of Law); Kara Bruce (Professor of Law, UNC School of Law) and David R. Kuney (Adjunct Professor, Georgetown University Law Center). Amici have devoted their careers to teaching, studying and writing about bankruptcy law, complex litigation, federal courts, and constitutional law.

Our interest in submitting this brief is to support the vital principles of bankruptcy law that govern the interpretation of the automatic stay under 11 U.S.C. § 362, and the enforcement mechanisms for guarding against abuse and stay violations. Our concern is that the Fifth Circuit decision below, will weaken and distort these principles.

In 1940 this Court decided *Kalb v. Feuerstein*, 308 U.S. 433 (1940) holding that a state foreclosure action conducted in violation of the federal bankruptcy law

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel contributed any money to fund its preparation or submission. Pursuant to Rule 37.2, counsel of record received timely notice of amici's intention to file its brief.

was invalid, void and wrongful.[2] The decision was based on the exclusive power of Congress to make uniform laws on the subject of bankruptcy, and by specific legislation render judicial acts taken with respect to the person or property of a debtor whom the law protects, "void," "nullities" and subject to collateral attack. *Id*. at 439.

The 1978 Bankruptcy Code carries forward this same vital principle and thus the majority rule among the circuit courts is that acts in violation of the automatic stay are "void ab initio." This principle prevents creditors from dismantling the bankruptcy estate and distorting the rules of priority. In addition, this concept also precludes each of the various states from interpreting and applying its own individual and idiosyncratic view of what the federal law might mean as well as the legal significance of a judicial proceeding in a state court in derogation of the federal bankruptcy law.[3] It is rooted in long-standing principles of uniformity of bankruptcy law and Congress' exclusive power to enact legislation on the subject of bankruptcies.

The Fifth Circuit decision held to the contrary of *Kalb* and insisted instead that actions in violation of the stay are merely avoidable, and hence such violations may be excused on any lesser showing of judicial "discretion." It based its decision below primarily on existing Fifth Circuit precedent, namely, *Sikes v.*

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[2] *Kalb* was decided under § 75 of the Bankruptcy Act, § 11 U.S.C. § 203 (repealed 1949), the Frazier-Lemke Act, the analog to the current automatic stay of § 362.

[3] "The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land." *Kalb,* 308 U.S. at 439.

Global Marine Inc., 881 F.2d 176 (5th Cir. 1989). *Sikes* has not been followed by most of the circuit courts.

Our interest, then is to support the petition and to urge this Court to adopt the majority rule that acts taken in violation of the automatic stay are void ab initio and not merely "avoidable." Our brief examines the underlying rationale for the voidness rule as being based on principles of federal supremacy and the exclusive power of Congress to enact laws on the subject of bankruptcies. We contend that the contrary rule of voidability would impair these values and permit undue loss of uniformity of bankruptcy law, thus running directly contrary to the Constitutional imperative that the bankruptcy laws be uniform throughout the Nation and weakening the notion of federal supremacy.

We urge this Court to grant the Petition. Petitioners correctly point out that the circuit courts are divided on the important issues in this case and that the split among the circuit courts is deeply entrenched, longstanding and ripe for resolution.

FACTUAL BACKGROUND

In the present case, Patrick and Patricia McConathy (the "debtors") initially filed for bankruptcy but failed to disclose valuable assets concerning oil and gas leases. Cert. Pet. 10. After they obtained a discharge, and the case was closed, one of the debtors, Patrick McConathy, along with several non-debtor parties, filed a state law action seeking to establish ownership over those very same assets (the "Kansas litigation") thus violating the automatic stay.[4]

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[4] The failure to list the leases on their schedules meant that the oil leases remained property of the bankruptcy estate and

American Warrior Inc. ("AWI") was named as a defendant in the Kansas litigation (along with others as set forth in the Petition). Cert Pet. 10. When it learned that the debtors had failed to disclose the assets that were the subject of the Kansas litigation, and that the debtors had violated the automatic stay, they moved to reopen the bankruptcy case, which request was granted.

