

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 Petition For A Writ of Certiorari To
The United States Court of Appeals For
The Seventh Circuit**

**BRIEF OF AMICUS CURIAE INTERNATIONAL
MUNICIPAL LAWYERS' ASSOCIATION IN
SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICUS CURIAE*¹

Amicus curiae the International Municipal Lawyers Association (“IMLA”) is a non-profit professional organization owned solely by its more than 2,500 members, which consists of local government attorneys who advise towns, cities, and counties across the country. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA’s mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state appellate courts.

This case is of particular concern to local government attorneys nationwide because of the uncertainty surrounding the legal avenues available to enforce traffic safety laws after a car owner has filed for bankruptcy. Impounding automobiles for serious safety violations and as a last resort after an owner’s failure to pay traffic fines is a widespread practice

¹ Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for amicus curiae made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2, amicus curiae states that counsel for all parties received notice at least ten days prior to the due date of the intention to file this brief and have consented to the filing of this brief.

among local governments. Local governments across the country have developed procedures that comply with the Bankruptcy Code’s requirements for impounded automobiles, but the split between the circuit courts hampers those efforts and sows uncertainty for local governments.

IMLA’s members are united in the belief that a clear and consistent requirement nationwide is preferable to the current circuit split. Furthermore, IMLA’s members ask this Court to consider how the rule adopted by the Seventh Circuit undermines public safety, enforcement of traffic codes, and incentivizes questionable or outright frivolous bankruptcy petitions filed solely to obtain the release of an impounded vehicle.

SUMMARY OF THE ARGUMENT

This case presents this Court with a recurring question of federal bankruptcy law that has left the courts of appeals divided: whether the Bankruptcy Code’s automatic stay mandates that creditors turn over the debtor’s impounded vehicle as soon as the bankruptcy petition is filed, or whether creditors that may have statutory defenses to turnover (such as the local government members of IMLA) may assert those defenses in bankruptcy and retain possession while awaiting an order of the Bankruptcy Court resolving the issue in an adversary proceeding.

Five circuits including the Seventh Circuit have held that the automatic stay of 11 U.S.C. § 362(a) requires a local government immediately to release an impounded vehicle when the owner files for

bankruptcy. *See* Pet. at 15-17. The Tenth and D.C. Circuits, by contrast, have rejected this argument, and instead have concluded that a creditor’s passive retention of property in which the estate has an interest does not violate the automatic stay because it is not an “act” to exercise control over estate property. *Id.* at 17-18. The key difference is that the application of the automatic stay provides no opportunity for a local government to assert defenses or seek an order requiring the debtor to take steps to protect the value of the vehicle prior to its release.

In addition to highlighting the acknowledged and entrenched circuit split on this issue, the City of Chicago’s cert petition lays out the textual and statutory reasons for why the Seventh Circuit’s ruling was erroneous. This amicus brief explains how the issue presented in this case affects nearly 39,000 cities, counties, and towns nationwide.² It further explains that the rule adopted by the Seventh Circuit burdens local governments by undermining the efficacy of their traffic and parking regulations, as well as by incentivizing the filing of bankruptcy petitions filed solely to recover an impounded vehicle.

This Court has the opportunity to address a statutory misinterpretation that threatens to undermine a certain core responsibility of every American municipality: ensuring the safety of roads

² See U.S. CENSUS BUREAU, *2017 Census of Governments* (Table 2), <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html> (2019).

and highways. The City of Chicago's petition for a writ of certiorari should be granted.

ARGUMENT

I. Local governments across the country rely on vehicle impoundment to enforce traffic safety laws.

The Seventh Circuit's opinion focused heavily on the particularities of Chicago's parking and traffic codes. However, impoundment is by no means a uniquely Chicagoan response to traffic safety violations. For example, in 2018, a total of 14,673 vehicles were impounded by Denver for code violations.³ Milwaukee impounded between 29,000 and 32,000 vehicles in each of the past three full years.⁴ In Boston, the annual number of impounded vehicles ranged from approximately 12,000 to 16,000 for each of the past three years.⁵ Montgomery County, Maryland, tows approximately 18,000 vehicles per

³ Statistics provided to IMLA by a City of Denver Assistant City Attorney on October 3, 2019, via email. This information is retained on file.

