COMMENT

AFFIRMATIVE ACTS, PASSIVE RETENTION, AND EXERCISING CONTROL: APPLYING *CITY OF CHICAGO V. FULTON* TO RELATED PROVISIONS OF THE AUTOMATIC STAY

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The Supreme Court's decision in City of Chicago v. Fulton *partially resolved a decades-long circuit split around the interpretation of a fundamental debtor-protection mechanism, the automatic stay. However, the limited ruling only applied to one subsection of the automatic stay and resulted in lingering questions regarding the proper application of the other subsections of 11 U.S.C. § 362(a). This Comment argues that despite the Court's narrow holding, its reasoning and analysis provided a framework that courts can extend and apply to other subsections of § 362(a). Further, this Comment argues that* City of Chicago v. Fulton *left open the possibility that passive retention of debtor property does, in some instances, violate the automatic stay.*

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TABLE OF CONTENTS

INTRODUCTION

"The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions." Section 362 of the Bankruptcy Code creates an automatic stay on enforcement actions by any creditors of the debtor; all debt collection efforts are prohibited without the consent of a

bankruptcy court.[1] It is widely accepted that filing for bankruptcy is an opportunity for the debtor to get a "fresh start," rid themselves of the overwhelming debt they cannot otherwise seem to escape, and chart a new path to financial stability.[2] The automatic stay section of the Bankruptcy Code ("the Code")[3] is—as its name suggests—automatic; it is intended to immediately protect both debtors and creditors and stop all collection efforts once the bankruptcy petition has been submitted.[4]

In 2021, however, the Supreme Court constrained the reach of the automatic stay with its decision in *City of Chicago v. Fulton*.[5] The Court ultimately held that passive retention of debtor property does not violate § 362(a)(3) of the automatic stay.[6] Prior to the Court's decision in *Fulton*, there was a split among lower courts about exactly what types of creditor conduct violate the automatic stay.[7] Under the majority approach ("the Majority Approach"), the Second, Seventh, Eighth, Ninth, and Eleventh Circuits have found that a creditor is in violation of the automatic stay if it does not return the debtor's property upon learning of the filing of the bankruptcy petition.[8] Under the minority approach ("the Minority Approach"), the Third, Tenth, and D.C. Circuits held that a creditor has no obligation under the automatic stay

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1. PRACTICAL LAW BANKRUPTCY & RESTRUCTURING & PRACTICAL LAW FINANCE, AUTOMATIC STAY: OVERVIEW, WESTLAW (2023), https://1.next.westlaw.com/Document/I21063e39ef0811e28578f7ccc38dcbee/View/FullText.html? [https://perma.cc/J5BV-PR46].

2. MICHAEL D. CONTINO, CONG. RSCH. SERV., R45137, BANKRUPTCY BASICS: A PRIMER 1 (2022); *e.g.*, Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (stating that the purpose of bankruptcy law is to "[give] to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt").

3. 11 U.S.C. § 362.

4. City of Chicago v. Fulton, 141 S. Ct. 585, 589 (2021) (noting that the automatic result of filing a bankruptcy petition is that the Stay "serves the debtor's interests by protecting the estate from dismemberment, and it also benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others").

5. *Id.* at 589–90.

6. *Id.* at 592.

7. *In re* Denby-Peterson, 941 F.3d 115, 123 (3d Cir. 2019) (acknowledging and explaining the majority and minority positions of the circuit split, and ultimately joining the Minority Approach).

8. *Id.*

to return debtor property until ordered to do so by a bankruptcy court.[9]

This Comment will primarily address § 362 of the Code, the automatic stay, and will focus on three sub-provisions: § 362(a)(3);[10] § 362(a)(4);[11] and § 362(a)(6).[12] For clarity and where appropriate, § 362(a)(3) will be referred to in this Comment as the "exercise control provision"; § 362(a)(4) as the lien provision"; and § 362(a)(6) as the "pre-petition claim provision." The turnover provision is also relevant,[13] which, unlike the automatic stay, requires judicial intervention prior to enforcement.[14] The phrases "passive retention" (or "mere retention") and "affirmative act" are central to this Comment; however, it is worth noting that, though various courts have discussed the phrases in general terms, courts have not precisely defined them.[15] Instead, under both the Majority Approach and the Minority Approach, the two phrases are used as part of the courts'

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9. *Id.*; *see* Zachary Dunn, *Deepening Circuit Split, Third Circuit Holds that Items Seized Pre-Petition Did Not Violate Automatic Stay*, JDSUPRA (Feb. 3, 2020), https://www.jdsupra.com/legalnews/deepening-circuit-split-third-circuit-79828 [https://perma.cc/8FDR-HJGT] (discussing that the state of the law as it relates to the automatic stay lacks uniformity and is complicated and "wholly unclear").

10. 11 U.S.C. § 362(a)(3) (stating that a bankruptcy petition filed under the relevant sections of the Code operates as a Stay, applicable to all entities (creditors), of "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. *Id.* § 362(a)(4) (stating that a bankruptcy petition filed under the relevant sections of the Code operates as a Stay, applicable to all entities (creditors), of "any act to create, perfect, or enforce any lien against property of the estate").

12. *Id.* § 362(a)(6) (stating that "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case" is a violation of the Code).

13. *Id.* § 542 (section 542, titled "Turnover of property to the estate," stipulates the circumstances under which the creditor must turn the property over to the creditor's trustee).

14. *In re* Denby-Peterson, 941 F.3d 115, 130 (3d Cir. 2019) (concluding that the turnover provision is "effectuated by virtue of judicial action" and that it would be "illogical for [the court] to interpret the turnover provision as imposing an automatic duty on creditors to turn over collateral to the debtor upon learning of a bankruptcy petition").

15. City of Chicago v. Fulton, 141 S. Ct. 585, 590 (2021) (holding that § 362(a)(3) "prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed"); *see Denby-Peterson*, 941 F.3d at 125–26 (agreeing with the minority position that § 362(a)(3) "requires a post-petition affirmative act to exercise control over property of the estate").

statutory analysis to interpret other phrases within the statute, yet are not defined in isolation.[16]

This Comment will argue that a proper application of the Supreme Court's *Fulton* opinion results in the conclusion that passive retention is a violation of the automatic stay under both the lien and pre-petition claim provisions.[17] A creditor's affirmative action post-petition, notwithstanding the very limited exceptions, is always a violation of the automatic stay.[18] Furthermore, it is an overextension of the Court's holding, as it applied to the exercise control provision, to conclude that all provisions of the automatic stay similarly require an affirmative creditor act in order to find a creditor violation.[19] This latter, erroneous application contravenes the overarching purpose of the automatic stay, renders it virtually irrelevant, and eliminates one of the debtor's main avenues to a fresh start.[20] This Comment does not suggest that lower courts simply apply the *Fulton* holding to whichever related provision of the automatic stay is at issue; rather, the precedential value of *Fulton* rests in the (i) framework it provides, (ii) insight it offers into how the Court assesses § 362, and (iii) legal reasoning that must be applied to determine if a creditor has violated the automatic stay.[21]

Part I of this Comment provides the necessary background on the legislative history of the Code, the automatic stay, the turnover provision, and the relevant jurisprudence.[22] Section I.A provides a brief overview and explanation of the procedural history and amendments to the Code.[23] It also includes a more thorough explanation of the

16. *See Denby-Peterson*, 941 F.3d at 124–26 (interpreting § 362(a)(3) of the Code by looking at the language of the statute itself, and adopting the Majority Approach to find that, together, the phrases "exercise control" and "act" prohibit the creditor from "taking any affirmative act"); WD Equip., LLC v. Cowen (*In re* Cowen), 849 F.3d 943, 949 (10th Cir. 2017) (adopting the Minority Approach and finding that § 362(a)(3) prohibits entities from "*doing* something to obtain possession[,]" but does not prohibit passively holding on to an asset).

17. *See infra* Part II.

18. *See infra* Section II.A (demonstrating and exploring the scenarios where the *Fulton* holding can be extended to other provisions of § 362).

19. *See infra* Section II.B (explaining why it is improper to blanket-apply the *Fulton* holding to all related provisions of § 362).

20. *See infra* Section II.B.

21. *See infra* Section II.B.

22. *See infra* Part I.

23. *See infra* Section I.A.

automatic stay and turnover provisions of the Code.[24] Section I.B outlines and explains the split among the federal circuits, and discusses the body of caselaw that created the majority and minority positions.[25] Section I.C provides an in-depth discussion of *City of Chicago v. Fulton*, the case that was ultimately granted certiorari to (partially) resolve the circuit split.[26] Section I.C outlines the new splits that have emerged since *Fulton*, discusses how lower courts are applying the *Fulton* precedent, and briefly addresses a few of the proposals recommended by other legal scholars and commentators.[27]

Part II begins an analysis that demonstrates how the legal framework from *Fulton* should be applied and extended to other provisions of the automatic stay.[28] Section II.A analyzes this framework through recent caselaw and explains how the Court's ruling on the exercise control provision extends to post-petition, affirmative acts under other provisions of the automatic stay.[29] Section II.B explores caselaw where the creditor did not engage in a post-petition affirmative act, and explains why finding a violation of the automatic stay is not precluded by *Fulton*.[30] Section II.C provides a critical analysis of erroneous applications to *Fulton* and discuss how the *Fulton* framework should be applied to other provisions of the automatic stay, apart from the already settled exercise control provision.[31]

I. BACKGROUND

First, this Part provides a brief overview of the Bankruptcy Code generally, as well as noteworthy amendments to the Code over the past decades. Then, it explains the automatic stay and discusses why it is so fundamental to effectuating the overarching purpose of the Code. Next, this Part provides an overview of the turnover provision and its relationship to and co-existence with the automatic stay. Finally, Part I discusses the relevant jurisprudence: the majority and minority positions of the circuit split, the Supreme Court's reasoning in *Fulton*, and pertinent post-*Fulton* caselaw.

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24. *See infra* Section I.A.
25. *See infra* Section I.B.
26. *See infra* Section I.C.
27. *See infra* Sections I.C.1, I.C.2.
28. *See infra* Part II.
29. *See infra* Section II.A.
30. *See infra* Section II.B.
31. *See infra* Section II.C.

A. Bankruptcy Basics

The Bankruptcy Reform Act of 1978[32] created what is today considered the modern Bankruptcy Code; prior to that, efforts to establish uniform bankruptcy law were scattered, largely unsuccessful, and piece-meal.[33] Since 1978, Congress has regularly updated the Code; the 1994 and 2005 amendments were especially extensive.[34] The 1984 amendments added the phrase "or to exercise control over property of the estate" to § 362(a)(3).[35] This amendment expanded what constitutes a violation by making it so that a creditor that "exercise[s] control" still violates the Stay, even if they do not actually obtain possession of the property.[36] There are no accompanying Congressional notes or reports discussing the intent behind the addition of the phrase.[37] The phrase was only added to § 362(a)(3).[38]

The Bankruptcy Code is organized by chapters that establish the different forms of bankruptcy proceedings.[39] The first three chapters are generally applicable to most bankruptcy cases and defines key terms like "debtor," and "creditor."[40] The subsequent chapters define the different methods by which an individual or an entity can declare bankruptcy.[41] Also applicable and fundamental to nearly all

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32. 11 U.S.C § Ch. 1 (1978).