AWI filed a motion in the bankruptcy court seeking sanctions against McConathy and his attorneys for violating the automatic stay by filing and pursuing the Kansas litigation. AWI also sought a determination that the Kansas litigation was void ab initio because it was a stay violation. Pet. App. 7a. The nondebtor parties countered with a request to annul the stay. *Id.* The bankruptcy court declined to annul the stay and likewise declined to rule that the Kansas litigation was void ab initio. Pet. App.7a.

AWI then timely filed appeals with the District Court, and the Court of Appeals. Cert. Pet. 14-15. AWI argued below that the *filing* and continuation of the Kansas litigation was a stay violation and was void ab initio. "[T]he great weight of authority [and] the majority of courts have long stated that violations of the automatic stay are void and of no effect." *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 572 (9th Cir. 1992) (collecting cases).

The Fifth Circuit affirmed the decisions below holding that the Kansas litigation was merely "voidable" and not void ab initio, and that an order annulling the stay

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thus actions seeking to recover such property were subject to the automatic stay even after the initial bankruptcy case was closed. *See Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380 (5th Cir. 2008).

was not required. It thus permitted the Kansas litigation to proceed.

The appeal to this Court followed. The question presented is this: should the Court grant certiorari to resolve a longstanding, entrenched, and acknowledged conflict among the courts of appeals over whether actions taken in violation of the automatic stay are void or merely voidable." Cert. Pet. i.

SUMMARY OF ARGUMENT

First, the automatic stay of § 362 is one of the foundational elements of bankruptcy law. Under the majority rule, actions taken in violation of the stay are void ab initio. This principle has its origins in *Kalb v. Feuerstein*, 308 U.S. 433 (1940) and remains valid under the 1978 Bankruptcy Code. The doctrine protects vital principles of supremacy—including the exclusive power of the federal bankruptcy courts to define the scope and meaning of the automatic stay. It ensures the uniformity of bankruptcy law throughout the nation. The contrary rule permits the state courts to adopt idiosyncratic doctrines concerning the scope and meaning of the automatic stay—all of which runs directly counter to the Constitutional imperative that the bankruptcy laws be uniform.

Second, an action which violates the automatic stay, such as the filing of a state law action against property of the estate remains void ab initio unless and until the party who has violated the stay obtains retroactive relief from the stay through an order annulling the wrongful action. *See* § 362(d). The requirement for such an order ensures that state legal proceedings in violation of the automatic stay have no cognizable validity unless and until there is an unmistakable

determination by a federal court confirming such annulment. No such order was obtained in the case below.

Third, the Fifth Court's decision is incorrect. It applied the minority rule that actions taken in violation of the stay are merely voidable. Most jurisdictions reject this rule. The Fifth Circuit's decision would impair the required uniformity of bankruptcy law and weaken the plenary power of Congress to create the laws on the subject of bankruptcy.

LEGAL ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI TO RESOLVE THE CIRCUIT SPLIT AND CONFIRM THAT ACTIONS WHICH VIOLATE THE AUTOMATIC STAY ARE VOID AB INITIO.

A. The automatic stay of § 362 prevents actions against both the debtor and property of the bankruptcy estate and is one of the cornerstones of bankruptcy law.

The enforcement and application of the automatic stay is key to the proper operation of the Bankruptcy Code. "The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws." *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569,572 (citing H.R. Rep. No. 595, 95th Cong.,1st Sess. 340 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News, 5787, 5963, 7296-97.[5] "[T]he automatic stay [is the] bedrock policy upon which the Code is

[5] *See also*, *Midlantic Nat. Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986) (same).

built and a fundamental debtor protection of the bankruptcy law (the importance of § 362 cannot be over-emphasized)."[6]

The goals of the stay are manifold. At its core, it ensures that the bankruptcy process will truly be a collective process, and not a race to the courthouse to dismember the debtor. It ensures that creditors are paid equitably and in accordance with the legal priorities established by Congress. Further, the stay provides that the debtor is given appropriate "breathing room" so that it can collect and distribute its assets as the law requires.

The scope of the stay is broad. It operates as a stay applicable to "all entities" and embraces "any act." It prohibits, among other things "the commencement or continuation … of a judicial … action … against the debtor that was or could have been commenced before the commencement of the case" (§ 362(a)(1)), as well as "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). *See City of Chicago, Illinois v. Fulton*, 592 U.S. 154, 156 (2021).

