CITY OF CHICAGO, ILLINOIS v. FULTON: MAINTAINING THE STATUS QUO AFTER THE TOW

By: Robert T. Reeder*

I. INTRODUCTION

Tow trucks are a common sight to see driving on city streets, perhaps on their way to assist a motorist in need or help to clear a wreck. However, some communities are less welcoming to tow trucks due to the inconveniences they are capable of causing. When a person's vehicle is towed and impounded, accrued fees and the threat of sale amplify the inconvenience of not having access to the vehicle. Unfortunately, many people are the target of towing operations, yet are unable to afford the fees to have their vehicle returned. For them, filing a petition for bankruptcy may be a viable option. The case under analysis addressed a dispute regarding the function of a fundamental protection afforded by filing a bankruptcy petition – the automatic stay of 11 U.S.C. section 362(a)(3).

City of Chicago, Illinois v. Fulton, 141 S. Ct. 585 (2021) was decided by the United States Supreme Court on January 14, 2021.[1] The issue ultimately presented to the Supreme Court in *Fulton* developed from the consolidated appeal of four Chapter 13 cases wherein "each respondent filed a bankruptcy petition and requested that the City of Chicago ("the City") return his or her vehicle, which was impounded for failure to pay fines for motor vehicle infractions."[2] The City acquired possessory liens through

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1. *City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021).
2. *Id.* at 587.

its municipal code.[3] "In each case, the [City refused to return the debtor's vehicle, and] was held by a bankruptcy court to violate the automatic stay."[4] The City then appealed each of the four bankruptcy cases[5] which were consolidated into one case[6] heard by the Seventh Circuit Court of Appeals. "The Seventh Circuit affirmed, concluding that by retaining possession of the vehicles the City had acted 'to exercise control over respondents' property in violation of [section] 362(a)(3)."[7] The City petitioned for a Writ of Certiorari[8] which was granted on December 18, 2019.[9]

The Supreme Court resolved the controversy by ruling that "mere retention of estate property after the filing of a [Chapter 13] bankruptcy petition did not violate [section] 362(a)(3) of the Bankruptcy Code ("Code")."[10] The Court stated that the "most natural reading of [the phrase, 'stay of any act to exercise control over the property of the estate,'] prohibits *affirmative* acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed."[11] Prior to the Supreme Court's opinion in *Fulton*, there was disagreement among circuits regarding their respective interpretations of how the automatic stay operated in practice and what conduct by a party in possession of estate property at the time a petition is filed is deemed

3. Municipal Code of Chicago § 9-92-080(f) (2020) ("Any vehicle impounded by the City or its designee shall be subject to a possessory lien in favor of the City in the amount required to obtain release of the vehicle.").

4. *Fulton*, 141 S. Ct. at 587.

5. *In re Shannon*, 590 B.R. 467 (Bankr. N.D. Ill. 2018), *aff'd sub nom. In re Fulton*, 926 F.3d 916 (7th Cir. 2019), *vacated and remanded sub nom. City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021); *In re Peake*, 588 B.R. 811 (Bankr. N.D. Ill. 2018), *aff'd sub nom. In re Fulton*, 926 F.3d 916 (7th Cir. 2019), *vacated and remanded sub nom. City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021); *In re Howard*, 584 B.R. 252 (Bankr. N.D. Ill. 2018), *aff'd sub nom. In re Fulton*, 926 F.3d 916 (7th Cir. 2019), *vacated and remanded sub nom. City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021); *In re Fulton*, No. 18 BK 02860 (Bankr. N.D. Ill. May 31, 2018), *aff'd,* 926 F.3d 916 (7th Cir. 2019), *vacated and remanded sub nom. City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 208 L. Ed. 2d 384 (2021).

6. *In re Fulton*, 926 F.3d 916, 920 (7th Cir. 2019), *cert. granted sub nom. City of Chicago, Illinois v. Fulton*, 140 S. Ct. 680 (2019), and *vacated and remanded sub nom. City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021).

7. *Fulton*, 141 S. Ct. at 587. (internal quotation marks omitted).

8. *See Pet'r's Pet. for a Writ of Cert.* at i, September 17, 2019 (presenting the question of "[w]hether an entity that is passively retaining possession of property in which a bankruptcy estate has an interest has an affirmative obligation under the Bankruptcy Code's automatic stay, 11 U.S.C[.] § 362, to return that property to the debtor or trustee immediately upon filing of the bankruptcy petition.").

9. *See generally City of Chicago v. Fulton*, No. 19-357, Press Rel. (U.S. April 13, 2020), available at https://www.supremecourt.gov/qp/19-00357qp.pdf.

10. *Fulton*, 141 S. Ct. at 587.

11. *Id.* (internal quotations omitted) (emphasis added).

permissible pursuant to that function. Notable topics of controversy included the purpose and development of the bankruptcy system as a whole and the concept of a status quo that the automatic stay seeks to protect. The *Fulton* Court distinguished the separate functions and purposes of sections 362(a)(3) and 542 of the Bankruptcy Code while simultaneously creating a universal 'safe-harbor' for mere possession of lawfully repossessed property seized pre-petition.

In Section II, the history and development of this issue will be addressed to provide a background to *Fulton*, as well as to explore the development of the law leading to this case. Section III will provide a summary of the Court's reasoning, along with the valid concerns and conclusions related to the ruling in Justice Sotomayor's concurrence. Section IV contains the writer's analysis of the Court's reasoning and decision with respect to the historical development, facts, and precedent leading up to this case. Section V concludes the analysis with a brief summary of the main points addressed in this case note.

I. HISTORY AND DEVELOPMENT

A. Bankruptcy Amendments and the Federal Judgeship Act of 1984

In 1984, Congress amended the Bankruptcy Code ("1984 Amendments"). Among the changes Congress implemented, as relevant to this case, was the addition of specific language to 11 U.S.C. section 362(a)(3). The section was amended " . . . in paragraph (3), by inserting 'or to exercise control over property of the estate' after 'estate' the second place it appears."[12] No notes accompanied the change, leaving the official explanation of the change unclear. Courts and scholars alike were relegated to opine on why Congress made these changes, leading to disputes regarding the interpretation of the added language. The following case reflects the Seventh Circuit's interpretation, which was relied upon by courts involved in the development of *Fulton*.

12. *Bankruptcy Amendments and Federal Judgeship Act of 1984*, Pub. L. No. 98–353, § 441(a)(2), 98 Stat. 333, 371 (July 10, 1984).

B. Thompson v. Gen. Motors Acceptance Corp., LLC, 566 F.3d 699, 701 (7th Cir. 2009)

Thompson (2009) was heavily relied upon by the Seventh Circuit when it decided *In re Fulton* in 2019. In *Thompson*, the debtor contracted with the General Motors Acceptance Corporation (GMAC) to purchase a vehicle, but later defaulted on payments.[13] Shortly after GMAC repossessed the vehicle, the debtor filed a petition for Chapter 13 bankruptcy in the U.S. Bankruptcy Court for the Northern District of Illinois.[14] The debtor asked GMAC to return the vehicle,[15] but "GMAC refused to return the vehicle to the estate absent . . . 'adequate protection' of its interests."[16] "Thompson moved for sanctions pursuant to 11 U.S.C. [section] 362(k), claiming that GMAC willfully violated the automatic stay provision in 11 U.S.C. [section] 362(a)(3)."[17] The bankruptcy court, relying on precedent, denied the motion.[18]

The *Thompson* court concerned itself with two issues: (1) "whether GMAC 'exercised control' over property belonging to Thompson's bankruptcy estate simply because it refused to return it to the estate after Thompson filed for bankruptcy;"[19] and (2) "whether GMAC, or a like-situated creditor, is required to return the asset prior to the bankruptcy court establishing that the debtor can provide 'adequate protection' of the creditor's interest in the asset."[20]

