Creditors, Keepers: Passive Retention of Estate Property and the Automatic Stay

The automatic stay provision is one of the most important provisions in the Bankruptcy Code. Until recently, however, it has remained unclear if passive retention of property of the bankruptcy estate must be immediately turned over to the debtor under the automatic stay provision. The Supreme Court decided in City of Chicago v. Fulton *that passive retention does not violate the automatic stay, saving creditors from the consequences of retaining estate property. The debate about the stay, however, is far from over. Many circuit courts were already concerned about the policy issues deriving from the City of Chicago maintaining possession over debtors' vehicles, rendering debtors unable to get to work or pay off their debts during the bankruptcy plan. Justice Sotomayor remains frustrated about these policy concerns and called on Congress to change the Code and enable debtors to be more successful in their payment plans. This Note suggests Congress make language and cross-reference changes to the Bankruptcy Code to satisfy both textual and policy issues associated with the current Code.*

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INTRODUCTION

Chicago, one of the largest and most racially segregated cities in America, is undergoing issues with bankruptcy on many levels. Currently itself under threat of filing for municipal bankruptcy,[1] it also leads the nation in chapter 13 bankruptcy filings.[2] The concentration of these filings is three times higher in predominantly Black neighborhoods,[3] adding more tension to a highly segregated city.[4] In fact, the rate of filings by Black residents in the Northern District of Illinois rose eighty-eight percent between 2011 and 2015.[5] While this

1. Richard Porter, *Commentary: Bankruptcy Looms for Chicago If There's No Pension Fix*, CHI. TRIB. (Sept. 26, 2019, 2:05 PM), https://www.chicagotribune.com/opinion/commentary/ct-opinion-bankruptcy-chicago-pensions-crisis-20190926-4iwzdnfcjzh2tac7pw6i5fbgea-story.html [https://perma.cc/3PW3-MB4L].

2. *City Unveils Vehicle Sticker Amnesty, Ticket Relief Programs for Scofflaw Drivers*, CBS CHI. (Sept. 27, 2019, 11:47 AM), https://chicago.cbslocal.com/2019/09/27/city-unveils-vehicle-sticker-amnesty-ticket-relief-programs-for-scofflaw-drivers/ [https://perma.cc/3AEK-L9UC]. Chapter 13 bankruptcy is for debtors who earn a regular income and therefore can pay in an installment plan created during the bankruptcy case. *Chapter 13 – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics (last visited Jan. 31, 2021) [https://perma.cc/8F4U-B6HR]. This chapter often allows debtors to keep their homes or cars. *Id.*

3. *Women in Cook County's Communities of Color File Bankruptcy at Disproportionately High Rates, Finds New Report*, WOODSTOCK INST., (May 3, 2011, 4:00 AM), https://woodstockinst.org/news/press-release/women-cook-countys-communities-color-file-bankruptcy-disproportionately-high-rates-finds-new-report/ [https://perma.cc/NC24-ZFA4].

4. *Detroit, Chicago, Memphis: The 25 Most Segregated Cities in America*, USA TODAY (July 20, 2019, 6:00 AM), https://www.usatoday.com/picture-gallery/money/2019/07/20/detroit-chicago-memphis-most-segregated-cities-housing-policies/1780223001/ [https://perma.cc/7K9E-A6RA].

5. Paul Kiel & Hannah Fresques, *How the Bankruptcy System Is Failing Black Americans*, PROPUBLICA (Sept. 27, 2017), https://features.propublica.org/bankruptcy-inequality/bankruptcy-failing-black-americans-debt-chapter-13/ [https://perma.cc/XF4D-L3HM].

may confound the average reader, many people familiar with the city wholeheartedly believe they know the cause—parking tickets.[6]