33. *See* Contino, *supra* note 3, at 1–3 (discussing the history and timeline of amendments to the Code).

34. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994); Julia Kagan, *Bankruptcy Abuse Prevention and Consumer Protection Act* Overview, INVESTOPEDIA (Apr. 26, 2023), https://www.investopedia.com/terms/b/bapcpa.asp [https://perma.cc/VVY8-XUSG] (describing how the 2005 amendments to the Code, for example, were incorporated through the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act, which placed more stringent requirements on who could file under Chapter 7).

35. 11 U.S.C. § 362(a)(3) (1984); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 441(a), 98 Stat. 333, 371 (1984).

36. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 441(a), 98 Stat. 333, 371 (1984).

37. City of Chicago v. Fulton, 141 S. Ct. 585, 592 (2021) (noting the absence of clear Congressional intent and discussing the potential reasons for the addition of the phrase).

38. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 441(a), 98 Stat. 333, 371 (1984).

39. Contino, *supra* note 3, at 3.

40. *Id.* at 3–4 (the term "creditor" means an entity that has a claim against the debtor or estate or has a community claim; the term "debtor" means a person or municipality against which a case has been commenced).

41. *Id.* at 10.

bankruptcy proceedings are the Federal Rules of Bankruptcy Procedure, which provide the procedural framework for bankruptcy proceedings.[42] The most common type of bankruptcy is a Chapter 7 filing, which is a liquidation proceeding available to both individuals and entities.[43] In a Chapter 7 proceeding, the debtor's assets are sold to fulfill their obligations to creditors.[44] Chapter 11 is primarily used by entities, and unlike the liquidation process of Chapter 7, provides relief through the reorganization of assets.[45] Notably, under a Chapter 11 filing, the debtor often remains in possession of their assets during the reorganization period and continues to operate after the cessation of the case.[46] A bankruptcy petition under Chapter 13 is exclusively available to "individual[s] with regular income" whose total outstanding debts are within the designated limit.[47] Chapter 12 of the Code is less common and is exclusively available to family farmers and family fisherman.[48] It is similar to a Chapter 13 bankruptcy filing and exists to give family farmers and fisherman the opportunity to reorganize their debts without ceasing farming and/or fishing operations.[49]

Proceedings under Chapter 9 of the Code are for use by municipal debtors, and allows for restructuring rather than liquidation, so that the municipality can continue to provide essential services to their residents.[50] Detroit is one of the most well-known municipalities to have filed for bankruptcy under Chapter 9.[51] Detroit's court-approved bankruptcy plan allowed the city to forgo $7 billion of its debt, and in

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42. *See* Contino, *supra* note 3, at 4 (detailing how the Federal Rules of Bankruptcy procedures are the core guidelines that bankruptcy courts follow). *See generally* FED. R. BANKR. P. (governing procedure in bankruptcy courts).

43. Contino, *supra* note 3, at 11.

44. *See id.* at 11 (noting that it is not uncommon for more than half a million debtors to initiate bankruptcy proceedings under Chapter 7).

45. *See id.* at 14 (explaining that the purpose of a Chapter 11 proceeding is to reorganize the debtor's outstanding debts so that they can continue to operate).

46. *Id.* at 15–16.

47. 11 U.S.C. § 109(e); *see* Contino, *supra* note 3, at 23 (discussing how Chapter 13 debtors can retain their assets if they comply with their bankruptcy plan).

48. 11 U.S.C. §§ 1201–32; Contino, *supra* note 3, at 26.

49. *See* Contino, *supra* note 3, at 26 (citing *In re* Pertuset, 492 B.R. 232, 259 (Bankr. S.D. Ohio 2012) and discussing who qualifies as a family farmer or fisherman, and the "complicated series of statutory prerequisites" that a debtor must satisfy to qualify under this Chapter).

50. Contino, *supra* note 3, at 27.

51. *See In re City of Detroit*, 524 B.R. 147, 276–77 (Bankr. E.D. Mich. 2014) (emphasizing that the overarching purpose of all chapters of the Code is to provide petitioners with a fresh start and a second chance).

December 2014, the city paid off its outstanding creditors and officially exited bankruptcy.[52] Just over 60 municipalities have filed under Chapter 9 since the 1950s, but Detroit was by far the largest, with estimates calculating the city's debt at more than $18 billion.[53]

1. An overview of the automatic stay

The protection an automatic stay affords a debtor is an essential, fundamental element of filing for bankruptcy.[54] While the automatic stay provision is primarily considered a mechanism to protect debtors, it is also central to the principles of judicial economy.[55] It dramatically limits the number of cases that end up in bankruptcy court because it automatically pauses collection and enforcement actions, so courts are spared from having to intervene and issue orders for many claims that would otherwise be before them.[56] Because the legislative records from the 1984 amendments to the Code offer no insight into the reasoning behind the addition of the phrase "exercise control" in § 362(a)(3), it has resulted in inconsistent interpretations and applications of the statutory language among the courts.[57] Conversely, § 362(b)(4),

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52. *Timeline: A History of Detroit's Fiscal Problems*, REUTERS, (Dec. 10, 2014, 12:47 PM), https://www.reuters.com/article/us-usa-detroit-bankruptcy-timeline/timeline-a-history-of-detroits-fiscal-problems-idUKKBN0JO1YW20141210 [https://perma.cc/47Q2-5WSW] (providing a timeline of the city's descent into financial insolvency, as well as the steps it took to declare bankruptcy and settle with creditors).

53. Monica Davey & Mary Williams Walsh, *Billions in Debt, Detroit Tumbles into Insolvency*, N.Y. TIMES (July 18, 2013), https://www.nytimes.com/2013/07/19/us/detroit-files-for-bankruptcy.html [https://perma.cc/MN6A-RSEB].

54. S. Rep. No. 95-989, at 54 (1978) ("The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions."). Debtors, however, are not the only ones who benefit from the automatic stay; it also protects judicial resources and creditors.

55. *See* Transcript of Oral Argument at 73, City of Chicago v. Fulton, 141 S. Ct. 585 (2021) (No. 19-357) (Eugene R. Wedoff, counsel on behalf of the respondents) (suggesting an unfavorable ruling would make Chapter 13 bankruptcy filings less effective and would decrease payments to creditors); *see also* Daniel Keating, *Offensive Uses of the Bankruptcy Stay*, 45 VAND. L. REV. 71–72 (1992) (discussing how debtors have leveraged the automatic stay as a progressively more powerful shield).

56. *See* Practical Law Bankruptcy & Restructuring & Practical Law Finance, *supra* note 2 (explaining how the Stay prevents creditors from racing to the courthouse).

57. *See supra* note 36 and accompanying text; John M. Hauber, *Update on Consumer Bankruptcy*: City of Chicago v. Fulton, 55 IND. L. REV. 501, 510–11 (2022) (discussing the inconsistent interpretations of the Stay and suggesting the Court foreshadowed how it was going to resolve the split when it framed and presented the issue as Chicago "ignor[ing]" the Code).

known as the "police and regulatory [powers] exception," is a clear example of Congress carving out a particularized exception to the automatic stay to ensure that it does not "frustrate necessary governmental functions."[58] Section 362(b)(4) states that the exercise of police and regulatory powers is not subject to certain provisions of the automatic stay.[59] This exception allows the government, in certain situations, to obtain judgments and pursue injunctions.[60] Though the Stay is a powerful protection for the debtor, it is not limitless; a court may grant creditors relief from the Stay by "terminating, annulling, modifying, or conditioning" it.[61] Because the legislative records from the 1984 amendments to the Code offer no insight into the reasoning behind the addition of the phrase "exercise control" in § 362(a)(3), it has resulted in inconsistent interpretations and applications of the statutory language among the courts.[62] Conversely, § 362(b)(4), known as the "police and regulatory [powers] exception," is a clear example of Congress carving out a particularized exception to the automatic stay to ensure that it does not "frustrate necessary governmental functions."[63] Section 362(b)(4) states that the exercise

58. *See* 11 U.S.C. § 362(b)(4); *see also Limits on Regulatory Powers Under the Bankruptcy Code: Hearing Before the Subcomm. on Com. and Admin. L. of the Comm. on the Judiciary H.R.*, 106th Cong. 3–5 (2000) (statement of Ethan Posner, Deputy Assoc. Att'y Gen., Dep't of Just.) (quoting United States v. Nicolet, Inc., 857 F.2d 202, 207 (3d Cir. 1988)) (opposing any further restriction of the police and regulatory exception to the automatic stay).

59. § 362(b)(4).

60. *Id.*

61. *See* § 362(d) (defining the situations that allow the court to grant relief from the automatic stay); Bud Stephen Tayman, *The Intersection of Bankruptcy Law and Environmental Law: The Clash Between Financial Survival and Environmental Regulation*, MD. STATE BAR ASS'N, (Sept. 21, 2021), https://www.msba.org/the-intersection-of-bankruptcy-law-and-environmental-law-the-clash-between-financial-survival-and-environmental-regulation [https://perma.cc/VN57-G7WC] (emphasizing the importance of the police and regulatory powers exception within the context of enforcing environmental regulations).

62. *See supra* note 36 and accompanying text; Hauber, *supra* note 57, at 510–11 (discussing the inconsistent interpretations of the Stay and suggesting the Court foreshadowed how it was going to resolve the split when it framed and presented the issue as Chicago "ignor[ing]" the Code).

63. *See* 11 U.S.C. § 362(b)(4); *see also Limits on Regulatory Powers Under the Bankruptcy Code: Hearing Before the Subcomm. on Com. and Admin. L. of the Comm. on the Judiciary H.R.*, 106th Cong. 3–5 (2000) (statement of Ethan Posner, Deputy Assoc. Att'y Gen., Dep't of Just.) (quoting United States v. Nicolet, Inc., 857 F.2d 202, 207 (3d Cir. 1988)) (opposing any further restriction of the police and regulatory exception to the automatic stay).

of police and regulatory powers is not subject to certain provisions of the automatic stay.[64] This exception allows the government, in certain situations, to obtain judgments and pursue injunctions.[65] Though the Stay is a powerful protection for the debtor, it is not limitless; a court may grant creditors relief from the Stay by "terminating, annulling, modifying, or conditioning" it.[66]

2. An overview of the turnover section

The inherent tension and duplicative nature of the automatic stay section and the turnover section makes it difficult to interpret or analyze either in isolation.[67] Litigation involving automatic stay issues often also include mention and discussion of the turnover provision.[68] The turnover provision is a tool for the debtor to recover property; it requires that the creditor return certain property, unless it is of "inconsequential value" or is proscribed property under the language of the statute.[69] Under the turnover provision, a creditor has no obligation to return debtor property until after the turnover hearing is complete and an order is issued.[70]

Though the Supreme Court declined to rule on the issues related to the turnover provision in *Fulton*, the Court did discuss the relationship between the automatic stay and the turnover provision.[71] Its ruling on the exercise control provision followed, in part, the conclusion

64. § 362(b)(4).