The court attempted to define the phrase 'exercise control' by looking to its plain meaning.[21] Using an ordinary dictionary, the court understood it to mean "[h]olding onto an asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use of an asset[.]"[22] It supported this interpretation by comparing it to the

13. *Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 700, 701 (7th Cir. 2009).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id. See In re Nash*, 228 B.R. 669 (Bankr. N.D. Ill. 1999), *abrogated by Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699 (7th Cir. 2009); *In re Spears*, 223 B.R. 159 (Bankr. N.D. Ill. 1998), *abrogated by Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699 (7th Cir. 2009) ("a creditor need not return seized property to a debtor's estate absent adequate protection of its interests").
19. *Thompson*, 566 F.3d at 701.
20. *Id.*
21. *Id.* at 702.
22. *Id.* (citing Merriam–Webster's Collegiate Dictionary (11th Ed.2003)).

primary goal of reorganization bankruptcy, which it defined as "group[ing] all of the debtor's property together in his estate such that he may rehabilitate his credit and pay off his debts; this necessarily extends to all property, even property lawfully seized pre-petition."[23] Critically, the court states, "[a]n asset actively used by a debtor serves a greater purpose to both the debtor and his creditors than an asset sitting idle on a creditor's lot."[24]

Beyond policy concerns, the court assumed that it was the intent of Congress to include the prohibition of mere possession. It reasoned that Congress understood that the provision prohibited conduct related to obtaining possession, but by amending it "to prohibit conduct above and beyond obtaining possession of an asset suggests that it intended to include conduct by creditors who seized an asset pre-petition."[25] The court referenced Sixth[26] and Ninth[27] Circuit decisions as support for this position, stating "withholding possession of property from a bankruptcy estate is the essence of exercising control over possession because it prevents the debtor from achieving beneficial use of the estate's property."[28]

GMAC argued that its possession was passive and "that further action, such as selling the car, is required to satisfy the Code's definition of 'exercising control' over the asset."[29] "In support of [its] proposition, GMAC relie[d] solely on *In re Spears*, 223 B.R. 159, 165 (Bankr. N.D. Ill. 1998), which simply reiterates the rationale expressed in *In re Young*, 193 B.R. 620, 624 (Bankr. D.D.C. 1996)."[30] Together:

> These courts find that a creditor that retains possession of a lawfully seized vehicle does not take any action; instead, these courts reason that the

23. *Thompson*, 566 F.3d at 702. *See United States* v. *Whiting Pools, Inc.,* 462 U.S. 198, 203-204 (1983); *In re Yates*, 332 B.R. 1, 5 (10th Cir. BAP 2005) ("As a practical matter, there is little difference between a creditor who obtains property of the estate before bankruptcy is filed, or after bankruptcy is filed. The ultimate result is the same—the estate will be deprived of possession of that property. This is precisely the result § 362 seeks to avoid.").

24. *Thompson*, 566 F.3d at 702.

25. *Id.*

26. *See In re Javens*, 107 F.3d 359 (6th Cir. 1997).

27. *See In re Del Mission Ltd.*, 98 F.3d 1147 (9th Cir. 1996), *abrogated by City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021).

28. *Thompson*, 566 F.3d at 703 (*quoting In re Sharon*, 234 B.R. 676, 682 (6th Cir. BAP 1999)) (internal quotation marks omitted).

29. *Id.* at 702.

30. *Id.*

> creditor simply maintains the pre-bankruptcy status quo (creditor in possession of the asset), which is the purpose of the Code's automatic stay provision. They hold that the 'Code restricts only obtaining possession of the property, rather than the passive act of simply continuing to possess it.'[31]

Rejecting GMAC's arguments, the court found "the act of passively holding onto an asset constitutes 'exercising control' over it, and such action violates section 362(a)(3) of the Bankruptcy Code . . . Here, GMAC exercised control over Thompson's vehicle when it refused to return it to the bankruptcy estate upon request."[32]

Nearly ten years after *Thompson* was decided, four debtors would have their bankruptcy cases consolidated into an appeal that would ultimately present a similar issue to be addressed and decided by the United States Supreme Court.

C. In re Fulton, 926 F.3d 916, 920 (7th Cir. 2019)

Fulton (2021) stemmed from the "consolidated appeal of four Chapter 13 bankruptcies in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division.[33] The United States Court of Appeals for the Seventh Circuit considered "whether the City of Chicago may ignore the Bankruptcy Code's automatic stay[34] and continue to hold a debtor's vehicle until the debtor pays her outstanding parking tickets."[35] In each of the individual bankruptcy cases, "the City impounded each of their vehicles for failure to pay multiple traffic fines,"[36] obtaining a possessory lien in the amount of fees owed to it under the 2016 amendments to the Chicago Municipal Code.[37] The debtors were unable to pay, instead choosing to file petitions for Chapter 13

31. *Thompson*, 566 F.3d at 702. (quoting *In re Young*, 193 B.R. at 624).
32. *Id.* at 703.
33. *Id.*
34. 11 U.S.C. § 362(a)(3) (2020). The filing of a bankruptcy petition "operates as a stay, applicable to all entities, of . . . any act to obtain possession of property of the estate or of property from the estate to exercise control over property of the estate."
35. *In re Fulton*, 926 F.3d at 920.
36. *Id.*
37. *Id. See* CHI., ILL., MUN. CODE § 9-92-080(f) (2016). *See also supra* text accompanying note 3.

Bankruptcy; however, the City did not return the debtor's vehicles, and justified its actions by "claiming it needed to maintain possession to continue perfection of its possessory liens on the vehicles and that it would only return the vehicles when the debtors paid in full their outstanding fines."[38]

The named debtor-appellee under whom the cases were consolidated was Robbin Fulton,[39] who used her "vehicle to commute to work, transport her young daughter to day care, and care for her elderly parents on weekends."[40] Fulton purchased a 2015 Kia Soul in December of 2017;[41] three weeks later, "the City towed and impounded the vehicle for a prior citation of driving on a suspended license."[42] "On May 2, Fulton filed a motion for sanctions arguing the City was required to turn over her vehicle pursuant to *Thompson*[43] and that failure to do so was sanctionable conduct."[44] The City refused, arguing that Fulton needed to initiate an adversary proceeding under section 542.[45] "On May 25, the bankruptcy court held that the City was required to return Fulton's vehicle under *Thompson* and that the city was not excepted from the stay under [section] 362(b)(3)."[46] The court ordered the vehicle to be returned and imposed sanctions for each day it failed to do so.[47] "The City moved to stay the order in the district court pending appeal; the district court denied the stay request on September 10."[48]

The additional cases consolidated into the appeal contained similar fact patterns.[49] The Seventh Circuit addressed the appeal, distinguishing its decision in *Thompson v. General Motors Acceptance Corp*.[50] The court explains that in *Thompson*:

38. *In re Fulton*, 926 F.3d at 920.
39. *Id.*
40. *Id.* at 920-21.
41. *Id.* at 921.
42. *Id.*
43. *Thompson*, 566 F.3d at 703-04 (A creditor must comply with the automatic stay and return a debtor's vehicle upon filing of a bankruptcy petition).
44. *In re Fulton*, 926 F.3d at 921.
45. *Id.*
46. *Id.*
47. *Id.* at 920.
48. *Id.* at 921.
49. *In re Fulton*, 926 F.3d at 923.
50. *Id.* (citing *Thompson*, 566 F.3d at 701).