Often, unpaid parking tickets will result in the city seizing a car and selling it for scrap metal.[7] Debtors, unable to pay off the parking tickets, file for bankruptcy to help them get control of their finances.[8] Before the summer of 2019, however, the City of Chicago was able to hold onto debtors' cars for months before proceedings for the turnover of the cars made their way through the bankruptcy courts.[9] Without a reliable way to get to work, many debtors were inhibited from successfully completing their debt repayment plans.[10] The city recently succeeded at the Supreme Court in its efforts to return to its former policy.[11] Following the Supreme Court's ruling in *In re Fulton* in January 2021, the city can hold onto debtors' cars until an adversary proceeding is completed for their turnover.[12] This process takes an average of one hundred days.[13]

Prior to the Court's most recent ruling, circuits were split over whether passive retention of a debtor's property possessed prior to a bankruptcy filing violates one of the Bankruptcy Code's most treasured provisions—the automatic stay.[14] Generally, the automatic stay immediately stops creditors' collection efforts once a debtor files for bankruptcy, though there are specific provisions of the Code that define the scope of the stay.[15] The Code currently prohibits "any act . . . to exercise control over property of the estate."[16] Five circuits, including

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6. Edward R. Morrison & Antoine Uettwiller, *Consumer Bankruptcy Pathologies* 2 (Columbia L. & Econ., Working Paper No. 550, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2845497 [https://perma.cc/NB25-7GZ5]; *City Unveils Vehicle Sticker Amnesty, Ticket Relief Programs for Scofflaw Drivers*, *supra* note 2.

7. Elliott Ramos & Claudia Morell, *Lawsuits, Stalled Legislation, and New Mayor. What's Going on with Chicago's Ticketing Reform?*, WBEZ (June 7, 2019, 6:00 AM), https://www.wbez.org/shows/wbez-news/chicago-ticketing-and-towing-facing-lawsuits-stalled-legislation-lori-lightfoot-ticket-reform/20826dc6-4d9e-4027-8645-d338f4ac238f [https://perma.cc/XR9B-E8XG].

8. Edward Morrison, *Parking Tickets Drive Bankruptcy's Racial Disparity*, COLUM. L. SCH. (Oct. 24, 2019), https://clawstage.ohodev.com/news/archive/parking-tickets-drive-bankruptcys-racial-disparity [https://perma.cc/DVK6-QYGL].

9. Melissa Sanchez, *Chicago Can't Hold Impounded Vehicles After Drivers File for Bankruptcy, Court Says*, PROPUBLICA, https://www.propublica.org/article/chicago-drivers-bankruptcies-impounded-vehicles-federal-appeals-court (last updated Oct. 3, 2019) [https://perma.cc/83KM-LM7M].

10. *Id.*

11. City of Chicago v. Fulton, 141 S. Ct. 585, 587 (2021).

12. *Id.* at 591.

13. *Id.* at 594 (Sotomayor, J., concurring).

14. Midlantic Nat'l Bank v. N.J. Dep't of Env't Prot., 474 U.S. 494, 503 (1986) (citing S. REP. NO. 95-989, at 54 (1978)).

15. *Automatic Stay*, NORTON BANKRUPTCY LAW AND PRACTICE DICTIONARY OF BANKRUPTCY TERMS (3d ed. 2020).

16. 11 U.S.C. § 362(a)(3).

the Seventh Circuit, which sits in Chicago, previously held that passive retention of property of the estate violates the automatic stay.[17] Three circuits disagreed and held the opposite.[18] The Supreme Court sided with the circuit minority, unanimously holding that passive retention of estate property does not violate the automatic stay.[19] While the Court's recent decision adheres to the text of the Code, it does not adhere to the policy goals of bankruptcy law. Although both competing approaches had textual analysis supporting their divergent opinions, the minority approach, recently adopted by the Supreme Court's interpretation of the statute's words, is more textually persuasive.[20] But the minority approach does not embody the strongest policy considerations Congress had in mind while drafting the Bankruptcy Code.[21] Therefore, the judicial opinion from the Supreme Court still cannot fully resolve the issue.

This Note proposes that the language in § 362(a)(3) of the Bankruptcy Code be amended to prohibit "any exercise of control over property of the estate that the debtor may require for the successful completion of its payment plan confirmed under chapters 12 and 13." Only then will bankruptcy law reflect the policy goals originally imagined by Congress and remain faithful to the text of the statute. If implemented, this amendment would require the City of Chicago to return debtors' cars once the debtors file for bankruptcy, enabling debtors to get to work and contribute toward the payment plan essential to chapter 13 bankruptcy cases.