In a Chapter 7 case, the property of the estate is administered by a Chapter 7 trustee. The debtor, such as Patrick McConathy in this case, is likewise barred from filing or continuing an action to possess or collect property of the estate. So, too, were the non-debtor parties.

The scope of the stay bars any "continuation" of the proceeding, which would thus include joinder of

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[6] *In re Lampkin*, 116 B.R. 450, 453 (Bankr. D. Md. 1990) (citing *In re Johns-Manville Corp.,* 57 B.R. 680, 685 (BC S.D.N.Y.1986); *In re Depew*, 51 B.R. 1010, 1013 (Bankr. E.D.Tenn.1985); *Grady v. A.H. Robins Co., Inc.,* 839 F.2d 198, 200 (4th Cir.1988).

parties. Indeed, it has been held that the stay divests the state court of power to act:

> Once triggered by a debtor's bankruptcy petition, the automatic stay suspends any non-bankruptcy court's authority to continue judicial proceedings then pending against the debtor. This is so because § 362's stay is mandatory and 'applicable to all entities,' including state and federal courts.

Calway v. Calway, 352 So. 3d 1, 2 (Fla. Dist. Ct. App. 2022) (citations omitted).

The stay continues throughout a case unless a court grants relief from the stay, such as by terminating, annulling, modifying or conditioning such stay. 11 U.S.C. § 362(d). In addition, the automatic stay continues following the closure of a case where property of the estate was not identified or listed, and hence was not "administered" during the course of the case. As the Fifth Circuit has noted, "[i]n a Chapter 7 case, at the close of the bankruptcy case, property of the estate that is not abandoned under § 554 and that is not administered in the bankruptcy proceedings, including property that was never scheduled—remains the property of the estate." *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 385 (5th Cir. 2008).

The statutory scheme in the 1978 Bankruptcy Code is premised on the notion that "any act" by "any entity" is embraced within the stay's protection. Courts have broadly construed this scope.[7] Further, Congress has provided for a series of sanctions for violations of the

[7] "The automatic stay is among the most fundamental debtor protections in bankruptcy law and its scope in protecting debtors and debtor property is broad." *In re Cousins*, 404 B.R. 281, 286 (Bankr. S.D. Ohio 2009).

stay. *See* 11 U.S.C. § 362(k)(1) providing that an individual injured by any willful violation of the stay shall recover actual damages, including costs and attorney's fees, and in appropriate circumstances may recover punitive damages.[8] Sovereign immunity is abrogated as to all governmental entities under 11 U.S.C. § 106 concerning § 362 (although certain police and regulatory powers may be excepted). And, in appropriate circumstances, civil contempt sanctions may be permitted.[9]

B. Actions taken in violation of the automatic stay are void ab initio, not merely voidable. To cure the voidness, the party who has violated the stay is obligated to seek retroactive annulment of the stay.

In *Kalb*, 308 U.S. at 438 the Court ruled that, under the prior Bankruptcy Act of 1898, the filing or continuation of a state court proceeding, against a debtor or the debtor's property, such as a foreclosure sale, without having obtained the consent of the bankruptcy court, rendered the state court action "not merely erroneous but [] beyond its power, void, and subject to collateral attack." The Bankruptcy Act, "rendered judicial acts taken with respect to the person or property whom the bankruptcy law protects nullities and vulnerable collaterally." *Id.*

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[8] There is a split of authority over whether corporate debtors may utilize § 362(k) to recover damages, or instead, must rely on § 105 and inherent contempt powers. *See, e.g.*, *In re Georgia Scale Co.*, 134 B.R. 69, 71-72 (Bankr. S.D. Ga. 1991) (collecting cases).

[9] "The bankruptcy statutes incorporate the traditional standards in equity practice for determining when a party may be held in civil contempt for violating an injunction." *Taggart v. Lorenzen*, 587 U.S. 554, 561, (2019).

The decision in *Kalb* is rooted, in part, on a supremacy concern, namely, the plenary power of Congress over bankruptcy law, and the federal courts' exclusive jurisdiction on issues concerning the automatic stay.[10] The Bankruptcy Act "deprived the Wisconsin County Court of the power to continue or maintain *in any manner* the foreclosure proceedings against appellants without the consent after hearing of the bankruptcy court." 308 U.S. at 440. (emphasis added).