> [A] creditor seized a debtor's car after he defaulted on payments. The debtor filed a Chapter 13 petition and attempted to retrieve his car, but the creditor refused. We considered two issues relating to [section] 362(a)(3): whether the debtor "exercised control" of property of the bankruptcy estate by failing to return the vehicle after the debtor filed for bankruptcy, and whether the creditor was required to return the vehicle prior to a court determination establishing the debtor could provide adequate protection for the creditor's interest in the vehicle.[51]

The court next addressed the issues of exercising control and compulsory turnover.[52] It relied on *Thompson* and *Whiting Pools* to establish that "the debtor has an equitable interest in his vehicle, and as such, it is property of his bankruptcy estate."[53] The court rejected the City's argument regarding the exercise of control, finding "passively holding the asset did not satisfy the Code's definition of exercising control."[54] It also rejected the City's interpretation of the phrase 'exercising control,' stating that such an interpretation:

> did not fit with bankruptcy's purpose: . . . to group *all* of the debtor's property together in his estate such that he may rehabilitate his credit and pay off his debts; this necessarily extends to all property, even property lawfully seized pre-petition.[55]

The court also looked to how section 362(a)(3) was amended in 1984 by Congress to "prohibit conduct that 'exercise[d] control' over

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51. *In re Fulton*, 926 F.3d at 923 (citing *Thompson*, 566 F.3d at 700).

52. *In re Fulton*, 926 F.3d at 924.

53. *Id.* at 923 (citing *Thompson*, 566 F.3d at 701 (quoting *Whiting Pools, Inc.*, 462 U.S. at 203)) (internal quotation marks omitted).

54. *In re Fulton*, 926 F.3d at 923. The court utilizes a definition from *Thompson* here: "Holding onto an asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use of an asset all fit within [the] definition, as well as within the commonsense meaning of the word." *Thompson*, 566 F.3d at 702. The *Fulton* court also explained that "limiting the reach of 'exercising control' to 'selling or otherwise destroying the asset,' as the creditor proposed, did not fit with bankruptcy's purpose."

55. *In re Fulton*, 926 F.3d at 923 (citing *Thompson*, 566 F.3d at 702 (quoting *Whiting Pools*, 462 U.S. at 203-04)) (internal quotation marks omitted).

estate assets."[56] The court understood the changes to suggest "congressional intent to make the stay more inclusive by including conduct of creditors who seized an asset pre-petition."[57] The City unsuccessfully petitioned the court to overrule *Thompson* for three reasons:

> (1) property impounded prior to bankruptcy is not property of the bankruptcy estate because the debtors did not have a possessory interest in their vehicles at the time of filing; (2) the stay requires creditors to maintain the status quo and not take any action, such as returning property to the debtor, so the onus is on the debtor to move for a turnover action to retrieve her vehicle; and (3) the plain language of [section] 362(a)(3) requires an act to exercise control, and passive retention of the vehicle is not an act.[58]

The court alluded to the fundamental principle of bankruptcy in its decision to reject these arguments, "to allow the debtor to regain his financial foothold and repay his creditors."[59] The court further cited to *Thompson* in support of the notion that "a debtor must be able to use his assets 'while the court works with both debtor and creditor to establish a rehabilitation and repayment plan.'"[60] The court considered this principle the basis for compelling turnover under section 542[61] to maintain the status quo of bankruptcy, which it defined as "the return of the debtor's

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56. *In re Fulton*, 926 F.3d at 923.

57. *In re Fulton*, 926 F.3d at 923 (citing *Thompson*, 566 F.3d at 702 (quoting *Whiting Pools*, 462 U.S. at 203-04)) (internal quotation marks omitted). *See In re Javens*, 107 F.3d at 368 ("The fact that 'to obtain possession' was amended to 'to obtain possession . . . or to exercise control' hints that this kind of 'control' might be a broadening of the concept of possession . . . It could also have been intended to make clear that [§ 362](a)(3) applied to the property of the estate that was not in possession of the debtor.") (first alteration in original). *See also In re Del Mission Ltd.*, 98 F.3d at 115 ([The 1984] amendment 'broaden[ed] the scope of § 362(a)(3) to proscribe the mere knowing retention of estate property').

58. *In re Fulton*, 926 F.3d at 925 (internal quotation marks omitted).

59. *Id.* citing *Thompson*, 566 F.3d at 706.

60. *Id.* citing *Thompson*, 566 F.3d at 707.

61. *Id. See Whiting Pools*, 462 U.S. at 205; *In re Weber*, 719 F.3d 72, 79 (2d Cir. 2013) *abrogated by City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021) ("*Whiting Pools* teaches that the filing of a petition will generally transform a debtor's equitable interest into a bankruptcy estate's possessory right in the vehicle.").

property to the estate."[62] By defining the status quo of bankruptcy this way, the court found that "the City was not passively abiding by the bankruptcy rules but actively resisting [section] 542(a) to exercise control over the debtor's vehicles."[63]

The court noted that "the Tenth Circuit recently adopted[64] the City's view,"[65] but it felt that decision reflected the minority view, with "*Thompson* [bringing] our Circuit in line with the majority rule, held by the Second, Eighth, and Ninth Circuits."[66] The Seventh Circuit court believed the "City want[ed] to maintain possession of the vehicles not because it want[ed] the vehicles but to put pressure on the debtors to pay their tickets[,] . . . [which] is precisely what the stay is intended to prevent."[67]

II. COURT'S ANALYSIS

In *City of Chicago, Illinois v. Fulton*, Justice Alito delivered the opinion of the Supreme Court of the United States on January 14, 2021.[68] The question presented was "whether an entity violates [section 362(a)(3)] by retaining possession of a debtor's property after a bankruptcy petition is filed."[69] The Court concluded "that mere retention of property does not violate [section] 362(a)(3)."[70]

In reaching this conclusion, the Court relied on section 541(a)(1), which creates an estate that "comprises 'all legal or equitable interests of the debtor in property as of commencement of the case.'"[71] It then looked to section 542, which requires "that an entity (other than a custodian) in possession of property of the bankruptcy estate 'shall deliver to the trustee, and account for'

62. *In re Fulton*, 926 F.3d at 925.
63. *In re Fulton*, 926 F.3d at 925.
64. *In re Cowen*, 849 F.3d 943 (10th Cir. 2017).
65. *In re Fulton*, 926 F.3d at 925.
66. *Id.* The court provides references to the following cases in support of its position that its ruling is in line with the 'majority' view. *In re Weber*, 719 F.3d 72 (2013); *In re Del Mission Ltd.*, 98 F.3d 1147 (1996); *In re Knaus*, 889 F.2d 773 (8th Cir. 1989), *abrogated by City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021).
67. *In re Fulton*, 926 F.3d at 925-926. *See also In re Fulton*, 926 F.3d at n. 1. (citing *In re Shannon*, 590 B.R. 467 (2018) ("[Sections] 362(a)(4) and (a)(6) also prohibit the City's continued retention of debtors' vehicles. Because the City is bound by the stay under [section] 362(a)(3), we do not reach the applicability of additional stay provisions.").
68. *City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021).
69. *Id.* at 589.
70. *Id.*
71. *Id.*

that property."[72] The section in question, 362(a), functions as a stay "of efforts to collect from the debtor outside of the bankruptcy forum."[73] Additionally, the function "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 others."[74] Important to the controversy in this case, section 362(a)(3) prohibits "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*."[75]

The Court found that "the most natural reading of [the] terms—'stay,' 'act,' and 'exercise control'—is that section 362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property at the time when the bankruptcy petition was filed."[76] After discussing the meaning of these terms in context, the Court stated "we do not maintain that these terms definitively rule out the alternative interpretation adopted by the court below and advocated by respondents[,]"[77] because "omissions can qualify as 'acts' in certain contexts, and the term 'control' can mean 'to have power over.'"[78] However, the Court found that "[a]ny ambiguity in the text of [section] 362(a)(3) is resolved decidedly in the City's favor by the existence of a separate provision, [section] 542, that expressly governs the turnover of estate property."[79]

The Court turned to the problems that the Respondents' interpretation would cause: (1) "it would render the central command of [section] 542 largely superfluous[;]"[80] and (2) it "would render the commands of [section] 362(a)(3) and [section] 542 contradictory."[81] The Court noted that "[r]eading 'any act . . . to exercise control' in [section] 362(a)(3) to include merely retaining possession of a debtor's property would make that section a blanket turnover provision[,]"[82] making the mandate of section 542 "surplusage if [section] 362(a)(3) already required an entity