Part I of this Note provides an overview of the automatic stay and related provisions in the Bankruptcy Code. Part II discusses the difficulty that lower courts had in interpreting § 362(a)(3) and the Supreme Court's decision in *In re Fulton*. Lastly, Part III argues that the Supreme Court decision interpreting the Code is unsatisfactory and that Congress needs to amend the Bankruptcy Code because it is the only way to effectuate the policy concerns rooted in the American bankruptcy system while staying true to the statutory text.

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17. *In re* Fulton, 926 F.3d 916 (7th Cir. 2019); Weber v. SEFCU (*In re* Weber), 719 F.3d 72 (2d Cir. 2013); Motors Acceptance Corp. v. Rozier (*In re* Rozier), 376 F.3d 1323 (11th Cir. 2004) (per curiam); Cal. Emp. Dev. Dep't v. Taxel (*In re* Del Mission Ltd.), 98 F.3d 1147 (9th Cir. 1996); Knaus v. Concordia Lumber Co. (*In re* Knaus), 889 F.2d 773 (8th Cir. 1989). Property of the estate includes all of the debtor's interests in any property as of the commencement of the case. 11 U.S.C. § 541.

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

19. City of Chicago v. Fulton, 141 S. Ct. 585, 587 (2021).

20. *See infra* Section II.B.1 (discussing the minority's focus on "act").

21. *See infra* Section II.B.2 (noting policy concerns).

I. A BREATH OF FRESH AIR: THE HISTORY OF THE AUTOMATIC STAY

Section 362 of the Bankruptcy Code, the automatic stay provision, dictates whether a creditor must immediately return a debtor's property or risk sanctions. Analyzing the effects of the stay, however, requires an understanding of other provisions of the Code such as § 361, the adequate protection provision, and § 542, the turnover provision. These provisions apply to all chapters of bankruptcy.[22] While the *Fulton* decision answered the questions regarding passive retention of estate property under § 362(a), it punted many of the other questions about how the Bankruptcy Code's multiple provisions shape interactions between creditors and debtors.[23] Before turning to the ultimate issue of whether property seized before a debtor filed for bankruptcy must be promptly returned to a debtor, this Note will briefly summarize how these provisions were developed, how they fit together in the greater scheme of the Code, and the questions yet to be satisfactorily answered about their interaction.

A. The History of the Bankruptcy Code and Relevant Provisions

The main purpose of the Bankruptcy Code is to "aid the unfortunate debtor by giving him a fresh start in life," and the Code remains "not only of private but of great public interest."[24] Many debtors utilize the Code to fairly and methodically pay back their creditors. For individuals, chapter 13 bankruptcy is often the most attractive option.[25] Chapter 13, as opposed to chapter 7, allows debtors to maintain possession of their property, discharge certain debts that would not be dischargeable under chapter 7, and open the door to the possibility of a more favorable future credit score.[26] Chapter 13 bankruptcy involves creating a payment plan in which the debtor pays off her debts to creditors out of her future income.[27] A bankruptcy court then must confirm the plan.[28] The plan allows a debtor to pay back some

22. 11 U.S.C. § 103(a) ("[C]hapters 1, 3, and 5 of this title" apply to chapters 7, 11, 12, and 13.).

23. *See Fulton*, 141 S. Ct. at 592 (declining to address concerns about the turnover provision's operation or other subsections of Section 362).

24. Stellwagen v. Clum, 245 U.S. 605, 617 (1918).

25. GENEVIEVE HEBERT FAJARDO & RAMONA L. LAMPLEY, 28 TEXAS PRACTICE SERIES: CONSUMER RIGHTS AND REMEDIES 3D § 16.17, Westlaw (database updated June 2020).

26. *Id.* Chapter 7 is liquidation bankruptcy, in which the debtor's assets are sold to repay debts. A discharge is what a debtor receives in bankruptcy, which essentially eliminates any debt acquired before the debtor filed, even if it was not completely paid off. This is why bankruptcy is often described as a fresh start.