Congress's power over the subject of bankruptcies is plenary. "Without purporting to define the full scope of the Clause, the Court has interpreted the Clause to have 'granted plenary power to Congress over the whole subject of 'bankruptcies'" and observed that the 'language used' did not 'limit' the scope of Congress' authority. *Hanover Nat. Bank v. Moyses*, 186 U.S. 181, 187, 22 S. Ct. 857, 46 L. Ed. 1113 (1902)." *Siegel v. Fitzgerald*, 596 U.S. 464, 474 (2022).

The right of Congress to enact laws on the subject of bankruptcy requires that such laws be uniform, and such uniformity precludes indulging state court interpretations of federal law.[11] The voidness rule protects the uniformity of bankruptcy law and protects against forum shopping for state courts that could too easily disregard the mandate of the automatic stay.

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[10] The federal district courts have exclusive jurisdiction "of all of the property. . . of the debtor." 28 U.S.C. § 1334(e). The delegation of jurisdiction to the bankruptcy courts is found in 28 U.S.C. § 157(a).

[11] "The Bankruptcy Clause empowers Congress "[t]o establish … Laws on the subject of Bankruptcies throughout the United States," but it requires that such laws be uniform." Art. I, § 8, cl. 4. *Off. Of United States Tr. v. John Q. Hammons Fall 2006, LLC,* 144 S. Ct. 1588 (2024).

Numerous cases under the Code continue to cite *Kalb* and its rationale for the rule that acts in violation of the stay are void. See Cert. Pet. 17-18. For example, the Ninth Circuit in *Gruntz v. Los Angeles (In re Gruntz)*, 202 F.3d 1074 (9th. Cir. 2000), citing *Kalb*, identified the close nexus between the notion that actions in violation of the stay are void, and the concerns over uniformity and federal supremacy. In *Gruntz*, the state court had issued an opinion that the automatic stay did not apply to prevent certain state criminal proceedings. 202 F.3d at 1078. Thus, the state court was making its own determination on the scope of the stay, holding that the state court proceeding "divests federal courts of jurisdiction to consider that question [of the stay]." *Id*. at 1078.

The Ninth Circuit, in *Gruntz,* held that a bankruptcy court had the power to vacate state law decisions rendered in violation of the stay as being void ab initio. It held that bankruptcy courts are not obligated to give full faith and credit to state court rulings on the scope of the automatic stay.[12] The rule of voidness prevents state courts from being empowered to issue binding judgments modifying the federal stay: the principle protects the exclusive jurisdiction of the federal bankruptcy courts by allowing them to create the governing standards for the automatic stay.

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[12] "Because, among other reasons, judicial proceedings in violation of the stay are void ab initio the bankruptcy court is not obligated to extend full faith and credit to such judgments. Infirm judgments are not entitled to full faith and credit in federal courts. *See Kremer v. Chemical Construction Corp*., 456 U.S. 461, 482–83, 102 S. Ct. 1883, 72 L.Ed.2d 262 (1982); *see also Matsushita Electric Indus. Co. v. Epstein*, 516 U.S. 367, 386, 116 S. Ct. 873, 134 L.Ed.2d 6 (1996) (noting that state court judgments are binding only if the state court had power to enter the judgment)." 202 F.3d at 1082.

In short, *Gruntz* illustrated the harm of permitting state courts to modify the automatic stay by ruling on its scope and application, that led it hold that the state law action was "void" relying on *Kalb.*

> If state courts were empowered to issue binding judgments modifying the federal injunction created by the automatic stay, creditors would be free to rush into friendly courthouses around the nation to garner favorable relief. The bankruptcy court would then be stripped of its ability to distribute the debtor's assets equitably, or to allow the debtor to reorganize financial affairs. "Such an exercise of authority would be inconsistent with and subvert the exclusive jurisdiction of the federal courts by allowing state courts to create their own standards as to when persons may properly seek relief in cases Congress has specifically precluded those courts from adjudicating." Gonzales, 830 F.2d at 1035. It is but slight hyperbole to say that chaos would reign in such a system.