72. *Fulton*, 141 S. Ct. at 589.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Fulton*, 141 S. Ct at 590.
77. *Id.*
78. *Id.* (citing *Thompson*, 566 F.3d at 702).
79. *Id*
80. *Id.* at 591.
81. *Fulton*, 141 S. Ct. at 591.
82. *Id.*

affirmatively to relinquish control of the debtor's property at the moment a bankruptcy petition is filed."[83] The Court found no textual basis to justify the inconsistency of Respondents' interpretation of the stay where exceptions to turnover apply, yet "[section] 362(a)(3) would command turnover all the same."[84] "[I]t would be 'an odd construction' of [section] 362(a)(3) to require a creditor to do immediately what [section] 542 specifically excuses."[85]

The Court also found a distinct lack of evidence showing Congressional intent that would support the Respondents' view, noting that "it would have been odd for Congress to [transform the stay in section 362 into an affirmative turnover obligation] by simply adding the phrase 'exercise control.'"[86] The Court posited that "the 1984 amendment . . . simply extended the stay to acts that would change the status quo with respect to intangible property and acts that would change the status quo with respect to tangible property without 'obtain[ing]' such property."[87] It concluded, "[w]e only hold that mere retention of estate property after the filing of a bankruptcy petition does not violate [section] 362(a)(3) of the Bankruptcy Code."[88]

Justice Sotomayor, in a concurring opinion, addressed the concerns of parties arguing the Respondents' view in favor of the debtors.[89] The concurrence discussed the underlying feelings of unfairness related to the debtors' situation, but laid out the alternative:

> Although the Court today holds that [section] 362(a)(3) does not require creditors to turn over impounded vehicles, bankruptcy courts are not powerless to facilitate the return of debtors' vehicles to their owners . . . [leaving] open the possibility of relief under [section] 542(a).[90]

83. *Id.*
84. *Id.*
85. *Fulton*, 141 S. Ct. at 591 (citing *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 20 (1995)).
86. *Id.* at 591-92.
87. *Id.* at 592.
88. *Id.*
89. *Fulton*, 141 S. Ct. at 592–95 (J. Sotomayor, concurring).
90. *Id.* at 594 (J. Sotomayor, concurring).

The Concurrence addressed inconveniences related to section 542 turnover proceedings, noting that "turnover proceedings can be quite slow."[91] "Of the turnover proceedings filed after July 2019 and concluding before June 2020, the average case was pending for over 100 days."[92] Understanding how this may affect the individual debtor unable to use their vehicle, Justice Sotomayor stated "[o]ne hundred days is a long time to wait for a creditor to return your car, especially when you need that car to get to work so you can earn an income and make your bankruptcy-plan payments."[93]

The Concurrence then addressed judicially devised remedies created in an attempt to "hurry things along."[94] It goes on to state, "any gap left by the Court's ruling today is best addressed by rule drafters and policymakers, not bankruptcy judges."[95] Justice Sotomayor stated:

> It is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under [section] 542(a), especially where debtors' vehicles are concerned. Congress, too, could offer a statutory fix, either by ensuring that expedited review is available for [section] 542(a) proceedings seeking turnover of a vehicle or by enacting entirely new statutory mechanisms that require creditors to return cars to debtors in a timely manner. Nothing in today's opinion forecloses these alternative solutions. With that understanding, I concur.[96]

Thus, Justice Sotomayor's concerns related to delays in the return of debtors' vehicles via section 542(a) turnover proceedings are addressed by calling upon the Advisory Committee on Rules of

91. *Fulton*, 141 S. Ct. at 593–-594 (J. Sotomayor, concurring).

92. *Id.* at 594. (J. Sotomayor, concurring); *see* Administrative Office of the United States Courts, *Time Intervals in Months From Filing to Closing of Adversary Proceedings Filed Under 11 U.S.C. § 542 for the 12-Month Period Ending June 30, 2020*, Washington, DC: Sept. 25, 2020.

93. *Id.* (J. Sotomayor, concurring).

94. *Id.* (J. Sotomayor, concurring).

95. *Id.* at 595 (J. Sotomayor, concurring).

96. *Fulton*, 141 S. Ct. at 595 (J. Sotomayor, concurring).

Bankruptcy Procedure as well as Congress to provide an adequate legislative solution.

I. ANALYSIS

Fulton[97] 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. The Supreme Court limited the scope of its opinion, found that mere retention of property of the bankruptcy estate is not violative of the automatic stay,[98] vacated the lower court's ruling, and remanded for further proceedings.[99] The Supreme Court arrived at the proper conclusion, resolving a circuit split that had been troubling the bankruptcy system following the implementation of additional language in section 362(a)(3) when the 1984 amendments[100] were enacted.[101] Although the Fulton court established a helpful uniform interpretation, some points addressed could have been expanded upon to prevent future controversy in practice. Justice Sotomayor's concurrence,[102] in consideration of the seeming unfortunate effects this precedent will have on debtors, is nothing short of a call for help to Congress.[103] Due to these noted effects, Congress must amend the Code to make it easier for debtors to recover their vehicles in similar situations without impairing the rights of creditors.

Each of the following issues will be addressed in this analysis: (1) the function and purpose of the automatic stay and term status quo, as relevant; (2) the differing interpretations that caused the underlying controversy; (3) the prohibitive function of the automatic stay; (4) the proper avenue for turnover of estate property; and (5) whether the City may still be found to have engaged in prohibited conduct under the automatic stay of section 362(a)(3).

97. *City of Chicago, Illinois, v. Fulton*, 141 S. Ct. 585 (2021).
98. *Id.* at 589, 592.
99. *Id.* at 592.
100. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, § 441(a)(2), 98 Stat. 333, 371 (July 10, 1984).
101. *Fulton*, 141 S. Ct. at 589–590.
102. *Id.* at 592-595 (J. Sotomayor, concurring).
103. *Id.* at 595 (J. Sotomayor, concurring).

A. Defining The Stay And Status Quo

The *Fulton* opinion decisively instructs courts that the automatic stay operates as a prohibition on conduct that would disrupt the status quo of assets at the time the petition is filed.[104] Therefore, the automatic stay does not mandate the return of lawfully repossessed assets seized prepetition to the trustee or debtor-in-possession.[105] This is the correct interpretation of the function of the stay. The automatic stay exists to protect debtors from further affirmative acts that would dismember, dispose, or otherwise transfer property of the estate.[106] It also prohibits further acts to collect on pre-petition debts.[107] Because the automatic stay is similar in function to a prohibitory injunction[108] rather than one mandating turnover, in practice, section 362(a)(3) should operate to prohibit certain impermissible conduct by parties to the bankruptcy filing, carrying the threat of sanctions for that which is deemed violative.[109] The *Fulton* Court is clear on this point: sections 362(a)(3) and 542 are separate provisions accomplishing separate functions,[110] and Congress would not have failed to include cross-references or gone to greater lengths to delineate an enforcement function of section 362(a)(3) had it intended to do so.[111] The Court reasoned there is no textual basis

104. *Fulton*, 141 S. Ct. at 590 ("[Section] 362(a)(3) halts any affirmative act that would alter the status quo as of the time of the filing of a bankruptcy petition.").

105. *Id.* at 591 ("Section 362(a)(3) prohibits collection efforts outside the bankruptcy proceeding that would change the status quo, while § 542(a) works within the bankruptcy process to draw far-flung estate property back into the hands of the debtor or trustee.").

106. *Id.* at 589 ("The automatic 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.").

107. *Id.* at 589 ("When a debtor files a petition for bankruptcy, the Bankruptcy Code protects the debtor's interests by imposing an automatic stay on efforts to collect prepetition debts outside the bankruptcy forum.").