27. 11 U.S.C. § 1321.

28. *Id.* § 1325.

of her debts over the course of three to five years.[29] Individuals may file chapter 13 bankruptcies only if they can prove that their creditors will receive at least as much as they would have under a chapter 7 bankruptcy.[30]

One of the most important provisions in the Bankruptcy Code creates the automatic stay, which "gives the debtor a breathing spell from his creditors."[31] The automatic stay has often been compared to an injunction, prohibiting both formal and informal collection methods against the debtor once she has filed for bankruptcy.[32] The list of these prohibited collection attempts can be found in § 362(a), and the exceptions are very limited.[33] The automatic stay is, as it sounds, automatic.[34] It is triggered by the debtor filing a bankruptcy petition and does not require a motion to the bankruptcy court or even notice to creditors.[35]

Until 1973, the automatic stay provisions were available only under chapter X, and the debtor had to make an affirmative application to restrain collection efforts.[36] With the adoption of the Federal Rules of Bankruptcy Procedure, the debtor received an automatic stay, getting rid of the injunction application process.[37] The burden then shifted to

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29. *Id.* § 1325(b)(4).

30. *Id.* § 1325(a)(4). In a chapter 7 case, the debtor's assets are immediately liquidated, and there is not a payment plan. *Chapter 7 – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics (last visited Jan. 31, 2021) [https://perma.cc/K5EU-RHLQ].

31. S. REP. NO. 95-989, at 54 (1978). Essentially, the automatic stay freezes all debt collection efforts made against the debtor by creditors. In a chapter 13 case, the automatic stay can last the entire length of the plan because the debtor makes periodic payments based on the regular income. There are certain exceptions regarding domestic support obligations, tax refunds, and licenses that do not bear on this general analysis. *See* 11 U.S.C. § 362(b) (exceptions to the stay include criminal actions against the debtor, certain civil actions, domestic support obligations, and more).

32. Claudia A. Restrepo, Comment, *A Pro Debtor and Majority Approach to the "Automatic Stay" Provision of the Bankruptcy Code*—In re Cowen *Incorrectly Decided*, 59 B.C. L. REV. E-SUPPLEMENT 537, 540 (2018).

33. *See* 11 U.S.C. § 362(a) (listing what the automatic stay prohibits); *Id.* § 362(b) (listing the exceptions).

34. MICHAEL D. SIROTA & MICHAEL S. MEISEL, 44 N.J. PRACTICE SERIES: DEBTOR-CREDITOR LAW AND PRACTICE § 7.31, Westlaw (database updated Sept. 2020).

35. McKeen v. FDIC, 549 S.E.2d 104, 106 (Ga. 2001); SIROTA & MEISEL, *supra* note 34.

36. WILLIAM L. NORTON III, 2 NORTON BANKRUPTCY LAW AND PRACTICE 3D § 43:2, Westlaw (database updated Jan. 2021). Before the new Code, bankruptcy chapters were referred to using roman numerals.

37. *Id.* Congress enacted this change as the Code became more debtor friendly over time. *See id.* ("The burden was shifted to the creditor who sought to obtain relief from the stay to file a complaint in an adversary proceeding upon a showing of cause."). Previously, the bankruptcy court had jurisdiction only over property in the debtor's possession, whether actual or constructive. *See id.* § 43:1 (discussing the difference between the historical jurisdiction that bankruptcy courts had over straight bankruptcy cases and rehabilitation cases). After reforms, the automatic stay existed only in the former Chapter X, which covered corporate bankruptcy and is now revised into Chapter 11. *See id.* § 43:2. With the adoption of the Federal Rules of Bankruptcy Procedure, the automatic

the creditor to request relief from the stay.[38] The precise language of § 362(a)(3) has remained unchanged since 1984, when Congress amended the provision to prohibit "any act to . . . exercise control over property of the estate."[39] The automatic stay also protects creditors' rights by ensuring the bankruptcy filing does not trigger a race to collect.[40] Without it, the creditors who are able to act first would deplete the resources of the estate before the court decides how to distribute the debtor's assets for the benefit of all creditors.[41]