65. *Id.*

66. *See* § 362(d) (defining the situations that allow the court to grant relief from the automatic stay); Tayman, *supra* note 62 (emphasizing the importance of the police and regulatory powers exception within the context of enforcing environmental regulations).

67. *See* Hauber, *supra* note 57, at 517 (taking no position on the lingering legal issues, but posing hypothetical questions about the relationship between the automatic stay (§ 362) and the turnover provision (§ 542) in light of the *Fulton* decision).

68. *See, e.g.*, City of Chicago v. Fulton, 141 S. Ct. 585, 592 (2021) (declining to resolve the relationship between the automatic stay and the turnover provision); *In re* Denby-Peterson, 941 F.3d 115, 124 (3d Cir. 2019) (explaining that the automatic stay and turnover provision "operate together such that a violation of the turnover provision results in a violation of the automatic stay").

69. 11 U.S.C. § 542(a).

70. *See* Hauber, *supra* note 57, at 512 (emphasizing that the "turnover provision is self-executing and compulsory").

71. *Fulton*, 141 S. Ct. at 591–92 (stating that the Court "need not decide how the turnover obligation in § 542 operates[,]" but noting that, under the respondents proposed interpretation, "§ 542 would be reduced to a footnote").

reached by the Court as it related to the turnover provision.[72] The Court held that, if it adopted the respondents' proposed interpretation of the exercise control provision, the two provisions would be contradictory and the turnover provision rendered largely redundant.[73] Because the Court declined to rule on how the turnover provision operates, other than in conjunction with the exercise control provision, confusion remains.[74]

B. The Circuit Split

Prior to the Court's ruling in *Fulton*, courts were split on how to interpret the automatic stay.[75] Under the Minority Approach, adopted by the Third, Tenth, and D.C. Circuit, a creditor has no obligation to affirmatively return debtor property held by the creditor at the time of the bankruptcy filing upon learning of the petition.[76] The courts defined this permissible conduct as "passive retention" of debtor property and reasoned that because the creditor is merely retaining what they had already acquired before the debtor filed for bankruptcy, there was no "act . . . to exercise control."[77] The Majority Approach, adopted by the Second, Seventh, Eighth, Ninth, and Eleventh Circuit,

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72. *Id.*

73. § 542(a); *see Fulton*, 141 S. Ct. at 591 (explaining that in situations where the § 542(a) exception applied, § 362(a)(3) would still require turnover).

74. *Fulton*, 141 S. Ct. at 592; *see* Hauber, *supra* note 57, at 515 (suggesting the Court's statements about the relationship between § 362(a)(3) and § 542 are "dissatisfying" and "[o]ne way or the other" the exercise control language is "superfluous to either section 542 or section 362").

75. *See Fulton*, 141 S. Ct. at 592 (granting certiorari to resolve the circuit court split).

76. *See* United States v. Inslaw, Inc., 932 F.2d 1467, 1474–75 (D.C. Cir. 1991) (reversing and remanding the lower court's order for lack of jurisdiction, but noting that, as a matter of law, there was no violation of the automatic stay); WD Equip., LLC v. Cowen (*In re* Cowen), 849 F.3d 943, 949 (10th Cir. 2017) (adopting the Minority Approach because the Majority Approach reads too much into the legislative history and is too rooted in practical and policy considerations rather than a "faithful adherence" to the statutory text); *In re* Denby-Peterson, 941 F.3d 115, 126 (3d Cir. 2019) (joining the Minority Approach based on the finding that the statutory language is prospective in nature and is intended to stay the act to exercise control, rather than the exercise of control itself).

77. *Inslaw, Inc.*, 932 F.2d at 1474 (holding that the automatic stay only prohibits creditors from gaining or exercising control over property of the estate but does not prohibit a creditor from *retaining* the property); *e.g.*, *Fulton*, 141 S. Ct. at 590 (stating that the language of the exercise control provision suggests "something more than merely retaining power is required to violate [§ 362(a)(3)]").

on the other hand, interpreted the automatic stay as requiring a creditor to automatically return debtor property upon learning of the bankruptcy filing.[78] Under the Majority Approach, a debtor need not proactively initiate proceedings under the turnover provision, and passive retention of debtor property violates the automatic stay.[79] Conversely, under the Minority Approach, a creditor is not in violation of the automatic stay by passively retaining debtor property; they must take an affirmative act to violate the Stay.[80] It is worth noting that the circuit split emerged from cases spanning thirty years.[81] It involved a variety of creditor/debtor relationships and presented issues about almost every provision within § 362(a).[82] The Court's decision to grant certiorari could have provided much-needed clarity on the automatic stay; however, its narrow holding did not do that, and instead left open many lingering questions about every provision *except* § 362(a)(3).[83]

1. The Majority Approach: Passive retention violates the automatic stay

Under the Majority Approach, the creditor is obligated to automatically return property to the debtor upon learning of the

78. *In re* Fulton, 926 F.3d 916, 920 (7th Cir. 2019), *vacated and remanded*, 141 S. Ct. 585 (2021); Weber v. SEFCU (*In re* Weber), 719 F.3d 72, 76 (2d Cir. 2013), *abrogated by* City of Chicago v. Fulton, 141 S. Ct. 585 (2021); Rozier v. Motors Acceptance Corp. (*In re* Rozier), 376 F.3d 1323, 1323–24 (11th Cir. 2004) (per curiam); *In re* Del Mission, 98 F.3d 1147, 1154 (9th Cir. 1996), *abrogated by* City of Chicago v. Fulton, 141 S. Ct. 585 (2021); Knaus v. Concordia Lumber Co. (*In re* Knaus), 889 F.2d 773, 775 (8th Cir. 1989), *abrogated by* City of Chicago v. Fulton, 141 S. Ct. 585 (2021).

79. *See Knaus*, 889 F.2d at 775 (holding that the creditor's duty to return the debtor's property is not contingent upon any order of the bankruptcy court or demand by the creditor and the creditor has a duty to automatically return property upon learning of the petition).

80. *See Denby-Peterson*, 941 F.3d at 126 (agreeing and aligning with the minority position that § 362(a)(3) requires a post-petition affirmative act to exercise control over property of the estate).

81. *See Knaus*, 889 F.2d at 774–75 (forming the Majority Approach of the circuit split with its ruling that the creditor/lumber company violated the Stay by refusing to return the debtor's grain and farming equipment; *In re* Fulton, 926 F.3d at 916 (declining to overturn its precedent, remaining aligned with the Majority Approach, and positioning itself as the case ultimately granted certiorari by the Supreme Court to resolve the split); *infra* Sections I.B.1, I.B.2 for additional background on the cases that encompass the split.

82. *See infra* Sections II.B.1, II.B.2 (providing an overview of the cases that created the circuit split).

83. City of Chicago v. Fulton, 141 S. Ct. 585, 592 (2021) (declining to rule on any provision except § 362(a)(3)).

bankruptcy petition.[84] In *In re Weber*,[85] the creditor lawfully repossessed the debtor's vehicle shortly before the debtor filed for bankruptcy.[86] After the debtor filed for relief under Chapter 13 of the Code, the lender refused to return the vehicle to the debtor.[87] The Second Circuit held that the lender violated § 362(a) by failing to deliver the repossessed vehicle to the debtor after receiving notice of the bankruptcy filing.[88] To reach its conclusion, the court discussed the purpose of the Code, stating that "[t]he primary goal of reorganization bankruptcy is to group *all* of the debtor's property together in his estate such that he may rehabilitate his credit and pay off his debts[.]"[89]

In the Eighth Circuit case, *In re Knaus*,[90] plaintiff John Knaus purchased grain equipment from Concordia Lumber Co. on credit.[91] When Knaus was unable to pay his debts, he filed for bankruptcy and subsequently demanded the return of his property.[92] The creditor refused and the court determined that the creditor's refusal violated the automatic stay.[93] Here, the court held that it is the creditor's duty, upon learning of the bankruptcy petition, to return the debtor's property automatically, rather than wait for a court order or request from the debtor.[94] The failure to fulfill its duty constituted an attempt to "exercise control over the property of the estate" in violation of § 362(a)(3).[95] The creditor's refusal to return the debtor's property was held to be an exercise of control over the debtor's estate, because it prevented the debtor from running his business.[96]

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84. *See Knaus*, 889 F.2d at 775 (stating that the duty to return the debtor's property is "not contingent upon any predicate violation of the stay").

85. 719 F.3d 72, 74 (2d Cir. 2013), *abrogated by* City of Chicago v. Fulton, 141 S. Ct. 585 (2021).

86. *Id.* at 74.

87. *Id.*

88. *Id.* at 74–75.

89. *Id.* at 81 (quoting Thompson v. Gen. Motors Acceptance Corp., 566 F.3d 699, 792 (7th Cir. 2009)).

90. 889 F.2d 773 (8th Cir. 1989), *abrogated by* City of Chicago v. Fulton, 141 S. Ct. 585 (2021).

91. *See* Knaus, 889 F.2d at 774.

92. *Id.*

93. *Id.* at 775.

94. *Id.*

95. *Id.*

96. *Id.*

In the Ninth Circuit case *In re Del Mission*,[97] the court joined the Majority Approach when it held that the automatic stay prohibits passive retention of debtor property after a bankruptcy filing.[98] Debtor Del Mission Limited ("Del Mission") paid disputed, outstanding taxes to the state so that it would be eligible to renew its liquor license.[99] After Del Mission filed for bankruptcy, it attempted to recoup the tax monies it had previously paid; the state refused to return the taxes the liquor store had previously paid.[100] In its opinion, the court stated that it interpreted the exercise control provision as "broadening the scope of § 362(a)(3) to proscribe the mere knowing retention of estate property."[101] The Ninth Circuit found that the creditor (the state) had violated § 362(a)(6) for demanding that Del Mission pay "pre-bankruptcy petition penalties and post-petition interest on prepetition taxes."[102] The Supreme Court declined to address § 362(a)(6) in *Fulton*.[103] However, post-*Fulton*, because "the Code does not forbid a claim relating to prepetition taxes," a creditor might argue that continuing to collect prepetition taxes is an affirmative action that does not, in fact, violate § 362(a)(6).[104] This is a lingering question that remains unanswered, even after the Supreme Court's ruling in *Fulton* partially overruled the Ninth Circuit.[105] The Ninth Circuit's reasoning in *In re Del Mission* is noteworthy because its discussion of the automatic stay closely mirrors the language later used by the Supreme Court to reject the proposition that mere retention does not violate the automatic stay.[106]

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97. 98 F.3d 1147 (9th Cir. 1996) *abrogated by* City of Chicago v. Fulton, 141 S. Ct. 585 (2021).

98. *See id.* at 1151 (joining the Eighth Circuit as the second circuit court to adopt the Majority Approach).

99. *Id.* at 1149.

100. *Id.* at 1149–50.

101. *Id.* at 1151.