108. *Prohibitory Injunction*, THE LAW DICTIONARY, https://thelawdictionary.org/prohibitory-injunction/ (last visited July 14, 2021) ("Prohibition of execution of certain actions by a certain party by a legal authority, normally a court.").

109. *See* 11 U.S.C. § 363(k)(1) ("Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.").

110. *Fulton*, 141 S. Ct. at 591–92.

111. *Fulton*, 141 S. Ct. at 591–92 ("Had Congress wanted to make § 362(a)(3) an enforcement arm of sorts for § 542(a), the least one would expect would be a cross-reference to the latter provision, but Congress did not include such a cross[-]reference or provide any other indication that it was transforming § 362(a)(3).").

to identify an enforcement function that requires turnover in section 362(a)(3).[112] In addition to the lack of evidence suggesting Congressional intent to that end, the Court is not free to write its own law or amend existing law.[113] However, this does not mean the Court is devoid of power to identify a need for Congress to address the issue and call upon it for a legislative solution.[114] This is seen in Justice Sotomayor's Concurrence, which will be more thoroughly addressed in subsection *D* of this analysis.[115]

The Supreme Court concluded that mere possession did not constitute an affirmative act that disrupts the status quo, much to the dismay of those assuming Respondents' interpretation.[116] Although the Seventh Circuit's interpretation received some support from scholars and practitioners alike,[117] the Supreme Court correctly decided *Fulton*. To properly understand the Court's reasoning and ultimate decision, it is important to identify and define the 'status quo' protected by the automatic stay. The *Fulton* Court defined the status quo as the current state of assets, whether they be possessed by the debtor or otherwise, at the time the petition is filed.[118] Following the Court's interpretation of the automatic stay pursuant to Section 362(a)(3), any affirmative act or omission to exercise control that disrupts the status quo will be deemed violative of the stay.[119] Accordingly, parties, such as creditors who carried out a prepetition repossession or perfected

112. *Id.* at 592 ("[I]t would have been odd for Congress to accomplish that change by simply adding the phrase "exercise control," a phrase that does not naturally comprehend the mere retention of property and that does not admit of the exceptions set out in § 542.").

113. *Id.* at 595 (J. Sotomayor, concurring). *See infra* text accompanying note 127.

114. *Fulton*, 141 S. Ct. at 595 (J. Sotomayor, concurring).

115. *See infra* Part IV (D), discussing Justice Sotomayor's concurrence.

116. *Fulton*, 141 S. Ct. at 589, 592.

117. *See* Brief for the LAF, National Consumer Bankruptcy Rights Center, and National Association of Consumer Bankruptcy Attorneys as Amicus Curiae, *City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021) (No. 18-2527, 18-2835, 18-3023); Brief for the American Civil Liberties Union, the American Civil Liberties Union of Illinois, the Cato Institute, the Fines and Fees Justice Center, the Institute for Justice, the R Street Institute, and the Rutherford Institute as Amicus Curiae, *City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021) (No. 19-357); Brief for the National Consumer Bankruptcy Rights Center, National Association of Consumer Bankruptcy Attorneys, and Legal Aid Chicago as Amicus Curiae, *City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021) (No. 19-357); Brief for the Professors John A. E. Pottow and Jay Lawrence Westbrook as Amicus Curiae, *City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021) (No. 19-357); Brief for the National Association of Chapter Thirteen Trustees as Amicus Curiae, *City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021) (No. 19-357); Brief for Geraci Law, L.L.C., as Amicus Curiae, *City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021) (No. 19-357).

118. *Fulton*, 141 S. Ct. at 590. *See supra* text accompanying note 104.

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

on a lien through control or possession prior to the filing of such a petition, are no longer engaging in sanctionable conduct constituting a violation of section 362 if they merely possess the property because this conduct does not rise to the level of an affirmative act.[120] Essentially, the Supreme Court created a universal safe harbor for mere possession of estate property in similar factual situations.[121]

Some may argue that the City exerted influence over the debtors' vehicles by maintaining them in impound, reasoning that such conduct constitutes an affirmative act or omission violative of the stay because the City made an active decision to exercise control over the vehicles by refusing to release them.[122] To properly understand why impoundment does not constitute a violation, it is important to note that the impoundment occurred lawfully, prior to the filing of the bankruptcy petition.[123] Because this was the state of the asset prior to filing, impoundment is the status quo protected by the automatic stay.[124] Additionally, there is no mandatory turnover function of section 362(a)(3). Debtors wishing to recover their vehicles must initiate an adversary proceeding under section 542, even though it may be inconvenient.[125] Adversary proceedings under section 542 are the proper mechanism by which a debtor may retrieve far-flung property of the estate[126] and as Justice Sotomayor alludes to in the Concurrence, inconveniences of these proceedings should be addressed by Congress rather than by relying on courts to implement judicially devised 'workarounds.' Especially when the function of these courts is merely to interpret and apply the provisions of the Code as written.[127] Accordingly, section 362(a)(3)

120. *Id.* at 589, 592.

121. *Id.* at 594 (J. Sotomayor, concurring) ("[T]he Court today holds that § 362(a)(3) does not require creditors to turn over impounded vehicles.").

122. *See* Brief for the LAF, et al.; Brief for Amici Curiae Nat'l Consumer Bankr. Rts. Ctr. Nat'l Ass'n of Consumer Bankr. Att'ys, and Legal Aid Chi. in Support of Respondents No.19–357 at 4. ("For purposes of section 362, the 'act' of holding onto property is as much an 'act' as taking it-to take and to hold are both 'acts' within the ordinary meaning of the term").

123. *In re Fulton*, 926 F.3d 916, 920 (2019). The City of Chicago obtained a possessory lien in the amount owed on the vehicle under M.C.C. § 9-92-080(f) (2016). In each of the individual bankruptcy cases, the City perfected on its security interest through control or possession via impoundment.

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

125. *Fulton*, 141 S. Ct. at 594–95 (J. Sotomayor, concurring).

126. *Id.* at 591. *See supra* text accompanying note 105.

127. *Id.* at 595 (J. Sotomayor, concurring) ("Ultimately, however, any gap left by the Court's ruling today is best addressed by rule drafters and policymakers, not bankruptcy

prohibits the City from engaging in affirmative acts that would disrupt the status quo upon the filing of the bankruptcy petition.[128] However, *Fulton* does not preclude the possibility that the City engaged in conduct violative of the automatic stay, which will be discussed later in this analysis.[129]

B. Differing Interpretations

Bankruptcy courts are afforded some discretion when they are called upon to interpret and carry out provisions of the Code,[130] but through its ruling to vacate and remand the lower courts' mistaken interpretations, the United States Supreme Court indicated that mere possession is not violative of the automatic stay, solidifying its function. Prior to *Fulton*, several Circuits, including the Seventh Circuit, utilized the automatic stay as a judicially devised 'workaround' to turnover proceedings under section 542, operating as a mandatory injunction[131] requiring the return of estate property to maintain the 'status quo,' which these courts defined as "the return of the debtor's property to the estate."[132] The concept that the automatic stay under section 362(a)(3) could function as a mandatory injunction requiring turnover of estate property upon filing of a bankruptcy petition is relatively new, developed after new language was added to the section when the 1984 Amendments to the Code were enacted.[133] *Fulton* now instructs

judges. It is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned. Congress, too, could offer a statutory fix, either by ensuring that expedited review is available for § 542(a) proceedings seeking turnover of a vehicle or by enacting entirely new statutory mechanisms that require creditors to return cars to debtors in a timely manner.").

128. *Fulton*, 141 S. Ct. at 592.

129. *See infra*, Part IV (E), which discusses the City's possible violative conduct of the automatic stay.

130. *See* 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.").

131. *Mandatory Injunction*, THE LAW DICTIONARY, https://thelawdictionary.org/mandatory-injunction/ (last visited July 14, 2021) ("Court order mandating a mandatary entity to perform or cease a specific act.").