The automatic stay provision works in tandem with the turnover provision of § 542(a), which states that a creditor "shall deliver to the trustee . . . [any] property . . . unless such property is of inconsequential value or benefit to the estate."[42] Disagreement remains over whether the turnover provision is self-operative, though the word "shall" indicates to many courts and scholars that § 542(a) is self-executing and mandatory.[43] For example, if the turnover provision is not self-executing and mandatory, the trustee in a bankruptcy case would have to initiate a turnover proceeding every time a debtor wanted to regain possession of her car from the City of Chicago.[44] Although the Court did not address the ultimate question of how the bankruptcy court should treat the turnover provision, the *Fulton* decision held that maintaining possession until the turnover order does not violate the

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stay was applied to all bankruptcy cases. *Id.* This meant that creditors could not pick apart bankruptcy estates to the detriment of all other creditors. *See id.* § 43:1 (describing bankruptcy courts' authority to institute an orderly liquidation procedure under which all creditors are treated equally).

38. *Id.* § 43:2.

39. 11 U.S.C. § 362(a)(3). *See generally* Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part I): Origins and Evolution of the Turnover Power*, 33 BANKR. L. LETTER, Aug. 2013, Westlaw 33 No. 8 BLL-NL 1 (discussing the 1984 amendments). Additional major amendments occurred in 1994 and 2005, but these concerned exceptions to the automatic stay and did not change the language of § 362(a)(3). *See* NORTON III, *supra* note 36, § 43:3 (referencing the 1994 and 2005 amendments).

40. H.R. REP. NO. 95-595, at 340 (1977).

41. The commencement of a bankruptcy case creates an estate, which consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Consequently, if a creditor obtains property of the estate, it adversely affects all other creditors because the estate consists of everything the debtor owns.

42. *Id.* § 542(a).

43. *See, e.g.*, *In re* Fulton, 926 F.3d 916, 924 (7th Cir. 2019) (finding that "shall" in § 542(a) makes turnover compulsory); 3A BANKRUPTCY SERVICE LAWYERS EDITION *Absolute Nature of Turnover Duty* § 30:11 Westlaw (database updated Jan. 2021) (collecting cases that discuss the mandatory nature of the turnover duty). *But see In re* Denby-Peterson, 941 F.3d 115, 128 (3d Cir. 2019) (rejecting the notion that turnover is self-executing). The Third Circuit partly relied on this difference in their holding that passive retention of estate property does not violate the automatic stay. *See infra* Section II.B (discussing the Third Circuit's assertion that an "act" requires more than retaining possession).

44. FED. R. BANKR. P. 7001(1).

automatic stay.[45] This means that until the turnover proceeding is held and decided, a debtor is left without her vehicle.

Section 361, the adequate protection provision, must also be taken into account when considering the turnover provision and the automatic stay.[46] A creditor can request adequate protection in any case to protect its interest in the property it is turning over,[47] and a court will grant adequate protection measures to acknowledge any depreciation an asset may undergo once the property is turned over.[48] For example, in cases involving vehicles, there is a valid concern that the creditor's interest in the car will decrease or disappear if the debtor is in an accident or any other damage occurs to the vehicle.[49] Protection can take the form of periodic cash payments on the property or requiring insurance coverage on the property.[50] If the trustee cannot provide adequate protection, the court may prohibit the use of the property.[51] A creditor must affirmatively request adequate protection, or it will lose the opportunity to obtain it.[52]

If the turnover provision has a higher priority in the Code, i.e., is self-executing and mandatory, then a creditor must turn over the property prior to receiving adequate protection.[53] If the adequate protection provision controls, then a creditor is not required to turn over property until it receives adequate protection.[54] The Supreme Court recently reiterated that it is unclear how the turnover provision is expected to operate in lower courts, leaving it up to the lower courts to parse out details regarding the interaction between adequate protection and the turnover provision.[55]

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45. City of Chicago v. Fulton, 141 S. Ct. 585, 587 (2021).