⁴ Statistics provided to IMLA by the Office of the City Attorney for Milwaukee on October 4, 2019, via email. This information is retained on file.

⁵ Statistics provided to IMLA by the City of Boston Law Department on October 4, 2019, via email. This information is retained on file.

year.⁶ These are just four American municipalities. It is safe to say that not just tens of thousands, but even several hundreds of thousands of vehicles are subject to impoundment each year in American local governments.

Local governments impound vehicles in a variety of situations: when a vehicle is parked in a dangerous or obstructive manner, when a driver fails to comply with insurance and permitting requirements, and when fines and fees go unpaid for a sufficient length of time. A brief overview of several local governments across other circuits illustrates the uses of impoundment.

The City of Denver authorizes its police to impound vehicles immediately in a variety of situations including parking and traffic offenses, abandonment of the vehicle, and lack of a license. D.R.M.C. 54-811(1)-(16), (18). Denver also permits impoundment as a last resort (following multiple notices and booting of the vehicle) for failure to pay fines for illegal parking or driving without a license plate. D.R.M.C. 54-811(17), (19). The City of Denver considers all of these situations to be “obstructions to traffic or public nuisances,” rather than being motivated by financial benefit. D.R.M.C. § 54-811. No vehicle may be released from impoundment until the

⁶ Statistics provided to IMLA by the Office of the County Attorney for Montgomery County on October 10, 2019, via email. This information is retained on file.

storage and impoundment fees are paid.⁷ D.R.M.C. 54-813.

Texas has statewide regulations permitting all of its municipalities to impound vehicles in three situations. First, a vehicle will be impounded following multiple violations of Texas state law requiring auto insurance. Tex. Transp. Code § 601.261. The vehicle cannot be released until the owner pays fees and obtains a court order of release. § 601.267(1). Second, a vehicle will be impounded if it was not registered and is involved in an accident causing injury, death, or property damage over \$500. § 601.291. The owner can only obtain the return of the vehicle by paying the cost of impoundment and obtaining a certificate of release from the department. § 601.295. Third, impoundment is also authorized for repeatedly failing to pay tolls. § 372.112. The toll road operator is required to release the impounded vehicle only after all unpaid tolls, fees, and impoundment-related charges have been paid. *Id.* Maintaining efficient traffic safety laws is particularly critical in such states with significant populations. Texas has approximately 15.4 million registered drivers.⁸

Like Texas, Pennsylvania also has statewide provisions authorizing impoundment. Pennsylvania

⁷ Local governments often contract out the actual towing and impoundment and incur costs associated with these services.

⁸ U.S. Department of Transportation, Federal Highway Administration, Highway Statistics, DL-201, available at www.fhwa.dot.gov/policyinformation/statistics/2017/.

municipalities can impound a vehicle immediately if the owner fails to pay fines that total \$250 or more and have been imposed for violating registration, permitting, and license plate requirements. 75 Pa. Stat. and Cons. Stat. § 6309.1. The vehicle may be impounded within 24 hours of the fine if the owner fails to pay the amount or enter into an installment plan. *Id.* A vehicle may be impounded immediately if it is being driven without a license or while the operator's driving privileges are suspended. § 6309.2(a). Under that subsection, the vehicle will be released only after all fines, towing fees, and storage costs have been paid, and only when proof of valid registration and financial responsibility have been provided. § 6309.2(d). Parking a vehicle on a highway or public property in violation of any local ordinance is another ground for impoundment. § 6109(a)(22). These regulations govern nearly 9 million licensed drivers in Pennsylvania.⁹

As seen in the examples above, impoundment is commonly employed to enforce vehicle licensing, registration, and insurance regulations. A rule requiring the release of vehicles impounded for violating these regulations removes a valuable tool from local governments and thereby undermines the public safety. Local governments also authorize impoundment where there is evidence of criminal activity.