132. *In re Fulton*, 926 F.3d 916, 925.

133. Brief for the Professors Ralph Brubaker, Ronald J. Mann, Charles W. Mooney, Jr., Thomas E. Plank, and Charles J. Tabb as Amicus Curiae at 13, *City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021) (No. 19-357) ("Courts adopting the Seventh Circuit's

courts to uniformly interpret and enforce the automatic stay provision as a prohibitory injunction that forbids creditors lawfully in possession of estate property from engaging in affirmative acts that would change or otherwise alter the status quo of the asset at the time the petition is filed.[134]

The lower courts, as well as the courts that rendered decisions creating the precedent they relied upon, may have been misguided in their interpretation of section 362(a)(3). However, it is unlikely they came to their conclusions in bad faith. There was an underlying premise of unfairness that the Seventh Circuit and bankruptcy courts identified with regard to the City's choice to retain possession and refuse to return vehicles that the debtors had an equitable interest in.[135] The City awarded itself a possessory lien through its own municipal code, and in some cases, the fees were high with respect to the liquidation value of the debtors' vehicles.[136] The debtors took the affirmative step of filing Chapter 13 bankruptcy petitions, hoping to financially rehabilitate

interpretation of §362(a)(3) have cited no pre-1984 case holding to the contrary. Those courts have misconstrued §542(a) turnover as somehow being self-executing under the influence of their misinterpretation of the 1984 amendment to §362(a)(3).").

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

135. *In re Fulton*, 926 F.3d at 926 ("The City's argument that it will be overburdened with responding to Chapter 13 petitions is ultimately unavailing; any burden is a consequence of the Bankruptcy Code's focus on protecting debtors and on preserving property of the estate for the benefit of *all* creditors. It perhaps also reflects the importance of vehicles to residents' everyday lives, particularly where residents need their vehicles to commute to work and earn an income in order to eventually pay off their fines and other debts.") (emphasis in original). The Seventh Circuit had a history of similar decisions in very similar factual circumstances. One of the primary concerns of the court, even if not stated by the *In re Fulton* court, was the balance of the creditors' and debtors' rights. The court preferred to preserve the debtor's ability to have beneficial use of their property, in which they maintained an equitable interest. Furthermore, the courts believed that the City's failure to seek adequate protection had waived its argument on that point. *See In re Cross*, 584 B.R. 833, 843–44 (Bankr. N.D. Ill. 2018) ("What the City is attempting to do is use this state statute as a means to circumvent U.S. Bankruptcy law and the rights of debtors therein to drive their cars to work in order to keep their jobs . . . [t]he City is clearly incorrect that Debtor does not have an interest in the vehicle pursuant to 11 U.S.C. § 542. First, Debtor is the owner of the vehicle, as she has stated in her Complaint and that alone establishes an interest in the vehicle. Moreover, the Debtor has an interest the moment she requests turnover of the vehicle from a creditor during the pendency of her bankruptcy. The City undoubtedly has authority to impound and hold a debtor's vehicle when they have committed violations and refused to pay their tickets. But, once that debtor enters bankruptcy, the City is bound by the ruling in *Thompson* to return the vehicle or seek protection by a motion.").

136. *See In re Fulton*, 926 F.3d at 920–22. In the four underlying bankruptcy cases, the vehicles and their respective fees were: (1) *In re Fulton* – 2015 Kia Soul, amended proof of claim totaled $11,831.20; (2) *In re Shannon* – 1997 Buick Park Avenue, amended proof of claim totaled $5,600; (3) *In re Peake* – 2007 Lincoln MKZ, secured proof of claim totaled $5,393.27; (4) *In re Howard* – unlisted vehicle, secured proof of claim totaled $17,110.80.

themselves to offset the fees and costs owed to the City, which ultimately led to their vehicles being impounded and accrual of additional costs related to such impoundment. Historically, the City returned vehicles when a debtor filed a bankruptcy petition but began refusing to do so under the assumption that it could retain possession of the vehicles and that impoundment was the best course of avenue to ensure payment.[137]

The Supreme Court, as well as the lower courts, identified: "under the Bankruptcy Code, the filing of a bankruptcy . . . petition creates an estate that, with some exceptions, comprises all legal or equitable interests of the debtor in property as of the commencement of the case."[138]

The disagreement was in regard to the function of the stay—the Supreme Court and lower courts interpreted the automatic stay as a provision that protects against dismemberment of the estate, but the interpretation differed as to whether it serves as a prohibition or enforcement provision of the Code.[139] The Seventh Circuit, sharing views with the Second, Eighth, and Ninth Circuits, interpreted the automatic stay to be a function of bankruptcy that required the return of property to the estate.[140] It stated "the 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; this necessarily extends to all property, even property lawfully seized pre-petition."[141]

It continued, "the status quo in bankruptcy is the return of the debtor's property to the estate."[142]

This interpretation of the purpose of Chapter 13 bankruptcy may be correct; however, the interpretation of the status quo, as relevant to the function of the automatic stay, was not. As the Supreme Court clarified in *Fulton*, section 362(a)(3) is not the

137. *In re Fulton*, 926 F.3d at 930 ("We are persuaded that, on balance, this is an exercise of revenue collection more so than police power.").

138. *Fulton*, 141 S. Ct. at 589 (internal quotation marks omitted).

139. *Id.* at 591. *See supra* text accompanying note 105. *See also In re Fulton*, 926 F.3d at n. 3 ("[T]here is no question the stay *compels* the City to return the vehicles.") (emphasis in original).

140. *In re Fulton*, 926 F.3d at n. 3 ("[T]here is no question the stay *compels* the City to return the vehicles.") (emphasis in original).

141. *Id.* at 932 (quoting *Thompson*, 566 F.3d at 702 (citing *Whiting Pools*, 462 U.S. at 203-04)).

142. *Id.* at 925.

primary means of consolidating property of the estate.[143] To retrieve property of the estate, a debtor-in-possession or trustee must initiate an adversary proceeding under section 542.[144] In its opinion, the lower court touched on the inconveniences Justice Sotomayor would later recognize related to adversary proceedings. However, these issues do not justify circumventing section 542 turnover proceedings in favor of interpreting section 362(a)(3) as a mandatory injunction that would require the return of property of the bankruptcy estate to debtors.[145] As the Supreme Court notes:

> Had Congress wanted to make [section] 362(a)(3) an enforcement arm of sorts for [section] 542(a), the least one would expect would be a cross-reference to the latter provision, but Congress did not include such a cross-reference [sic] or provide any other indication that it was transforming [section] 362(a)(3).[146]

This is a critically important statement, because it identifies that Congress had the power to merge these sections or omit section 542 from the Code in its entirety, thereby amending section 362 to accomplish the turnover function of section 542; yet, it did neither.[147]

Hindsight now provides adequate opportunity for reflection on the reasoning set forth in these decisions in light of the Supreme Court's interpretation. Specifically, courts may empathize with debtors in factual situations such as the one presented in *Fulton*, but they must uniformly apply provisions of the Code with respect to all parties, who in turn, must utilize the proper provisions to

143. *Fulton*, 141 S. Ct. at 591.

144. *Id*. at 592 (Sotomayor, J. concurring).

145. *Id.* at 594 (Sotomayor, J. concurring) ("The trouble with § 542(a), however, is that turnover proceedings can be quite slow . . . [o]ne hundred days is a long time to wait for a creditor to return your car, especially when you need that car to get to work so you can earn an income and make your bankruptcy-plan payments.").

146. *Id.* at 592.