Gruntz, 202 F.3d 1074, 1083–84.

Other courts likewise have held that under *Kalb* actions taken in violation of the stay are void, and that this rule is crucial to protecting the exclusive jurisdiction of the federal bankruptcy courts which in turns is why the bankruptcy courts are not prohibited by the *Rooker-Feldman* doctrine from "determining the applicability of the automatic stay despite the State Court's prior determination." *Southwest Airlines Co. v. Tidewater Fin. Co. (In re Cole),* 552 B.R. 903,

908 (Bankr. N.D. Ga. 2016).[13] That is, these cases see the direct connection between the voidness rule and the protection of bankruptcy principles of plenary power and uniformity.

Kalb remains good law today and is reflective of the "broad debtor protections" that safeguard the stay and thus is consistent with Congressional intent. *Kalb* and its progeny guard against intrusions into the values of federal supremacy in the area of bankruptcy, federal preemption, and uniformity of bankruptcy law, each of which is a core value that this Court has recognized as essential to the proper and just functioning of the bankruptcy system.[14] The decision below by the Fifth Circuit, and notion that stay violations are merely avoidable and not void ab initio undercuts these values and opens the door to systemic harm, uneven and distorted holdings on the law, and the dilution of federalism.

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[13] "This Court joins the line of cases that concludes the *Rooker-Feldman* doctrine does not bar a bankruptcy court from reviewing a state court's determination of whether the automatic stay applies." *Id*. at 909. The bankruptcy court noted that while state and federal courts have concurrent jurisdiction to determine whether litigation is stayed, a bankruptcy court is empowered to review the state court determination, as held in the Third and Ninth Circuit, noting, however that "some courts have reached differing results." 552 B.R. at 907.

[14] This Court has been keenly attentive to the issue of uniformity and has recently emphasized the need for uniformity in the application of the bankruptcy Code, a requirement based on the Constitutional grant in the Bankruptcy Clause. "The Bankruptcy Clause empowers Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U. S. Const., Art. I, § 8, cl. 4. *Siegel v. Fitzgerald*, 596 U.S. 464, 473 (2022).

II. THE FIFTH CIRCUIT DECISION WAS WRONG. THE COURT ERRED BY FAILING TO RULE THAT THE FILING OF THE KANSAS LITIGATION WAS VOID AB INITIO.

The Fifth Circuit did not apply the rule announced in *Kalb*, relying instead on *Sikes v. Glob. Marine, Inc*., 881 F.2d 176, 178 (5th Cir. 1989). Pet. App.21a-22a. *Sikes* held as follows:

> We are persuaded that the better reasoned rule characterizes acts taken in violation of the automatic stay as voidable rather than void. We agree that "the characterization of every violation of section 362 as being absolutely void is inaccurate and overly broad." *Fuel Oil Supply*, 30 B.R. at 362.

The Fifth Circuit held, further, that under *Sikes,* an act taken in violation of the automatic stay has not been "voided" until it has been pronounced "void" by a court of competent jurisdiction. No such declaration was made in this case. Pet. Ap. 22a. Circuit Judge Johnson dissented in *Sikes*: "In general, "[a]cts in violation of the [automatic] stay are void *ab initio* regardless of lack of knowledge of the filing of the petition." (*Id*. at 180.)

This is the opposite rule of the majority of cases which hold that an action is void ab initio unless and until there is an order of annulment. But, under the Fifth Circuit rule a state court proceeding can retain its asserted validity even where the suit was initiated or continued despite the undisputed application of the automatic stay.

The Fifth Circuit below did not discuss nor cite *Kalb*. Nor did it cite *Gruntz* which analyzes the impetus for

Kalb and its roots in supremacy and exclusive jurisdiction (see above). There is no discussion on the values of uniformity and a bankruptcy court's plenary authority over core matters. Thus, the Fifth Circuit failed to get to the heart of the matter. By this key omission the Fifth Circuit failed to see the important underpinnings of *Kalb* and the voidness doctrine. It gave no consideration to the broader underpinnings of federal supremacy, uniformity, and bankruptcy jurisdiction.