46. 11 U.S.C. §§ 361-362, 542.

47. Chase Manhattan Bank USA NA v. Stembridge (*In re* Stembridge), 394 F.3d 383, 387 (5th Cir. 2004).

48. *Id.*

49. Petition for a Writ of Certiorari at 19, City of Chicago v. Fulton, 140 S. Ct. 680 (2019) (No. 19-357).

50. 11 U.S.C. § 361(1); *In re* Denby-Peterson, 576 B.R. 66, 81–82 (Bankr. D.N.J. 2017) (not addressed on appeal in *In re* Denby-Peterson, 941 F.3d 115 (3d Cir. 2019)); 3 COLLIER ON BANKRUPTCY ¶ 361.03[2] (Henry J. Sommer & Richard Levin eds., 16th ed. 2020).

51. 11 U.S.C. § 363(e). The trustee is the appointed custodian and administrator of the bankruptcy estate. He or she possesses extensive powers in order to perform his or her duty of maximizing the value of the estate. 9 AM. JUR. 2D *Bankruptcy* § 509 (2020).

52. TranSouth Fin. Corp. v. Sharon (*In re* Sharon), 234 B.R. 676, 682 (B.A.P. 6th Cir. 1999).

53. *In re* Fulton, 926 F.3d 916, 924 (7th Cir. 2019) (holding that turnover is compulsory upon filing or else the adequate protection provision would be rendered meaningless).

54. *In re Denby-Peterson*, 941 F.3d at 128 (holding that because the Federal Rules of Bankruptcy Procedure list procedural requirements to initiate a turnover, turnover is not self-executed upon a debtor's filing).

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

B. Supreme Court Decisions on Turnover and the Automatic Stay

The Supreme Court has sparingly dealt with actions regarding violations of the Bankruptcy Code's automatic stay,[56] even though the stay is one of the Code's most litigated provisions.[57] In *United States v. Whiting Pools, Inc.*, the Court examined whether the IRS must return property seized under a tax lien when a debtor files for chapter 11 bankruptcy.[58] The Court resolved this issue under the turnover provision, rather than the automatic stay provision.[59] Explaining that although outside of bankruptcy obtaining possession of property may be an available manner in which a creditor can enforce its lien, the Court noted that bankruptcy law "modifies the procedural rights" otherwise held by the creditor.[60] Because the estate in question was so broad, it did not matter that the debtor may not have had a possessory interest in the property pre-petition.[61] Several provisions in the Code envision bringing property not currently in the debtor's possession into the bankruptcy estate.[62] The Court highlighted that instead of excluding property a secured creditor may have had an interest in from the estate, Congress provided creditors with the option of adequate protection.[63] Therefore, the turnover provision "requires the [creditor] to seek protection of its interest according to the congressionally established bankruptcy procedures, rather than by withholding the seized property from the debtor's efforts to reorganize."[64]

In *Whiting Pools*, the Court ordered the IRS to return the seized collateral in question.[65] The Court did not, however, directly address whether the turnover of the estate property must occur before or after the creditor secures adequate protection. The Court in *Whiting Pools*

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56. In fact, from 1982–2017, only 2.5 percent of the Court's civil cases dealt with the entire Bankruptcy Code. RONALD J. MANN, BANKRUPTCY AND THE U.S. SUPREME COURT 31 (2017). Mann, a Columbia law professor, goes as far as to say that the Court remains "systematically underinformed about the importance of the Bankruptcy Power and the relief it provides." *Id.* Why the Supreme Court does not regularly grant petitions to these cases remains unclear.

57. Lawrence Ponoroff, A.L.I.-A.B.A. Continuing Legal Educ., Understanding the Law of Bankruptcy—A Primer on Basic Bankruptcy Rules, Concepts, and Policies (Mar. 26–28, 2003), Westlaw SH042 ALI-ABA 1, at *16.

58. 462 U.S. 198, 200–202 (1983).

59. *Id.* at 202–08 (examining the issue under the § 542).

60. *Id.* at 206.

61. *Id.* at 205.