⁹ *Id.*

In addition to other bases, the City of SeaTac, Washington also authorizes impoundment when there are indications of criminal activity. The vehicle may be impounded where a police officer has information sufficient to form a reasonable belief that the vehicle constitutes evidence of a crime or contains evidence of a crime, if impoundment is reasonably necessary to obtain or preserve evidence. SeaTac Mun. Code, § 9.20.030(A)(5). Vehicles may also be impounded where the driver was arrested or taken into custody and is physically or mentally incapable or too intoxicated to rationally decide on steps to take to protect the property. § 9.20.030(A)(7).

Impoundment where the driver is under the influence of alcohol or drugs is not unique to SeaTac. According to the Centers for Disease Control and Prevention (CDC), many states and local governments also authorize vehicle impoundment in situations where police encounter a driver under the influence of alcohol or drugs.¹⁰ In seven states, the vehicle is impounded for a short period of time, until the driver is no longer intoxicated. Fifteen other states allow for a longer period of impoundment due to the severity of the public safety issue.¹¹

¹⁰ CENTERS FOR DISEASE CONTROL AND PREVENTION, *Motor Vehicle Safety: Vehicle Impoundment* (2015), <https://www.cdc.gov/motorvehiclesafety/calculator/factsheet/impoundment.html>.

¹¹ *Id.*

Studies have shown impoundment to be effective in preventing repeat driving while intoxicated offenses. A study on a local impoundment law in Cincinnati, Ohio, found that it reduced recidivism by 40 percent while the vehicle was impounded and by 25 percent for one year after impoundment.¹² Another study, which analyzed the effects of an earlier California law that allowed impoundment of vehicles driven by a person with a suspended or revoked license, concluded that impoundment reduced repeat offenses by approximately 24 percent and crashes by approximately 25 percent as compared to unlicensed drivers whose vehicles were not impounded.¹³ The rule adopted by the Seventh Circuit undermines local governments' ability to enforce these traffic safety laws.

II. The rule adopted by the Seventh Circuit would imperil enforcement of traffic safety laws and incentivize frivolous bankruptcy filings.

Under the construction of the Bankruptcy Code adopted by the Seventh Circuit, the hundreds of

¹² Voas, Tippetts, and Taylor, *Temporary vehicle impoundment in Ohio: a replication and confirmation*, ACCID. ANAL. PREV. 1998 Sep.; 30(5):651, 655.

¹³ Deyoung, DJ, *An evaluation of the specific deterrent effects of vehicle impoundment on suspended, revoked, and unlicensed drivers in California*, ACCID. ANAL. PREV. 1999 Jan-Mar; 31(1-2):45-53.

thousands of impoundments conducted every year by local governments—just like a secured creditor’s repossession of its collateral—can potentially be overcome by a bankruptcy filing, *regardless* of the original reason for impoundment. Therefore, it is crucial to examine what effects the Seventh Circuit’s recent ruling could have on American local governments and public safety generally if extended nationwide.

In 2018, the Northern District of Illinois—which covers the City of Chicago—saw 17,603 chapter 13 bankruptcy cases filed.¹⁴ This was far and away the greatest number of cases filed in any federal district and is due to the prevalence of owners of impounded vehicles filing chapter 13 petitions to obtain the return of their cars.¹⁵ Indeed, a 2013 investigation by the *Chicago Tribune* found that hundreds of owners of impounded vehicles had turned to a single scam artist to file fraudulent bankruptcy petitions in order to receive their vehicles without paying an impoundment

¹⁴ Dugan, Alexandra & Elizabeth R. Brusa, The City Has My Vehicle. What Now? Financial Services Perspectives (May 7, 2019), available at <https://www.financialservicesperspectives.com/2019/05/the-city-has-my-vehicle-what-now/>.

¹⁵ *Id.*

fee.¹⁶ In 2016, approximately 3,800 vehicles impounded by Chicago were released in response to chapter 13 bankruptcy petitions.¹⁷ These vehicles are returned to the debtor not just in the case of unpaid fines, but also in cases where the vehicle was impounded because the driver did not have insurance, or a license, or another public safety reason.