Significantly, the Fifth Circuit in *Sikes agreed* that under pre-Code law, and *Kalb*, the state court proceeding was *void,* but it claimed that this was because under the prior Act there was no express reference to statutory annulment:

> Our decision today does not conflict with the Supreme Court's holding in *Kalb v. Feuerstein*, 308 U.S. 433, 60 S. Ct. 343, 346, 84 L. Ed. 370 (1940), involving a post-petition real property foreclosure action, where the Court stated: "[T]he action of the Walworth County Court was not merely erroneous but was beyond its power, void, and subject to collateral attack." When the Supreme Court decided *Kalb*, in 1940, bankruptcy referees had the express statutory power only to modify or terminate the automatic stay. The power to annul the stay had not been authorized. Accordingly, where the violation of the stay was statutorily proscribed and an applicable exception did not exist, the violative action was void. That scenario no longer applies.

Sikes, 881 F.2d at 179.

The suggestion that *Kalb* is no longer controlling in view of the addition of the power to "annul" the stay

found in § 362(d) is unwarranted. Congress was presumably well aware of the oft cited *Kalb* decision from 1940 when it adopted the 1978 Code, and yet, the long and detailed legislative history makes no mention that the stay provisions were meant to overturn *Kalb* or alter its effect in any way. "Congress is presumed to know the content of existing, relevant law, and …where Congress knows how to say something but chooses not to, its silence is controlling." *Lindley v. F.D.I.C.*, 733 F.3d 1043, 1055-56 (11th Cir. 2013), *aff'd sub nom. Lokey v. F.D.I.C.*, 608 F. App'x 736 (11th Cir. 2015).

Further, this Court has repeatedly stated that it must not erode a past bankruptcy practice absent a clear indication in the legislative history that Congress intended such a departure.[15] "This Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992).

As noted above, the Fifth Circuit expressly acknowledged that under the prior Act, actions taken in violation of the automatic stay were void. Nor has anyone cited to legislative history which would remotely suggest Congress intended an alteration in such views. Indeed, given the importance of the doctrine to protecting the values of uniformity and supremacy, there is no basis to presume that Congress intended to depart from the long-held view of "voidness."

Other courts have rejected this statutory view of the Fifth Circuit. For example, the Ninth Circuit likewise

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[15] Kenneth N. Klee and Whitman L. Holt, BANKRUPTCY AND THE SUPREME COURT: 1801-2014, 17 (2015).

found that reliance on the addition of annulment does not mean that stay violations are merely avoidable:

> The *Sikes* and *Oliver* courts read far too much into the meaning and operation of section 362(d). The power to grant relief, even retroactively, simply does not mean that violations of the stay must be merely voidable rather than void. As was explained by the court in *In re Garcia*, 109 B.R. at 339, "that Congress saw fit to include specific exceptions to the automatic stay does not require the conclusion that actions in violation of the automatic stay are merely voidable." It is entirely consistent to reason that, absent affirmative relief from the bankruptcy court, violations of the stay are void.

In re Schwartz, 954 F.2d 569, 573 (9th Cir. 1992).

In addition, the Fifth Circuit held that any voidness arising from the Debtor's wrongful secreting of assets, did not render the conduct of the co-plaintiffs who participated in the Kansas litigation from being a stay violation. It ruled that the bankruptcy court did not err in "limiting any violation of the stay to the Debtors and their counsel." *McConathy*, 111 F.4th at 581.

This too was error. Once the Kansas litigation was void, then no further acts in continuation of the state-court action could have any validity. The voidness was not specific to a subset of the parties, but to all parties, regardless of motive. This is what voidness means. Thus, even if AWI later settled with the debtors, leaving only non-debtors as parties, the voidness remained. Only an order of annulment could change this voidness, and no such order was entered.

This mischaracterizes what the bankruptcy court held as well as the legal consequences of the stay. "[T]he bankruptcy court explained that any adjudication of rights and royalties in the Kansas litigation could have an impact on the property of the estate under Section 362(a)(3) of the Bankruptcy Code because the estate's property rights were hopelessly intermingled with the other plaintiff's claimed interest." Pet. Ap. 6a.[16]

The bankruptcy court found that the non-debtor parties were subject to the automatic stay, and thus their continued presence in an active suit constituted "any act" against property of the estate and was a violation of § 362(a).