102. *See* State Bd. of Equalization v. Taxel, 998 F.2d 756, 757 (9th Cir. 1993).

103. *See In re* Del Mission, 98 F.3d 1147 n.4 (9th Cir. 1996) (commenting that the State's actions violated § 362(a)(6)). *But see Fulton*, 141 S. Ct. at 592 (declining to settle the meaning of other subsections of § 362(a)).

104. *See Taxel*, 998 F.2d at 757.

105. *See In re* Del Mission, 98 F.3d at 1147 n.4 (noting that the State's actions also violated § 362(a)(6)).

106. *Id.* at 1150–52 (agreeing with the lower bankruptcy court that the 1984 amendments to the Code that added "'exercise control' . . . broaden[ed] the scope of § 362(a)(3) to proscribe the mere knowing retention of estate property"). *But see Fulton*, 141 S. Ct. at 591 (holding that the language of § 362(a)(3) suggests something more than mere retention is required to violate the provision).

2. The Minority Approach: A creditor must engage in an affirmative act to violate the automatic stay

Under the Minority Approach adopted by the D.C., Tenth, and Third Circuit courts, a creditor has no obligation to automatically return property to the debtor.[107] In the D.C. Circuit case, the debtor, Inslaw, a software company, installed a software system on computers for the Department of Justice.[108] Inslaw filed for Chapter 11 reorganization bankruptcy and subsequently filed a complaint with the bankruptcy court, alleging that DOJ had violated the automatic stay by continuing to use its software.[109] The D.C. Circuit opinion is notably more direct than other caselaw, and states that the language of § 362 "makes clear that the stay applies only to acts taken *after* the petition is filed."[110] Despite the suggestions of the D.C Circuit, the language of the statute has proven itself less than clear, as evidenced by the decades-long circuit court split.[111] The D.C. Circuit suggested that the bankruptcy court had left the words of the statute "in the dust" and "hauled" the DOJ into court over what it characterized as contract and trade secret disputes.[112]

In the Tenth Circuit case, *In re Cowen*,[113] Trent Cowen borrowed money from WD Equipment to repair his truck, and in exchange provided the creditor with a lien on it.[114] Around the same time that he was trying to refinance, he defaulted on another loan that was secured by a different vehicle.[115] The second vehicle was repossessed,

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107. United States v. Inslaw, Inc., 932 F.2d 1467 (D.C. Cir. 1991); WD Equip., LLC v. Cowen (*In re* Cowen), 849 F.3d 943 (10th Cir. 2017); *In re* Denby-Peterson, 941 F.3d 115 (3d Cir. 2019).

108. *Inslaw, Inc.*, 932 F.2d at 1468–69.

109. *Id.*

110. *See id.* at 1473–74 (stating that the plaintiff's interpretation of the automatic stay provision would go far beyond what Congress intended).

111. *Compare In re* Fulton, 926 F.3d 916 (7th Cir. 2019), *and* Weber v. SEFCU (*In re* Weber), 719 F.3d 72 (2d Cir. 2013), *abrogated by* City of Chicago v. Fulton, 141 S. Ct. 585 (2021), *and* Rozier v. Motors Acceptance Corp. (*In re* Rozier), 376 F.3d 1323 (11th Cir. 2004) (per curiam), *and Del Mission*, 98 F.3d at 1147, *and* Knaus v. Concordia Lumber Co. (*In re* Knaus), 889 F.2d 773 (8th Cir. 1989), *abrogated by* City of Chicago v. Fulton, 141 S. Ct. 585 (2021), *with Inslaw, Inc.*, 932 F.2d at 1467, *and In re* Cowen, 849 F.3d at 943, *and Denby-Peterson*, 941 F.3d at 115 (comparing the body of caselaw on the majority side with the body of caselaw on the minority side).

112. *Inslaw, Inc.*, 932 F.2d at 1474.

113. 849 F.3d 943 (10th Cir. 2017).

114. *Id.* at 945.

115. *Id.*

and Cowen filed his petition under Chapter 13 of the Code.[116] The Tenth Circuit rejected the Majority Approach because it was driven by "practical" and "policy" considerations and "reads too much into the section's legislative history[,]" rather than interpreting the text itself.[117] It ultimately reversed the judgment of the bankruptcy court and issued an opinion in line with the Minority Approach.[118]

In 2021, the Third Circuit joined the Minority Approach with its decision in *In re Denby-Peterson*.[119] The debtor, Joy Denby-Peterson, purchased a Chevrolet Corvette and then defaulted on her payments several months later.[120] She notified her creditors that she had filed under Chapter 13 and requested the return of her car.[121] The creditor refused, and Denby-Peterson filed a motion for turnover.[122] The Third Circuit interpreted the exercise control provision as enabling the creditor to retain collateral received pre-petition because failure to return the property does not constitute an act to exercise control over property of the estate.[123] Furthermore, the court stated that the purpose of the exercise control provision aligns with its finding that Congress did not intend for passive retention to qualify as a violation of the Stay, and to hold otherwise would contradict the purpose of the automatic stay.[124] More than any other circuit opinion, the legal reasoning and statutory interpretation employed by the Third Circuit most closely mirrors the reasoning later adopted by the Supreme Court to reach its conclusion in *Fulton*.[125]

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116. *Id.* at 946.

117. *Id.* at 948–49.

118. *Id.* at 950–51.

119. 941 F.3d 115 (3d Cir. 2019).

120. *Id.* at 118–19 (considering whether the creditor violated the automatic stay when it refused to return the car, even though the car was repossessed pre-petition).

121. *Id.*

122. *Id.*; *see* Dunn, *supra* note 10 (explaining that, though the creditor was required to relinquish the car to the debtor via the turnover provision, it did not violate the automatic stay by refusing to relinquish it prior to the turnover proceeding).

123. *Denby-Peterson*, 941 F.3d at 119 (affirming the bankruptcy court's finding that the creditors did not violate the automatic stay by retaining possession of the Corvette).

124. *Id.* at 126 (stating that to hold otherwise would "directly contravene the status-quo aims of the automatic stay").

125. *Compare id.* at 124–32 (analyzing the individual words in § 362(a)(3), then moving to the legislative purpose of the automatic stay, and then framing its analysis in conjunction with the turnover provision) *with* City of Chicago v. Fulton, 141 S. Ct. 585, 588 (2021) (same approach); *see also* Dunn, *supra* note 123 (hypothesizing that the creditor's attorneys would rely on *Denby-Peterson's* reasoning in arguments before the Supreme Court).

C. City of Chicago v. Fulton

Eventually, the Supreme Court granted certiorari to the Seventh Circuit's 2019 case, *In re Fulton*, to resolve the split over the exercise control provision.[126] In a unanimous 8-0 decision,[127] the Court vacated the judgment of the Seventh Circuit and held that mere retention of debtor property does not violate § 362(a)(3).[128] The following facts of this case perfectly capture why the automatic stay is so important, and address the very purpose of the Code.[129]

Chicago had a policy of impounding vehicles when the owner failed to pay parking fines.[130] In 2017, city officials began claiming that the city had liens on impounded vehicles and that it did not have to return them after motorists filed for bankruptcy.[131] Instead, the city held onto the cars until motorists agreed to prioritize paying off ticket debt in their bankruptcy payment plan, a process that often took months and left many people unable to get to work.[132] The respondents filed for Chapter 13 protection and requested the return of their vehicles, which the city refused.[133] The irony of Chicago's model is that debtors, in order to comply with their bankruptcy payment plan, need to work and bring in an income.[134] The loss of a car often results in devastating

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126. *In re* Fulton, 926 F.3d 916 (7th Cir. 2019), *cert. granted* City of Chicago v. Fulton, 141 S. Ct. 585 (2021).

127. *Fulton*, 141 S. Ct. at 586, 592 (noting that Justice Barrett took no part in the consideration or decision of the case).

128. *Fulton*, 141 S. Ct. at 585–86.

129. *See* Terrence L. Michael, *Restoring the Fresh Start: Four Areas of Consumer Bankruptcy Law that Need to be Fixed NOW*, 30 AM. BANKR. INST. L. REV. 61, 62–63 (2022) (arguing that debtors need the ability to keep possession of items that are essential to their future and allow them to get a fresh start).

130. *Fulton*, 141 S. Ct. at 588.

131. *See* Melissa Sanchez, *Chicago Can't Hold Impounded Vehicles After Drivers File for Bankruptcy, Court Says*, PROPUBLICA (July 3, 2019, 3:59 AM), https://www.propublica.org/article/chicago-drivers-bankruptcies-impounded-vehicles-federal-appeals-court [https://perma.cc/KV57-HA7Z] (asserting that the city was hoping to decrease Chapter 13 bankruptcy filings and bring in more revenue by preventing motorists' ticket debt from being "wiped out").

132. *See id.* (noting that the City initially would not say how many vehicles it had refused to return after launching the policy).

133. *See In re* Fulton, 926 F.3d 916 (7th Cir. 2019), *cert. granted*, *City of Chicago. v. Fulton*, 141 S. Ct. 585, 585 (2021) (stating that the City was refusing to return vehicles until the debtor had paid their outstanding fines in full).

134. *See* Michael, *supra* note 130, at 73 (echoing Justice Sotomayor's opinion, which argued that allowing debtors to retain possession of their vehicle is what enables them to pay of the debts and comply with their bankruptcy plan).

effects for the owner, impeding their ability to bring in an income, care and provide for their children, and attend appointments.[135] In 2016 alone, prior to implementing the policy to not return debtor vehicles, the city returned close to 3,800 impounded vehicles to debtors who had filed for bankruptcy.[136] Without a vehicle, many people are left with an unreliable and inconsistent way to get to work.[137] Allowing debtors to keep possession of their car post-petition makes sense and aligns with the purpose of the Code—to give debtors a fresh start.[138]

To reach its conclusion in *Fulton*, the Court examined (1) the text and language of § 362(a)(3); (2) how it relates to the turnover provision; and (3) the legislative intent and purpose of the automatic stay more generally.[139] The Court placed particular emphasis on the 1984 amendments to the Code, especially where the automatic stay prohibits an act "to exercise control over property of the estate."[140] Each word was analyzed in turn, first in isolation, and then in relation to the surrounding words and related provisions.[141] After individually considering and defining the words "act," "stay," and "exercise," the Court determined that the combination of the words as used in the automatic stay suggests that the exercise control provision prohibits any affirmative act that would "alter the status quo as of the time of the filing of a bankruptcy petition."[142] Accordingly, the Court's distinction and relationship between the exercise control provision and the turnover provision, § 542(a), is more certain than the distinction between the provisions in § 362(a).[143] Less clear, however, is the

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135. *See id.* at 63 ("It is nearly impossible to overestimate the importance of a motor vehicle in American society.").

136. *Sanchez*, *supra* note 131.

137. *See Fulton*, 141 S. Ct. at 593 (Sotomayor, J., concurring) (stating that having a car is essential to employment).

138. *See* Michael, *supra* note 130, at 68 (arguing that the hardship caused by the city's policy falls "squarely on the shoulders of those who can least afford it").