Although this wave of questionable, recovery-motivated chapter 13 filings began in Chicago, nothing limits the practice to that city. Without this Court's intervention, there is a significant risk that more courts will adopt the Seventh Circuit's rule, opening the door for this practice to spread nationwide.

It is important to note that the alternative rule, endorsed by the Tenth and D.C. Circuits, still leaves an avenue for the debtor to obtain the release of his or her impounded vehicle. Under 11 U.S.C. § 542(a), a debtor is entitled to recover property, including an impounded vehicle, but the debtor must bring an

¹⁶ Annie Sweeney, *Feds: Bankruptcy scam freed impounded vehicles*, CHICAGO TRIBUNE (Apr. 25, 2013) <https://www.chicagotribune.com/news/ct-xpm-2013-04-25-chi-feds-bankruptcy-scam-freed-impounded-vehicles-20130425-story.html>.

¹⁷ Melissa Sanchez, *Impounded vehicles can't be held after drivers file for bankruptcy, court says*, ABA JOURNAL (July 10, 2019) <http://www.abajournal.com/news/article/chicago-cant-hold-impounded-vehicles-after-drivers-file-for-bankruptcy-court-says/>.

adversary proceeding to obtain release of the property. Fed. R. Bankr. P. 7001(1). At that time, the creditor has the opportunity to seek adequate protection of its interest in the property, which is a right under the Bankruptcy Code. 11 U.S.C. § 361. In the context of automobiles, this procedure would allow a judge to require that the debtor maintain sufficient insurance on the vehicle, make cash payments equal to the depreciation of the vehicle, or post a bond. *Id.* This balances the interest of the debtor in obtaining use of the vehicle and the interest of the local government in ensuring that its interest in the value of the vehicle is protected.

The Seventh Circuit's rule requiring immediate return of an impounded vehicle following a bankruptcy petition, however, affords no protection to a local government's interest in an impounded vehicle. As one municipal director of code enforcement stated, "[i]f a vehicle is released to the debtor before the fees/fines are paid, the city will never see the car or the unpaid fees/fines again."¹⁸ This result would severely imperil local governments' ability to enforce traffic safety regulations. If the automatic stay requires an immediate release of the vehicle, a local government loses the opportunity to appear before a judge and request one of the above-mentioned forms of protection or relief prior to its release. Consequently,

¹⁸ Comments provided to IMLA by the City of Denver's Director of Prosecution and Code Enforcement on September 17, 2019, via email. This information is retained on file.

its ability to enforce its traffic safety statutes will be significantly hampered.

In closing, it should be noted that local governments suffer two other problems under the Seventh Circuit rule. First, the public is endangered if a debtor can immediately obtain the release of vehicles that were impounded for violations arising from safety concerns such as driving without a permit, lack of insurance, or dangerous driving, including while under the influence of drugs or alcohol. The rule endorsed by the Seventh Circuit and four of the other circuits applies to vehicles impounded for any reason, not just for unpaid parking tickets.

Second, perverse incentives result when a bankruptcy filing automatically releases an impounded vehicle. The story of Chicago illustrates that questionable, frivolous, or even bad-faith petitions are likely to be filed solely to avoid paying fines and fees. This produces immense strain on all parties involved in bankruptcy proceedings—trustees, the U.S. Trustee, judges, and court personnel—even if the petition is quickly abandoned or dismissed.¹⁹ Filing for bankruptcy solely to obtain the release of a vehicle is less likely to occur if the local government will have a chance to assert defenses and request that the bankruptcy court require the debtor to undertake protective measures when the vehicle is released. Thus, requiring an adversary proceeding reduces the

¹⁹ Dugan & Brusa, *The City Has My Vehicle. What Now?*, *supra* n.7.

burden of inappropriate bankruptcy petitions on local governments and bankruptcy personnel.

CONCLUSION

The Court should grant the City of Chicago's petition for a writ of certiorari.

Respectfully submitted,

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