> With respect to the claims *asserted by the non-debtor parties*, the *automatic stay also applies* because a resolution of those claims may have an adverse impact on the estate claims. In this case, the non-debtor parties have asked the Kansas court to determine their fractional interests in leases in which the estate also holds an interest.

Further,

> Section 362(a)(3)'s prohibition of acts to exercise control over property of the estate applies in this instance to prevent the adjudication of the claims *asserted by the non-debtor parties* thatare hopelessly intertwined with the claims of the estate.

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[16] It is widely recognized that actions involving non-debtors that would have an 'adverse impact' upon the property of the estate are *subject to the automatic stay under § 362(a)(3)*." Memorandum Ruling, p. 9 (emphasis added).

Memorandum Ruling of June 11, 2021, U.S. Bankruptcy Court, Case No. 90-13449, ECF 220, p. 10 (emphasis added).

As noted, the stay applies to "any claim" by "any entity." The non-debtor parties who were co-plaintiffs were seeking essentially the same relief—namely, an action against property of the estate. They were as bound by the stay as the debtor. They were as guilty of a stay violation as the primary plaintiff.

The Fifth Circuit also held that the absence of an order expressly annulling the wrongful stay violation was not necessary. "We disagree with AWI's interpretation … that only a formal annulment order could 'retroactively validate' the Kansas litigation." 111 F.4th at 581.

A formal order of annulment was required.[17] Courts agree there is a purposeful distinction between termination and annulment; the annulment is the only remedy that works retroactively; the termination of the stay is effective only prospectively. *See*, *e.g.*, *E. Refractories Co. Inc. v. Forty Eight Insulations Inc.*, 157 F.3d 169, 172 (2d Cir. 1998) stating as follows:

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[17] As Petitioner correctly points out, the legal standards are also different; a termination of the stay may be based on a court's discretionary determination, but an annulment requires the movant to meet a higher barrier and is a remedy that is to be granted rarely. Pet. 8, 16. *See also Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 977 (1st Cir. 1997). "Thus, if congressional intent is to be honored and the integrity of the automatic stay preserved, retroactive relief should be the long-odds exception, not the general rule …[A]lthough courts possess a limited discretion to grant retroactive relief from the automatic stay, instances in which the exercise of that discretion is justified are likely to be few and far between."

> The Bankruptcy Code empowers bankruptcy courts to take measures that grant relief from the automatic stay, including "terminating, annulling, modifying, or conditioning" the stay, under certain circumstances. 11 U.S.C. § 362(d). These measures have different operation and effect. An order "terminating" an automatic stay operates only from the date of entry of the order. Such an order thus permits a creditor to re-initiate its lawsuit (or start another one) *after* the termination order is entered but does not affect the status of actions taken between the filing of the bankruptcy petition and the entry of the termination order—such actions are void *ab initio.* By contrast, an order "annulling" a stay does have retroactive effect, and thereby reaches back in time to validate proceedings or actions that would otherwise be deemed void *ab initio.*

See also In re WorldCom, Inc., 325 B.R. 511, 519 (Bankr. S.D.N.Y. 2005)(some citations omitted) holding that "merely terminating the stay will not validate a stay violation which therefore remains void."

> When an action has been commenced in violation of the stay, that action can only be made legitimate by an order retroactively validating the action. *Enron / MARTA*, 306 B.R. at 477 ("An order annulling the automatic stay has retroactive effect and validates actions or proceedings that would otherwise be deemed void ab initio."). In contrast, an order terminating the stay operates only from the date of entry of the order and does not

affect the status of actions taken between the filing of the petition and the entry of the order.

The Fifth Circuit disregarded a long-standing principle that actions which violate the stay, either by a party or a state court, are void; this view has been approved by a majority of the circuit courts. The roots of this doctrine are in principles of federalism with due regard to the exclusive power of Congress to make uniform laws of bankruptcy. Granting certiorari will benefit the bankruptcy system by adopting a uniform rule of voidness and requiring those who seek relief to seek annulment. It will prevent serial filings of lift-stay motions, and reduce needless prolongation of cases.

CONCLUSION

Wherefore, your amici respectfully request that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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