147. Brief for the Professors Ralph Brubaker, Ronald J. Mann, Charles W. Mooney, Jr., Thomas E. Plank, and Charles J. Tabb as Amicus Curiae at 16-17, *City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021)
("The 1984 amendment to §362(a)(3) did not repeal pre-1984 turnover law. Neither the text of that amendment nor the legislative record of its enactment suggests repeal. To the contrary, the statutory language of that amendment and the legislative explanations thereof demonstrate that Congress simply extended the protections of the §362(a)(3) stay to intangible property rights that are incapable of actual physical possession.").

accomplish their goals in the interest of fairness to all involved in that matter. This is the basis for Justice Sotomayor's Concurrence, wherein it was reasoned, that section 542 is the proper procedural mechanism for securing the return of property of the estate to the debtor.[148] While Justice Sotomayor does point out that the Supreme Court's holding in *Fulton* may delay the recovery of debtors' vehicles by no longer permitting section 362(a)(3) to function as a shortcut to recovery, it doesn't tip the scale in favor of the Respondents' view because such an interpretation would render section 542 superfluous.[149]

C. What Qualifies As Prohibited Conduct

The Supreme Court's guidance and ultimate decision in *Fulton* directly impact the rights of creditors in possession of property of the bankruptcy estate at the outset of such a matter. The Court expressly states that mere possession is not violative of the automatic stay.[150] This statement, on its own, serves as a safe harbor to specific conduct being deemed a violation of the automatic stay. As helpful as it may be to have definitive guidance regarding mere possession in these types of situations, some questions remain unanswered. Practitioners and courts alike may find themselves limited to the Supreme Court's interpretation of the terms "stay," "act," "exercise," and "control."[151] These terms led

148. *Fulton*, 141 S. Ct. at 594 (Sotomayor, J. concurring) (citing *Whiting Pools*, 462 U.S. at 207; 11 U.S.C. § 542(a)) ("[T]he Court leaves open the possibility of relief under § 542(a). That section requires any "entity," subject to some exceptions, to turn over "property" belonging to the bankruptcy estate. 11 U.S.C. § 542(a). The debtor, in turn, must be able to provide the creditor with "adequate protection" of its interest in the returned property, § 363(e); for example, the debtor may need to demonstrate that her car is sufficiently insured. In this way, § 542(a) maximizes value for all parties involved in a bankruptcy: The debtor is able to use her asset, which makes it easier to earn an income; the debtor's unsecured creditors, in turn, receive timely payments from the debtor; and the debtor's secured creditor, for its part, receives "adequate protection [to] replace the protection afforded by possession.")*.*

149. *Id.* at 591 ("Reading § 362(a)(3) to cover mere retention of property, as respondents advocate, would create at least two serious problems. First, it would render the central command of § 542 largely superfluous . . . Second, respondents' reading would render the commands of § 362(a)(3) and § 542 contradictory.").

150. *Fulton*, 141 S. Ct. at 589.

151. *Id.* at 590 ("Taking the provision's operative words in turn, the term 'stay' is commonly used to describe an order that 'suspend[s] judicial alteration of the status quo.' *Nken v. Holder*, 556 U.S. 418, 429, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (brackets in original; internal quotation marks omitted). An 'act' is '[s]omething done or performed . . . ; a deed.' Black's Law Dictionary 30 (11th ed. 2019); see also Webster's New International Dictionary 25 (2d ed. 1934) ('that which is done,' 'the exercise of power,' 'a deed'). To 'exercise'

the Court to interpret the function of the automatic stay as one of prohibiting parties from exercising their power to exert control over property of the estate, whether through an affirmative act or omission qualifying as such, that alters the status quo in the period of time following the filing of the petition for bankruptcy.[152]

There is a high likelihood that this interpretation of the stay will also lead to one or both of the following outcomes: (1) any party in possession of property of the estate is now understood to be acting in compliance with the automatic stay so long as they are merely possessing such property and have not engaged in conduct qualifying as an affirmative act that would alter the status quo of the asset at or after the time the petition for bankruptcy is filed;[153] and (2) courts are now provided with discretion to determine whether *any* act or omission beyond mere possession that alters the status quo qualifies as a violation of the automatic stay.[154] This will inevitably lead to disputes and differing interpretations among circuits as to whether certain conduct or acts may be defined as an affirmative act prohibited by the automatic stay of section 362(a)(3). Due to the lack of specificity in the *Fulton* Court's opinion regarding acts that may or may not qualify as violations of the automatic stay, lower courts will have the discretion to make these determinations pursuant to section 105(a).[155] Future cases will provide opportunities for courts to rule on these issues, but without definitive guidance from the Supreme Court or Congress, there will be additional controversy and discord among circuits related to these determinations. Furthermore, controversy is certain to surround any attempt to create a 'bright line' rule to

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in the sense relevant here means 'to bring into play' or 'make effective in action.' Webster's Third New International Dictionary 795 (1993). And to 'exercise' something like control is 'to put in practice or carry out in action.' Webster's New International Dictionary, at 892.").

152. *Id. See supra* text accompanying note 104.

153. *Id.* at 590.

154. *Fulton*, 141 S. Ct. at 590 (citing *Thompson*, 566 F.3d at 702; Merriam-Webster's Collegiate Dictionary 272 (11th ed. 2003)) ("We do not maintain that these terms definitively rule out the alternative interpretation adopted by the court below and advocated by respondents. As respondents point out, omissions can qualify as 'acts' in certain contexts, and the term 'control' can mean 'to have power over.' But saying that a person engages in an "act" to "exercise" his or her power over a thing communicates more than merely "having" that power. Thus, the language of § 362(a)(3) implies that something more than merely retaining power is required to violate the disputed provision.") (internal citations omitted) (internal quotation marks omitted).

155. *See* Brubaker, Mann, Mooney, Plank, & Tabb *supra* at 12 ("Section 542(a) provides an express statutory basis for a bankruptcy court to enter a § 105(a) injunction ordering turnover of property properly in the possession of a secured creditor.").

identify a minimum level of conduct required to be deemed violative. Because these issues affect the rights of parties in possession of estate property and entail a variety of concerns such as the separation of powers, the Supreme Court likely refrained from opining on these issues, choosing instead to call upon Congress to provide guidance in future amendments to the Code.[156]

In *Fulton*, the Supreme Court's interpretation of Congress' choice to add "exercise control" was that the stay extended to "acts that would change the status quo with respect to intangible property and acts that would change the status quo with respect to tangible property without obtain[ing] such property."[157] Thus, it would be helpful if Congress were to amend the Code or otherwise define when an act is considered to alter the status quo to create a bright-line rule for all involved parties. Without a defined level of acceptable conduct beyond mere possession, any party in possession of a debtor's property prior to the filing of a bankruptcy petition should tread carefully so as not to disrupt the status quo by engaging in conduct that may be deemed violative of the automatic stay after a petition is filed. Practitioners and courts alike should prepare for arguments related to what conduct may be deemed an affirmative act and whether such conduct is violative of the automatic stay pursuant to *Fulton*. Because the automatic stay is no longer a permissible procedural mechanism to secure the return of a debtor's property at the outset of a bankruptcy filing in any jurisdiction, practitioners must advise current and prospective clients that a section 542 turnover proceeding is required in similar factual situations to that of *Fulton*. Clients should also be made aware of the costs and timeframe implicated by such a proceeding. In the absence of a legislative solution, practitioners should be ready to address these inconveniences as identified by Justice Sotomayor in the Concurrence.

D. Section 542 Is The Proper Method For Turnover

Following *Fulton*, the burden to recover "far-flung" property of the estate and have it turned over to the debtor-in-possession or trustee is now shifted to the debtor through an adversary

156. *Fulton*, 141 S. Ct. at 595 (Sotomayor, J. concurring).
157. *Id.* at 592.

proceeding under section 542.[158] If a debtor wants the property returned post-petition, they must go through the process of filing an adversary proceeding under section 542 as the proper mechanism for the turnover of estate property, which also protects the creditors' rights and provides assurances that the property will be adequately protected.[159] *Fulton* distinguishes the respective functions of section 362, prohibiting any act that would disrupt the status quo at the time the petition is filed, and section 542, for retrieving "far-flung" property of the estate.[160] The inconveniences related to an adversary proceeding under section 542 serve as the foundation for Justice Sotomayor's concerns raised in the Concurrence; specifically, that there should be a better way for debtors to recover their vehicle without a lengthy and costly adversary proceeding under the umbrella of bankruptcy.[161] As Justice Sotomayor stated, "any gap left by the Court's ruling today is best addressed by rule drafters and policymakers, not bankruptcy judges."[162] Alternative interpretations would unfairly impair the rights of creditors in favor of the debtor.