139. *Fulton*, 141 S. Ct. at 588.

140. 11 U.S.C. § 362(a)(3); *Fulton*, 141 S. Ct. at 591.

141. *See Fulton*, 141 S. Ct. at 591 (noting that, in a statutory interpretation analysis, the "canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme[,]" (quoting Yates v. United States, 574 U.S. 528, 543 (2015) (plurality opinion))).

142. *Id.* at 590 (asserting that the language used implies that something more than merely retaining power is required to find a violation). *But see id.* (noting that the terms do not "definitively rule out the alternative interpretation" that "omissions can qualify as 'acts' in certain contexts").

143. *Id.* (stating that any ambiguity in (a)(3) is "resolved decidedly in the City's favor" because of the text of § 542(a)).

appropriate application of the Court's ruling as it relates to the lien provision and the pre-petition claim provision.[144] Notably, the Court acknowledged that the alternative definition adopted by the majority of the circuit split was not entirely resolved, and there are, in fact, omissions that can qualify as affirmative acts in certain contexts.[145] Post-*Fulton*, a creditor only violates the exercise control provision of the Stay with an *affirmative* act; however, *retaining* a debtor's repossessed car post-petition, for example, is "mere retention" that does not satisfy the Court's definition of an "affirmative" act such that the creditor is in violation of § 362(a)(3).[146]

In a concurring opinion that legal scholars and practitioners have extensively analyzed, Justice Sotomayor wrote that regardless of whether the creditor's refusal to return the property violated the text of the Code, the majority opinion "hardly comports with [the Code's] spirit."[147] Her concurring opinion emphasizes the other provisions that the Court had declined to rule on, and suggested that any gaps left by the Court's ruling should be addressed by rule drafters and policy makers.[148] Since the Court's ruling in *Fulton*, legal scholars almost

144. *See* Transcript of Oral Argument at 40–71, City of Chicago v. Fulton, 141 S. Ct. 585 (2021) (No. 19-357) (Gorsuch, J., questioning whether arguments under provisions other than § 362(a)(3) would be preserved if the Court rejected the (a)(3) argument).

145. *Fulton*, 141 S. Ct. at 590 (quoting Thompson v. General Motors Acceptance Corp., 566 F.3d 699, 702 (7th Cir. 2009)); *see also* Jennifer Brooks Crozier, *Courts Begin to Wrestle with the Impact of* City of Chicago, Illinois v. Fulton *on a Debtor's Ability to Recover Estate Property*, WEIL RESTRUCTURING BLOG (May 12, 2022), https://restructuring.weil.com/property-of-the-estate/courts-begin-to-wrestle-with-the-impact-of-city-of-chicago-illinois-v-fulton-on-a-debtors-ability-to-recover-estate-property [https://perma.cc/268K-47GA] (discussing that the Court left open the possibility of finding a creditor violated the automatic stay through passive retention of debtor property).

146. *Fulton*, 141 S. Ct. at 590 (discussing the language of § 362(a)(3) and noting that it implies that something more than retaining power is required to violate § 362(a)(3)).

147. *See Fulton*, 141 S. Ct. at 592–93 (Sotomayor, J., concurring) (suggesting that rule drafters, policymakers, and the Advisory Committee on Rules of Bankruptcy Procedure should consider amendments to the Rules to any lingering issues the Court did not resolve); Robert T. Reeder, City of Chicago, Illinois v. Fulton*: Maintaining the Status Quo After the Tow*, 1 STETSON BUS. L. REV. 95, 117 (2022) (proposing two options to address outstanding issues); Caitlin M. McAuliffe, Note, *Creditors, Keepers: Passive Retention of Estate Property and the Automatic Stay*, 74 VAND. L. REV. 829, 829 (2021) (suggesting that Congress amend the Code).

148. *See Fulton*, 141 S. Ct. at 593 (Sotomayor, J., concurring) (highlighting the provisions of the automatic stay left unresolved); *Cordova v. City of Chicago*, 635 B.R.

immediately began to propose fixes to the automatic stay, suggesting, among other things, that Congress amend either the automatic stay requirements or the Federal Rules of Bankruptcy Procedure.[149] Among the more drastic ideas is that the Court reverse its decision.[150]

*1. Post-*Fulton *jurisprudence: Inconsistent and contradictory interpretations of the law*

After *Fulton*, there is an emerging lack of uniformity and consistency amongst lower courts, especially around the lien and pre-petition claim provisions within the automatic stay.[151] The Second Circuit concluded that the IRS had not violated the pre-petition claim provision of the automatic stay when it froze monies that the debtor argued were due to him as a tax refund.[152] The debtor in *United States v. Waters*[153] unsuccessfully argued that the IRS violated § 362(a)(1), (5), and (6) when it refused to refund his alleged tax overpayments.[154] Here, the Second Circuit held that the IRS's administrative freeze was not an act to collect.[155] This case was unique in that the debtor was requesting a refund of alleged tax overpayments.[156] Based on the court's ruling it remains unclear where, if at all, this scenario fits into

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321, 352 (Bankr. N.D. Ill. 2021) (arguing on remand that all of plaintiffs' claims under § 362 are precluded by the Court's ruling in *Fulton* and should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted).

149. *See* McAuliffe, *supra* note 148, at 831–32 (arguing that the Court's decision in *Fulton* was a fundamentally flawed interpretation of the statutory text and, in light of the decision, the Code should be rewritten or amended to reflect the "policy goals originally imagined by Congress" and effectuate the policy concerns rooted in the American Bankruptcy system).

150. *See* Michael, *supra* note 130, at 76 (proposing three options to preserve the automatic stay post-*Fulton*, in one of the more direct critiques of the Court's opinion: (1) The Court reverse the decision; (2) Congress re-write § 362(a)(3) or (3) rule makers modify The Federal Rules of Bankruptcy Procedure).

151. *See* Donald L. Swanson, City of Chicago v. Fulton*: What the Supreme Court DID NOT Decide*, MEDIATBANKRY BLOG ON BANKR. & MEDIATION (July 21, 2023, 6:55 AM), https://mediatbankry.com/2021/01/21/city-of-chicago-v-fulton-what-the-supreme-court-did-not-decide [https://perma.cc/GL62-TVCX] (arguing that despite the Court's ruling, a "variety of related issues have only just begun").

152. United States v. Waters, No. 21-1219, 2022 WL 17086310, at *4 (2d Cir. Nov. 21, 2022) (holding that the IRS "did not violate § 362(a)(6) because, on the facts of [the] case, the freeze did not constitute an act to collect, assess, or recover a claim against Waters"); *see infra* Section II.C (analyzing the reasoning in applicable caselaw).

153. No. 21-1219, 2022 WL 17086310 (2d Cir. Nov. 21, 2022).

154. *See id.* at *2.

155. *Id.* at *2.

156. *Id.*

the *Fulton* analysis because the strength of the plaintiff's refund claims had to be addressed prior to addressing potential automatic stay violations.[157]

Conversely, in *Bayview Loan Servicing LLC v. Fogarty*,[158] which the Second Circuit ruled on six months before *Waters*, the circuit court held that under § 362(a)(1) and (a)(2), a creditor violates the automatic stay if they continue foreclosure proceedings against a debtor, even if the debtor's interest in the property is only possessory.[159] Though this decision aligns with the process and policy as set forth in the Code, it contradicts the court's later reasoning employed in *Waters*.[160]

In January 2023, in *Freedom Mortgage Corp. v. Dean*,[161] the Middle District of Florida reversed and vacated the lower bankruptcy court's order that the creditor had violated the automatic stay under § 362(a)(6), the pre-petition claim provision.[162] The court reversed and vacated the bankruptcy court's order that the creditor, Freedom Mortgage Corporation, had violated the automatic stay by continuing to send the debtor mortgage statements after the debtor had filed for relief under Chapter 13 of the Code.[163] Post-petition, the creditor continued to send monthly mortgage statements to the debtor, yet the district court erroneously held that this did "not constitute [an] attempt[] to collect . . . ."[164] The district court stated that it could not locate Eleventh Circuit or Supreme Court precedent addressing the

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157. *Id.* (acknowledging that although the plaintiff alleged he was due a refund for overpayment of taxes, it was unclear to the circuit court how strong the plaintiff's claims were, notwithstanding the alleged automatic stay violations).

158. 39 F.4th 62 (2d Cir. 2022).

159. *Fogarty*, 39 F.4th at 73–74 (stating that some overlap of various provisions within § 362 does not require the court to interpret the statute in a way that eliminates overlap).

160. *Compare Fogarty*, 39 F.4th at 62 (finding violation of the automatic stay when the creditor continued foreclosure proceedings post-petition), *with Waters*, 2022 U.S. App. No. 21-1219, 2022 WL 17086310, at *2 (2d Cir. Nov. 21, 2022) (finding the IRS did not violate the automatic stay when it refused to return an alleged tax overpayment). *See infra* Section II.A (analyzing and discussing the Second Circuit's contradictory opinions in *Fogarty* and *Waters*).

161. 647 B.R. 780 (M.D. Fl. 2023).

162. *Id.* at 780–84.

163. *Id.*

164. *See id.* at 783 (finding that the creditor had not performed an affirmative act when it mailed the debtor mortgage statements). *But see* City of Chicago v. Fulton, 141 S. Ct. 585, 590 (2021) (defining an "act" by its dictionary definition as "[s]omething done or performed").

question of what, exactly constitutes an attempt to "collect, assess, or recover" a claim under the pre-petition claim provision.[165] Though the *Fulton* holding itself was limited to § 362(a)(3), the legal analysis and process employed by the Court is transferrable and applicable to the facts of *Dean*.[166] The district court concluded that even though the mortgage statements contained contradictory language, when viewed as a whole, the mortgage statements did not constitute collection efforts.[167] The mortgage statement was found not to be an attempt to collect because it was a modified version of the standard mortgage statement and included instructions that payments should be sent to the bankruptcy trustee, if required by the debtor's bankruptcy plan, rather than the creditor.[168]

A year after *Fulton*, in 2022, the Ninth Circuit declined to apply *Fulton* to § 362(a)(6) of the automatic stay in *In re Parker*.[169] Here, the debtor surrendered her property to the creditor (a homeowner's association), and the creditor then executed a new lease on it.[170] Though the debtor had surrendered her property to the homeowner's association to make it available to foreclose upon, the home was still vested in the debtor until the homeowner's association initiated foreclosure proceedings.[171] Instead of initiating foreclosure proceedings, Bayside Court Owners Association executed a lease to begin receiving rent payments itself.[172] The Ninth Circuit affirmed the lower bankruptcy court's finding that the rent payments were intended to recoup the debtor's pre-petition HOA debts, in violation of § 362(a)(6).[173] Because the outstanding HOA payments were pre-

165. *Dean*, 647 B.R. at 783. *But see Fulton*, 141 S. Ct. at 592 (Sotomayor, J., concurring) (addressing creditor conduct under § 362(a)(6))).

166. *Dean*, 647 B.R. at 783 (seeking relevant precedent to determine whether a certain action constitutes an attempt to collect); *see infra* Section II.C for a proper application of *Fulton* to the facts of the case at issue.

167. *Dean*, 647 B.R. at 781.

168. *Id.* at 784.

169. Parker v. Jennings, No. 12-15746, 2022 WL 15523089 (9th Cir. Oct. 27, 2022).

170. *Id.* at *2–3 (finding that a creditor/homeowner's association, Bayside Court Owners Association, willfully violated the pre-petition claim provision of the automatic stay when it executed a new lease on a debtor's property).

171. *Id.* at *1.

172. *Id.*

173. *Id.*

petition debts, the attempt to collect on those debts by the creditor violated the automatic stay.[174]

In Citimortgage, Inc. v. Corte Madera Homeowners Ass'n,[175] the Ninth Circuit considered a debtor's claims of alleged lien provision (§ 362(a)(4)) violations, yet declined to cite *Fulton*.[176] The defendant/creditor, a homeowner's association, initiated a foreclosure sale after the homeowner petitioned for bankruptcy.[177] The plaintiff, Citimortgage, Inc., was the assignee of the deed of trust securing the original loan to the homeowner, and sued the homeowner's association, alleging a violation of the automatic stay.[178] In a concise opinion, the Ninth Circuit held that the home was property of the debtor's estate and therefore protected by the automatic stay; accordingly, the homeowner's association violated the automatic stay by initiating foreclosure proceedings.[179]

The Third Circuit considered whether the creditor, California Coast University, had violated the pre-petition claim provision.[180] The court held that passive retention violated the automatic stay.[181] In this case, the creditor was a university and had retained the student-debtor's final transcript because the student had a financial hold on her account.[182] The creditor argued that it had fulfilled its obligations, regardless of the means used to satisfy those obligations—either providing the student with an incomplete transcript pre-petition, or entirely withholding the student's final transcript post-petition.[183] The circuit court rejected this approach, finding instead that the creditor's

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174. *See infra* Section II.A for further discussion of the Ninth Circuit's *In re Parker* ruling.

175. No. 20-16638, 2021 WL 5505409 (9th Cir. Nov. 24, 2021).

176. *Id.* at *1 (citing four prior cases as relevant precedent in the memorandum opinion but declining to reference or cite *Fulton*).

177. *Id.*

178. *Id.*

179. *Id.*

180. Cal. Coast Univ. v. Aleckna (*In re* Aleckna), 13 F.4th 337 (3d Cir. 2021).

181. *See id.* at 347 (finding that if the student "were not a debtor, she would have been entitled to receive a transcript confirming her graduation . . . [and] was therefore deprived of a service—the voluntary provision of a complete, certified transcript—that would have been otherwise available but for her existing debt"); *see also infra* Section II.B.1 (analyzing the Third Circuit's reasoning and opinion).

182. *Cal. Coast Univ.*, 13 F.4th at 339.

183. *Id.*

retention of the transcript was passive retention of debtor property.[184] The court found that the creditor had violated the automatic stay.[185]

*2. Post-*Fulton *commentary and proposals*

Despite the Court's opportunity to resolve the numerous issues surrounding the proper interpretation of the automatic stay, the Court's holding in *Fulton* has already shown its limitations.[186] Though the Court resolved the circuit split concerning § 362(a)(3), many open questions remain after the Court's decision in *Fulton*, including how far the holding extends, which provisions of the Code it applies to, and if and when other types of passive inaction fall under the Court's holding.[187] Not long after the *Fulton* opinion was published, legal scholars and commentators began to suggest "fixes" to the automatic stay, and in some cases, the Code more generally.[188] However, despite the alleged flaws in the Court's reasoning and opinion, the *Fulton* framework still provides more insight into the proper application of the automatic stay than any other Supreme Court precedent, all of which, except *Fulton*, were published prior to the 1984 amendments to the Code.[189] Robert Reeder suggests that the *Fulton* decision is broadly applicable to all subsections of the automatic stay provision, despite the Court explicitly stating that it was only opining on § 362(a)(3).[190]

In a particularly significant analysis of the *Fulton* opinion, John M. Hauber emphasizes that the Court entirely overlooked the plain meaning of § 542 as it relates to Chapter 13 bankruptcy filings.[191] He

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184. *See id.* at 340 (holding that an incomplete transcript is tantamount to providing no transcript at all, therefore the creditor violated the automatic stay).

185. *Id.* at 339.

186. *See* Swanson, *supra* note 151 and accompanying text.

187. *See infra* Section II.B.1 (discussing the cases and circumstances in which passive retention violates the automatic stay).

188. *See infra* Sections II.A, II.B.1, II.C (explaining why the proposed approaches to reconciling the *Fulton* holding with the purpose and policy of the Code are unnecessary).

189. *See* United States v. Whiting Pools, Inc., 462 U.S. 198, 199 (1983) (basing its analysis on current version of the Code—the Bankruptcy Reform Act of 1978). *See generally* City of Chicago v. Fulton, 141 S. Ct. 585 (2021).

190. *See* Reeder, *supra* note 148, at 108 (characterizing the holding as broadly applicable to the automatic stay, but acknowledging the limited applicability of the Court's holding and arguing that *Fulton* "solidified the purpose of the automatic stay, defined the status quo it protects, and set it apart from the function and purpose of an adversary proceeding under section 542").

191. *See* Hauber, *supra* note 57, at 515 (arguing that the proper application of the turnover provision precludes it from use in Chapter 13 filings).

argues that, under a strict reading of the rights granted to a trustee in a Chapter 13 petition, the debtor has no right to compel turnover via the turnover section.[192] According to Hauber, "[s]imply put, section 542 is not applicable to Chapter 13 cases as it is currently written."[193] Assuming the turnover section does not apply and the automatic stay requires an affirmative act, under this interpretation, a debtor who files a Chapter 13 petition would be incredibly restricted in how they can recover property.[194]

II. ANALYSIS

Part II of this Comment discusses, and then applies, the framework as provided by the Court in *Fulton*.[195] First, it posits that the *Fulton* framework can extend to both the lien provision and the pre-petition claim provision to find that a post-petition affirmative act violates the automatic stay.[196] Then, it explains why the *Fulton* holding itself, unlike the framework, cannot be blanket-applied to all subsections of the automatic stay.[197] Next, this Comment argues that passive retention of debtor property may violate other provisions of the automatic stay because only § 362(a)(3) includes the phrase "exercise control."[198] Lastly, it applies the *Fulton* framework to recent jurisprudence.[199]

A. Affirmative Acts Violate Other Provisions of the Automatic Stay Based on the Framework Provided in City of Chicago v. Fulton

A proper application of the framework and reasoning provided by *Fulton* demonstrates that an affirmative act taken by a creditor post-

192. *See id.* (arguing that under a Chapter 13 petition, debtor property cannot be turned over to the trustee because Chapter 13 does not afford the trustee the rights established through the turnover provision).

193. *Id.*

194. *See id.* (comparing the powers that a debtor has under § 542 with Chapter 13); City of Chicago v. Fulton, 141 S. Ct. 585 (2021) (holding that retention of estate property after filing a bankruptcy petition does not constitute an act to exercise control over property of the estate in violation of the Bankruptcy's Code automatic stay).

195. *Infra* Part II.

196. *Infra* Section II.A.

197. *Infra* Section II.B.

198. *Infra* Section II.B.1.

199. *Infra* Section II.C.

petition is a violation of the automatic stay.[200] Though there is an emerging body of caselaw where circuit splits are already prevalent, there are more straightforward cases where courts more uniformly recognize and find violations of the automatic stay.[201] The precedential value of *Fulton* rests not in its ultimate holding, but in the methodical analysis and reasoning employed by the Court to reach its decision.[202] Though *Fulton* is one of the only Supreme Court cases that addresses the automatic stay, it is not frequently cited by lower courts. However, it is arguably more broadly applicable, particularly in cases where a creditor has engaged in an affirmative act, such as initiating a foreclosure sale after a homeowner fails to make timely mortgage payments and files for bankruptcy.[203] This mistakenly limited application is likely because, as the Court noted, its holding was limited to § 362(a)(3).[204] Though the holding was limited, because the Court conducted a thorough and comprehensive interpretation of the automatic stay, including its policy goals and relationship to other sections of the Code, its reasoning is more broadly applicable than its holding.[205]

Citimortgage, Inc. v. Corte Madera Homeowners Ass'n serves as an example of how to properly apply and extend *Fulton* to related provisions of the automatic stay.[206] The court appears to apply the legal reasoning of *Fulton*, and reaches the same conclusion as the Supreme

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200. Notwithstanding the few limited exceptions explicitly proscribed under § 362. *See supra* note 59 and accompanying text (discussing the "police and regulatory powers" exception as defined in § 362(b)(4)).

201. *See, e.g.*, Citimortgage, Inc. v. Corte Madera Homeowners Ass'n, No. 20-16638, 2021 WL 5505409 (9th Cir. Nov. 24, 2021) (holding that the HOA's foreclosure sale of the debtor's home violated the automatic stay); *In re* Parker, No. 12-15746, 2022 WL 15523089, at *1 (9th Cir. Oct. 27, 2022) (holding that the HOA violated the automatic stay by collecting the debtor's HOA fees post-petition).

202. *In re* Parker, 2022 WL 15523089, at *1–2.

203. *See Citimortgage, Inc.*, 2021 WL 5505409, at *1 (affirming that the creditor violated the automatic stay by electing to sell a home after the homeowner filed for bankruptcy); Bayview Loan Servicing LLC v. Fogarty, 39 F.4th 62, 68 (2d Cir. 2022) (finding that the creditor violated § 362(a)(1) and (a)(2) by initiating a foreclosure sale, even though the debtor's direct interest was only possessory).

204. City of Chicago v. Fulton, 141 S. Ct. 585, 590 n.2 (2021) (noting that the respondent presented theories that the City had also violated §§ 362(a)(4), (6), but declining to consider them).

205. *See id.* at 590 (noting that the Court's ruling did not definitively rule out alternative interpretations).

206. *See Citimortgage, Inc.*, 2021 WL 5505409, at *1–2 (analyzing the facts in a manner consistent with the *Fulton* analysis).

Court, though it omits mention of, or citation to, the recent (and relevant) binding precedent.[207] The Ninth Circuit in this case correctly found that the creditor violated the automatic stay because of its affirmative act post-petition to record the notice of the lien and default, but referencing *Fulton* would have bolstered the court's analysis by citing binding Supreme Court caselaw.[208] The Ninth Circuit may have omitted reference to *Fulton* because the creditor action was a patently obvious post-petition affirmation action, though *Fulton* would have been both stronger and more relevant to support the circuit's position, as opposed to the caselaw cited.[209]

The *Bayview Loan Servicing LLC v. Fogarty* opinion models the correct framework for how lower courts can apply *Fulton* in a way that both adheres to the Court's ruling and precedent and aligns with the overall purpose of the Code.[210] This case also demonstrates how lower courts should apply the reasoning in *Fulton* to other provisions of § 362.[211] In *Bayview*, debtor Eileen Fogarty filed for bankruptcy under Chapter 7 and subsequently notified Bayview Loan Servicing LLC that further action in the foreclosure proceedings would violate the automatic stay.[212] Bayview proceeded with the foreclosure sale, and, after the case progressed through the judicial system,[213] was eventually found to be in violation of the automatic stay by the Second Circuit Court of Appeals.[214] Similar to the statutory interpretation process employed by the Court in *Fulton*, here the court proceeded with a "straightforward

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207. *See id.* (reversing the district court and finding that the defendant had a valid claim when it challenged the validity of the foreclosure sale and the recording of the notice of delinquent lien).