The *Fulton* opinion reflects the best interpretation of the Code's provisions without creating new law or overstepping what Congress initially intended when it drafted the Code and amended section 362(a)(3) further in 1984. Were the automatic stay to function as a turnover provision, bankruptcy courts would be overburdened with tasks related to enforcement and creditors would be heavily disadvantaged because they would be required to enforce the return of all property of the estate upon the filing of a bankruptcy petition without proper opportunity to protect their rights and ensure adequate protection.[163] Assuming the Respondents' view would require turnover immediately upon filing of the petition—this could be any property—tangible or

158. *Fulton*, 141 S. Ct. at 591.
159. *See id.* at 594 (Sotomayor, J. concurring).
160. *Fulton*, 141 S. Ct. at 591.
161. *Id.* at 593-595 (Sotomayor, J. concurring).
162. *Id.* at 595 (Sotomayor, J. concurring).
163. *See* Brubaker, Mann, Mooney, Plank, & Tabb *supra* at 4-5 ("Forcing immediate turnover of repossessed collateral without adequate protection, as the Seventh Circuit requires, can eviscerate a secured creditor's statutory right to adequate protection. Section 542(a) permits a secured creditor to retain possession of repossessed collateral pending the court's entry of a turnover order and the trustee's provision of statutorily-mandated court-ordered adequate protection. The Court should 'not give §362(a)(3) . . . an interpretation that would proscribe what' the Code's express turnover provisions 'were plainly intended to permit.' *Citizens Bank v. Strumpf*, 516 U.S. 16, 21 (1995).").

intangible.[164] It would also render section 542 superfluous, because section 362(a)(3) would accomplish the same function with reduced time and cost.[165]

It is hard to fault the Supreme Court for coming to this conclusion; *Fulton* protects the integrity of the Code while simultaneously defining the function of sections 362(a)(3) and 542 in a way that is fair to both creditors and debtors.[166] It also discourages debtors from engaging in bad-faith filings where a petition for bankruptcy is filed with the expectation that the debtor will immediately recover their assets.[167] The Supreme Court's interpretation of the automatic stay does involve the grouping of the debtor's assets into a bankruptcy estate; however, it provided further guidance in relation to this goal by finding that section 362(a)(3) does not mandate return of a debtor's assets to group them into the bankruptcy estate.[168] Rather, turnover proceedings are the proper procedural method of accomplishing this goal; precisely why Congress included section 542 in the Code.[169]

E. Fulton Does Not Preclude The Possibility That The City Violated The Automatic Stay

Fulton does not preclude a finding that the City's conduct that exceeded mere possession and violated the automatic stay by altering the status quo; rather, it prohibited a finding that the City's retention of vehicles in the impound lot after debtors filed a petition for bankruptcy was conduct violative of the automatic stay because impoundment constituted mere possession and the

164. Brubaker, Mann, Mooney, Plank, & Tabb *supra* at 16-17 ("[T]he statutory language of that amendment and the legislative explanations thereof demonstrate that Congress simply extended the protections of the [section] 362(a)(3) stay to intangible property rights that are incapable of actual physical possession."). By combining this understanding of [section] 362(a)(3)'s scope to the Respondent's view, chaos would ensue in the process of determining and enforcing turnover of any property to the debtor.

165. *See Fulton*, 141 S. Ct. at 591.

166. *Id.*

167. *In re Fulton*, 926 F.3d at 926, 927. *See supra* text accompanying note 135. ("Furthermore, if a debtor files a bankruptcy petition in bad faith and immediately dismisses her case, as the City claims many debtors do solely to retrieve their impounded vehicles, the City has recourse: it may file a bad faith motion against the debtor."). The court fails to identify that this interpretation places the burden of preserving a right to seek adequate protection on the creditor, depriving it of rights in favor of convenience to the debtor.

168. *See* Fulton, 141 S. Ct. at 592.

169. *Id.* at 591-92.

vehicles were lawfully obtained pre-petition.[170] The status quo of the vehicles at the moment the bankruptcy petitions were filed was impoundment. Accordingly, the stay prohibits any further affirmative act or omission beyond mere possession that changes the status quo. The Court expressly limited the scope of its holding to provide the lower courts with discretion to determine what further acts may be deemed violative of section 362(a)(3).[171]

Due to the lack of guidance on what conduct is violative beyond mere possession, there is no clear answer or guidance in *Fulton* as to whether the following situations would be deemed violative of the automatic stay: (1) the City's refusal to return to the vehicle *unless* payment is received after the debtor calls or visits the impound lot; (2) maintaining online collection portals; (3) accruing additional fees for impoundment; (4) modifying the vehicle in any way that would inhibit its function, such as installing a 'boot' or an ignition kill switch; or (5) moving the vehicle within the impound lot or to a different facility.[172] Bankruptcy courts have discretion to decide these issues through the exercise of their powers under section 105(a), so long as their actions are consistent with *Fulton*.[173] In the absence of a legislative solution, courts and practitioners should be mindful of the implications of the Supreme Court's decision and reasoning in *Fulton*, understanding that there is no bright-line rule defining what affirmative act or omission is impermissible beyond mere possession. Additionally, debtors seeking the return of estate property must initiate an adversary proceeding under section 542 and assume the inconveniences related to such an action, rather than by relying on a court to mandate its return under section 362(a)(3) by filing a petition for bankruptcy, as this practice is no longer acceptable in any jurisdiction.

II. CONCLUSION

Despite remaining questions left unanswered by the Supreme Court, courts, practitioners, and scholars alike now have

170. *Fulton*, 141 S. Ct. at 592. *See supra* text accompanying note 127.

171. *Id.* at 590.

172. *Id. See supra* text accompanying note 154. It will be interesting to see how courts address situations like these; there can be no doubt that a major issue will be determining when 'something,' as the Court used the term, falls outside the bounds of 'retaining power.'

173. 11 U.S.C. section 105(a). *See supra* text accompanying note 131.

fundamental guidance regarding the function and purpose of the automatic stay as well as the necessity of initiating an adversary proceeding under section 542 to secure the return of assets, which is the proper procedural enforcement mechanism of the Code to accomplish that goal. They have also been provided with an operative definition of the status quo as it pertains to the automatic stay. Importantly, *Fulton* specifically instructs courts how to properly interpret and apply provisions of the Code. The Supreme Court correctly concluded that a creditor's mere possession or retention of property lawfully obtained before the filing of a bankruptcy petition is not violative of section 362(a)(3) because, to date, it is the best interpretation of the Bankruptcy Code's provisions in consideration of the function Congress likely intended for it to accomplish.[174] Section 362(a)(3) may no longer be used as a procedural mechanism mandating turnover when a petition is filed; rather, it "halts any affirmative act that would alter the status quo as of the time of the filing of a bankruptcy petition."[175] An adversary proceeding brought under section 542 is now identified as the proper procedural mechanism for turnover because it "works within the bankruptcy process to draw far-flung estate property back into the hands of the debtor or trustee"[176] while also offering adequate protection to a creditor's interest in the property. If turnover proceedings are ineffective with regard to the expeditious return of essential property, that is a matter best left addressed by Congress.[177]

174. *Fulton*, 141 S. Ct. at 592.
175. *Id.* at 590.
176. *Id.* at 591.
177. *Id.* at 595 (Sotomayor, J. concurring).