208. *Id.*

209. *Id.* (citing Premier One Holdings, Inc. v. Bank of N.Y. Mellon, 401 P.3d 1145 (Nev. 2017); and then citing Schwab v. Reilly, 560 U.S. 770 (2010)).

210. 39 F.4th 62, 67 (2d Cir. 2022).

211. *See id.* at 73 (citing and applying *Fulton* to hold that even though there may be circumstances where the provisions of the automatic stay overlap, that does not render them redundant or inapplicable).

212. *See id.* at 81 (concluding that "Bayview violated the automatic stay when it proceeded with the Sale after Fogarty filed her bankruptcy petition").

213. *See id.* at 69, 73–74 (commencing the claim in the bankruptcy court prior to the Court's oral arguments and decision in *Fulton*, and then being heard on appeal by the Second Circuit after the Court's opinion in *Fulton* was published).

214. *Id.* at 71 (holding the creditor violated §§ 362(a)(1), (2) by moving forward with its foreclosure sale, even though the debtor only had a possessory interest in the property).

textual interpretation".[215] Quoting *Fulton*, the court acknowledged that though there may be overlap in the provisions of § 362, "some overlap . . . does not require either striking or ignoring the scheme."[216] Moreover, in its opinion, the court referenced some of the inherent tensions and lasting conflict that Justice Sotomayor discussed in her concurring opinion.[217] While bankruptcy courts are courts of equity with the authority to modify creditor-debtor relationships, the automatic stay does not allow the court to consider particular circumstances.[218] Though the court acknowledged that its holding "may be viewed as formulistic[,]" it is this formulistic approach that allows the court to appropriately apply the *Fulton* precedent to related provisions of the automatic stay.[219] The court's approach in *Bayview* adequately and correctly considers *Fulton* in its analysis.[220]

B. Broadly Extending Fulton's Holding to All Subsections of the Automatic Stay is in Direct Conflict with the Purpose of the Act and the Fulton Precedent

If all provisions within the automatic stay allowed the passive retention of debtor property, the overall purpose of the automatic stay would be rendered largely irrelevant, and the only way to effectuate its purpose and reacquire property post-petition would be the turnover provision.[221] Complete foreclosure of related claims under other provisions of § 362 for lack of an affirmative act does not align with the overall purpose of the Bankruptcy Code and does not align with the purpose of the automatic stay.[222] Courts that adopt this approach and

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215. *See id.* at 77 (rejecting Bayview's arguments in favor of a plain reading of § 362, consistent with *Fulton*).

216. *Id.* at 74.

217. *Id.* at 73–74 (interpreting § 362(a)(1) and (a)(2) with no identified precedent to apply to the facts at issue).

218. *Id.* at 80.

219. *Id.*

220. *Id.* at 73–74.

221. *See* Michael, *supra* note 130, at 63–64 (arguing in favor of Congress amending the Code to preserve the "fresh start" that it is intended to effectuate). *But see* Hauber, *supra* note 57, at 515 (arguing that a literal application of the turnover provision precludes it from use in Chapter 13 filings, which would leave the debtor with no way to reacquire their property).

222. *See* S. Rep. No. 95-989, at 54 (1978) ("The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and

erroneously decline to consider the *Fulton* framework fail to adequately assess whether the creditor has violated the automatic stay, regardless of which provision is at issue; a violation under the exercise control provision is interconnected to, but not dispositive of, violations of the other provisions.[223]

Post-*Fulton*, Chicago's failed argument on remand exemplifies this point.[224] When the City argued that the Court's ruling in *Fulton* precluded the plaintiff's other claims under § 362(a)(4) and (a)(6), the bankruptcy court disagreed, holding that the plaintiff had, in fact, sufficiently alleged claims under the related provisions.[225] Furthermore, the bankruptcy court correctly interpreted the holding in *Fulton* as being derived from "the *combination*" of the three key terms ("act," "stay," and "to exercise control over"); because the other provisions of § 362(a) do not include that combination of words, "there remain plausible readings of these sections that do not preclude the [debtors']" arguments.[226] Here, the court's application of *Fulton* correctly extends the precedential value of it to the case at issue, with an appreciation for the Supreme Court's *analysis*, rather than its holding.[227]

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all foreclosure actions."); *see also* Cordova v. City of Chicago, 635 B.R. 321, 328–29 (Bankr. N.D. Ill. 2021) (finding that the Supreme Court's decision does not expressly or impliedly foreclose the Plaintiff's claims under §§ 362(a)(4), (6), or (7), as a matter of law, and that the plaintiff's had sufficiently alleged claims under § 362(a)(4) and (6)). *See generally* McAuliffe, *supra* note 148, at 829–30, 832 (explaining why the Fulton decision was a fundamentally flawed interpretation of the statutory text).

223. *See* Transcript of Oral Argument at 71–72, City of Chicago v. Fulton, 141 S. Ct. 585 (2021) (No. 19-357) (counsel for respondents responding to questioning about whether arguments under provisions other than § 362(a)(3) would be preserved if the Court rejected the (a)(3) argument).

224. *Cordova*, 635 B.R. at 328–29 (finding that the Supreme Court's decision does not expressly or impliedly foreclose the Plaintiffs' claims under §§ 362(a)(4), (6), or (7), as a matter of law, and that the plaintiffs had sufficiently alleged claims under § 362(a)(4) and (6), though dismissing the claims related to § 362(a)(7)).

225. *Id.*

226. *Id.* at 343. *But see* Stuart v. City of Scottsdale (*In re* Stuart), 632 B.R. 531, 541–43, n.12 (B.A.P. 9th Cir. 2021) (holding that the creditor did not violate the automatic stay with an affirmative act because: (1) it was already garnishing the debtor's wages prior to him filing for bankruptcy; and (2) it collected no funds via wage garnishment post-petition, while noting that "[t]he result would likely be different . . . if this were a wage garnishment which attached to the debtor's postpetition wages").

227. *Cordova*, 635 B.R. at 343.

1. A creditor may violate other provisions of the automatic stay through passive retention of debtor property because only § 362(a)(3) includes the phrase "exercise control"

The Court's statutory interpretation methodology in *Fulton* placed central focus and emphasis on the phrase "exercise control" and was largely based on a word-by-word evaluation of the words "act" and "exercise control" together.[228] The phrase "exercise control" was only added in 1984 to one provision of the automatic stay—§ 362(a)(3).[229] This, combined with the Court's reasoning in *Fulton*, leaves open the door for a differing interpretation of the other provisions of the automatic stay that is (1) aligned with the statutory text, and (2) aligned with the legislative intent and overall purpose of the Code and the automatic stay.[230]

The Third Circuit's ruling in *In re Aleckna* demonstrates this proper interpretation of the automatic stay.[231] Here, the Third Circuit held that passive retention violated the automatic stay under the pre-petition claim provision, with no mention of the role of the turnover provision.[232] In this case, the creditor's passive retention of the debtor's (student's) transcript was a violation of the automatic stay.[233] The creditor asserted that it complied with the law, regardless of the means used to satisfy its obligations—either providing the student with an incomplete transcript pre-petition, or entirely withholding the student's final transcript post-petition.[234] The court rejected this approach, finding that the creditor's retention of the transcript was passive retention of property, which, under *Fulton*, is not an affirmative act, yet the court held that the creditor had violated the automatic

228. *See Fulton*, 141 S. Ct. at 591–92 (suggesting the purpose of the 1984 amendments and addition of the phrase "exercise control" were to extend the automatic stay to intangible property).

229. *See supra* Section I.A.1 (discussing the 1984 amendments to the Code).

230. *See* S. Rep. No. 95-989, at 54 (1978) ("[t]he automatic stay . . . gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions"); *In re* City of Detroit, 524 B.R. 147, 276–77 (Bankr. E.D. Mich. 2014) (emphasizing that the overarching purpose of the Code is to provide petitioners with a fresh start and a second chance).

231. Cal. Coast Univ. v. Aleckna (*In re* Aleckna), 13 F.4th 337 (3d Cir. 2021).

232. *See Aleckna*, 13 F.4th at 337 (declining to opine on the proper application of the automatic stay in conjunction with the turnover provision based on the binding precedent of *Fulton*).

233. *Id.* at 339.

234. *Id.* at 341.

stay.[235] Under *Fulton*, the passive retention of debtor property under the exercise control provision was not a violation of the automatic stay; conversely, the Third Circuit held that passive retention of debtor property under § 362(a)(6) *was* a violation of the automatic stay.[236] The Third Circuit effectively applied the *Fulton* framework to another provision of the automatic stay and reached the opposite conclusion of the Supreme Court.[237] Though the Third Circuit's holding is the reverse of the Court's holding in *Fulton*, the Third Circuit correctly reached its holding by way of an analytical framework that closely mirrors the reasoning employed in *Fulton*.[238]

C. Analyzing and Correcting Erroneous Applications of Fulton

The value of the Supreme Court's precedent in *Fulton* is likely overlooked because lower courts view it as a limited, narrow holding.[239] Despite the narrow holding, however, it provided an incredibly valuable analysis of the automatic stay that is applicable to more than just § 362(a)(3).[240] The Ninth Circuit erred when it declined to apply *Fulton* to § 362(a)(6) of the automatic stay in the case at issue before it in *Parker*, despite resolving the case in alignment with the proper interpretation of the automatic stay.[241] The creditor's continued collection of the debtor's unpaid homeowners' association fees is a

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235. *See id.* at 340 (noting that the lower court held that providing an incomplete transcript is the same as providing no transcript, therefore the creditor violated the automatic stay).

236. *See id.* (stating that the creditor's withholding of the debtor's transcript, but later withdrawing its claim, was essentially a concession that the debt was dischargeable under the Code); City of Chicago v. Fulton, 141 S. Ct. 585 (2021) (finding that the creditor's refusal to return the debtor's car was not an affirmative act such that it violated the Exercise Control provision).

237. *Compare Aleckna*, 13 F.4th at 340 (noting that the refusal to hand over the debtor's full transcript violated the automatic stay) *with Fulton*, 141 S. Ct. at 589 (holding that mere retention of the debtor's property does not violate an automatic stay).

238. *Aleckna*, 13 F.4th at 340; *Fulton*, 141 S. Ct. at 585.

239. *Fulton*, 141 S. Ct. at 585 (declining to rule on any provision other than § 362(a)(3)).

240. *Cf.* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1868 (2014) (defining "narrowing" as a tactic that courts use to deliberately interpret precedent in a way that is more limited in scope than the ideal reading of the precedent).

241. *See* Jennings v. Parker (*In re* Parker), No. 21-15746, 2022 WL 15523089, at *2 (9th Cir. Oct. 27, 2022) (noting that the automatic stay precludes any act to recover stayed debts).

clear violation of § 362(a)(6).[242] This case stands as an example of the distinction between passive retention versus an affirmative action.[243] The homeowners' association, in the court's opinion, engaged in an affirmative act by executing a lease post-petition, which is a clear violation of the automatic stay.[244]

Despite the clarity provided by *Fulton* for assessing creditor action (or inaction) under § 362(a)(3), the line between passive retention and affirmative action remains undefined and unclear, which has exacerbated the issues around the other provisions of § 362.[245] The Second Circuit's opinion in *Waters* does not align with the Court's reasoning in *Fulton* because the IRS's freeze of the debtor's assets post-petition is an affirmative act that changes the status quo.[246] Accordingly, this violates the automatic stay.[247] The lower court's erroneous decision that *Fulton* was inapplicable to the case is somewhat understandable, given the Supreme Court's statement that it was declining to rule on § 362(a)(6).[248] However, in *Waters*, the Second Circuit should have applied the framework the Court provided, not because of *Fulton*'s holding and the § 362(a)(3) guidance, but because the Supreme Court's reasoning would have bolstered the Second Circuit's analysis.[249] In its opinion, the court states that the plaintiff, Waters, had not identified an action that the IRS had brought against him, but the very purpose of the plaintiff's claim was to oppose the

242. *Id.* at *1 (holding that, under § 362(a)(6) of the automatic stay "actions by creditors to 'collect, assess, or recover a claim against the debtor that arose before the commencement of the [bankruptcy proceeding]' are prohibited") (alteration in original).

243. *See id.* at *1–2 (describing how the creditor took affirmative steps to recover the debt subject to the automatic stay by executing a lease intending to recover the debt via rent payments).

244. *Id.*

245. City of Chicago v. Fulton, 141 S. Ct. 585, 592 (2021).

246. *See* United States v. Waters (*In re* Waters), No. 21-1219, 2022 WL 17086310, at *2 (2d Cir. Nov. 21, 2022) (holding that the IRS did not violate the automatic stay because the freeze did not constitute an act to collect, assess, or recover); *Fulton*, 141 S. Ct. at 590.

247. *See Waters*, 2022 WL 17086310, at *2 (noting that the IRS knew of Water's pending bankruptcy petition yet froze his overpayment refund); *Fulton*, 141 S. Ct. at 590–92 (the exercise control provision prohibits an affirmative act that would alter the status quo at the time the debtor files the bankruptcy petition).

248. *See Fulton*, 141 S. Ct. at 590 (declining to rule on the related provisions of § 362, apart from § 362(a)(3)).

249. *Waters*, 2022 WL 17086310, at *2; *Fulton*, 141 S. Ct. at 590.

administrative freeze on his assets.[250] Moreover, as discussed by the Supreme Court in *Fulton*, the appropriate consideration is whether the creditor has taken some affirmative action that changes the status quo post-petition, not whether the plaintiff has exhausted all other legal proceedings and eventually landed on the automatic stay as a last resort to recover his property.[251]

Continuing the critical analysis of post-*Fulton* caselaw, the Middle District of Florida erroneously reversed and vacated the bankruptcy court's order that the creditor had violated the automatic stay under § 362(a)(6) in *Freedom Mortgage Corp. v. Dean*.[252] The creditor continued to send monthly mortgage statements to the debtor after they had petitioned for bankruptcy, yet the court erroneously held that this did "not constitute [an] attempt[] to collect."[253] In its opinion, the court mistakenly asserted that it could not locate binding precedent that addressed the question of what, exactly constitutes an attempt to "collect, assess, or recover" a claim under § 362(a)(6).[254] Though the *Fulton* holding itself was limited to § 362(a)(3), the legal analysis and process employed by the Court is transferrable and applicable to the facts of *Dean*.[255]

In *Dean*, the Middle District of Florida erroneously concluded that though the mortgage statements "included some contradictory language, they did not rise to a collection effort" because the bank's statements did not "rise to collection efforts when reviewed as a whole and in context."[256] The district court erroneously stated that it could not locate any precedent to guide it in determining what language renders a financial statement an attempt to "collect, assess, or recover"

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250. *Waters*, 2022 WL 17086310, at *2.

251. *See Fulton*, 141 S. Ct. at 590 (suggesting that something "more" than merely retaining control over the asset is required to find a creditor violated the Stay under the Exercise Control provision). *But see Waters*, 2022 WL 17086310, at *2 n.1 (distinguishing between a creditor's temporary refusal to preserve the debtor's rights versus an indefinite refusal and finding that the former is not a violation).

252. *See* Freedom Mortg. Corp. v. Dean, 647 B.R. 780, 785 (M.D. Fl. 2023) (reversing and vacating the bankruptcy court's order).

253. *See Dean*, 647 B.R. at 781–83 (stating that it was unclear whether the purpose of the mortgage statement was to collect the debt). *But see Fulton*, 141 S. Ct. at 590 (noting that "an act is something done or performed" (quoting *Act*, BLACK'S LAW DICTIONARY (11th ed. 2019))).

254. *See Dean*, 647 B.R. at 783.

255. *Fulton*, 141 S. Ct. at 590.

256. *Dean*, 647 B.R. at 781–83.

under the pre-petition claim provision.[257] Instead of recognizing the precedential value of *Fulton*, it elected to apply an Eleventh Circuit case that had interpreted language in the Fair Debt Collection Practices Act.[258] The mortgage statement, the court opined, was not an attempt to collect because it was a modified version of the standard mortgage statement and included instructions that payments should be sent to the bankruptcy trustee, if required, rather than the creditor.[259] Confusingly, however, the mortgage statement also included a payment coupon and a statement that the debtor could "'write to [the creditor]' 'if [he/she] want[ed] to stop receiving statements.'"[260]

Applying the *Fulton* reasoning to the facts of this case, the statutory language implies that "something more than merely retaining power" is required to violate the automatic stay.[261] Surely a creditor mailing its debtor a statement that is nearly identical to a mortgage statement and shifting the burden to the debtor to stop the mailings if they so desire is the "something more" that the Supreme Court alluded to in *Fulton*.[262] Moreover, the Supreme Court, in its analysis of § 362(a)(3), considered the very phrase, "any *act* to collect, assess, or recover," that the Middle District of Florida court sought to interpret.[263] The Supreme Court plainly stated that creditor actions that change the status quo with respect to tangible property without obtaining such property violated the automatic stay.[264] While the Supreme Court's analysis was based on the proper interpretation of § 362(a)(3), *Fulton* is undoubtedly more relevant and appropriate precedent than the precedent the district court applied.[265] Moreover, the fact that the

257. *Id.* at 783 (citing and applying the Eleventh Circuit's reasoning from *Daniels v. Select Portfolio Servicing, Inc.*, 34 F.4th 1260 (11th Cir. 2022)).

258. *Id.*

259. *Id.* at 784.

260. *Id.*

261. *Fulton*, 141 S. Ct. at 590.

262. *See id.*; *Dean*, 647 B.R. at 783 (looking for something more than the actions taken by the creditor to find a violation).

263. *See Dean*, 647 B.R. at 784 (emphasis added) (analyzing the verbiage of automatic stay violations); *Fulton*, 141 S. Ct. at 590 (considering this verbiage in the Court's analysis).

264. *Fulton*, 141 S. Ct. at 592 (discussing the 1984 amendments and the purpose of adding the phrase "exercise control" to § 362(a)(3)).

265. *See id.* at 591 (holding that affirmative actions that disturb the status quo as of the time the petition was filed are prohibited). *But see Dean*, 647 B.R. at 783, 785 (acknowledging that the creditor's mortgage statements "might lead to confusion" and result in the debtor assuming that they need to send payment to the creditor).

mortgage statement included some instructions and languages indicating that it was merely for informational purposes is irrelevant.[266] The purpose of the statement was plainly intended to collect whatever debts the debtor was willing to pay.[267]

Combining the *Dean* holding as it currently stands with Hauber's analysis of the *Fulton* ruling, the debtor who petitions under Chapter 13 may be entirely precluded from compelling turnover under § 542, because a textualist, strict reading of Chapter 13 does not grant the trustee the right to compel turnover.[268] If a debtor is precluded from initiating a turnover proceeding under § 542, and simultaneously precluded from benefitting from the protections of the automatic stay under § 362, they are left entirely without remedy, effectively rendering their bankruptcy petition worthless.[269]

CONCLUSION

This Comment argues that *Fulton*, despite its narrow holding, is readily extendable to more alleged automatic stay violations than lower courts currently acknowledge.[270] Though *Fulton* does not provide bright-line rules for any provision except the Exercise Control provision, it does provide a framework to interpret the other provisions of the automatic stay.[271] Since the 1984 amendments to the Code that modified the exercise control provision, courts have struggled with the proper interpretation of both § 362(a)(3), as well as the other provisions of the automatic stay.[272] This Comment proposes that: (1) the holding from *Fulton* is applicable to other provisions of § 362(a)

266. *See Dean*, 647 B.R. at 783 (finding that even though the creditor had not violated the automatic stay, it would still be wise to modify the mortgage statement to eliminate confusion).

267. *Id.* at 784 (noting that it is reasonable to infer that the debtor is required to send in payment, based on the instructions, but declining to find a creditor violation in light of the instructions "contained elsewhere in the mortgage statements").

268. *See* Hauber, *supra* note 57, at 515 (suggesting that, as currently written, debtors who petition under Chapter 13 are entirely precluded from turnover proceedings).

269. *See Dean*, 647 B.R. at 785 (holding that though the creditor's mortgage statements were confusing, they did not violate the automatic stay); Hauber, *supra* note 57, at 515 (suggesting that Chapter 13 petitioners have no right to initiate turnover proceedings). *But see Fulton*, 141 S. Ct. at 590–92 (suggesting that when the automatic stay fails to protect the debtor, the debtor still retains the enforcement power of the turnover provision).

270. *See supra* Part II.

271. *See supra* Part II.

272. *See supra* Section I.B.1, 2 (discussing the circuit split).

and leads to the finding that post-petition affirmative acts always violate the automatic stay;[273] (2) absent an affirmative act, the *Fulton* holding cannot be broadly extended to other provisions of § 362(a), but the framework provided through the Court's analysis can;[274] and (3) lower courts that have declined to consider the *Fulton* precedent when reviewing potential automatic stay violations (other than § 362(a)(3)) have done so in error.[275] Because *Fulton* provides a critical analysis of the automatic stay and a framework for statutory interpretation that the judicial system so badly needs, courts should, at the very least, consider it when deciding whether a creditor has violated the automatic stay.[276]

273. *See supra* Section II.A (arguing that affirmative acts always violate the automatic stay).

274. *See supra* Section II.B.1 (arguing that the *Fulton* framework can be extended to passive retention violations).

275. *See supra* Part II.

276. *See supra* Part II.