62. *Id.* (citing 11 U.S.C. §§ 543, 547-48).

63. *Id.* at 203–04.

64. *Id.* at 212.

65. *Id.* at 210–12.

ordered creditors not to engage in self-help[66]—in that case, maintaining possession—to acquire adequate protection.[67]

The Supreme Court complicated matters by carefully parsing what constitutes property in *Citizens Bank of Maryland v. Strumpf*, which examined the automatic stay provision.[68] In *Strumpf,* a bank placed an administrative freeze on a debtor's account because he had taken out a loan.[69] The Court held that such a freeze did not violate the automatic stay because it did not permanently deduct the amount in the debtor's account, as a setoff would.[70]

Most notably, the Court held that placing an administrative freeze on a bank account did not violate § 362(a)(3) of the automatic stay provision because the creditor did not take something from the debtor, nor did it "exercis[e] dominion over property that belonged to [the debtor]."[71] The bank account was only a promise of the bank to pay the debtor, not his actual money.[72] Although the debtor could not gain possession of money that was rightfully his, the Court hinted that the automatic stay provision may be more complicated than previously thought by distinguishing a bank account as a promise to pay and not actual property.[73] The Court did not, however, address the implications of its holding for bankruptcy cases where creditors exercise control over the debtor's actual property, as in the vehicle cases addressed in this Note.[74]

The Bankruptcy Code, while developing steadily since the 1970s, still contains ambiguities in some of its most central provisions.[75] The breadth of the automatic stay and the relationship between the automatic stay, turnover, and adequate protection still confound debtors and creditors.[76] Without knowing exactly how these provisions

66. Self-help would be efforts the creditor takes unilaterally to enforce the debt outside of the bankruptcy case.

67. *Whiting Pools*, 462 U.S. at 211–12.

68. 516 U.S. 16, 17 (1995).

69. This case mainly discusses § 362(a)(7), which places a stay on "setoff" rights. In *Strumpf,* the bank would not pay withdrawals on the account up to the amount the debtor owed on the loan. For example, if the debtor wrote a check for $20, the bank would not execute the payment. *See id* at 17–18 (explaining the nature of the bank's actions).

70. *Id.* at 19. An example of a setoff is when the creditor has $300 of the debtor's money in its possession, but the debtor also owes the creditor $1,000. The creditor would apply the $300 to the debt and say that the debtor now only owes it $700.

71. *Id.* at 21.

72. *Id.*

73. Michael R. Herz, *An Accelerating Thaw: Revisiting the Legality of Administrative Bank Freezes*, 31 AM. BANKR. INST. J., Sept. 2012, at 40, 41–43.

74. *Strumpf*, 516 U.S. at 16.

75. *See infra* Part II (discussing one such ambiguity).

76. *See, e.g.*, Brief for Petitioner at 19–20, City of Chicago v. Fulton, 141 S. Ct. 585 (2021) (No. 19-357), 2020 WL 583728 (discussing unsettled state of the law).

operate, parties who find themselves in bankruptcy court cannot know their rights and obligations.[77]

II. CURRENT LAW AND ITS EMERGENCE

The Supreme Court held in *City of Chicago v. Fulton* that passive retention of estate property does not violate the automatic stay.[78] As a dichotomous question, it is important to understand the two approaches the Court could have taken—previously the majority and the minority approach. This Section first explores how circuit courts attempted to answer the passive retention question and then explains the Supreme Court's reasoning in reaching its ultimate, yet limited, decision with regard to § 362(a).

Courts were previously split on the proper interpretation of the automatic stay provision, which prohibits "any act to obtain possession of property of the estate . . . or to exercise control over property of the estate."[79] The most common dispute over the meaning of "any act . . . to exercise control" surrounded instances in which a creditor had repossessed a debtor's vehicle, though the statutory language applies to all types of property.[80] Five circuits and the Sixth Circuit Bankruptcy Appellate Panel held that retention of property of the estate possessed before the debtor filed for bankruptcy must be immediately turned over to the bankruptcy trustee, without first requiring a turnover motion or adequate protection.[81] Three circuits held directly the opposite: that passive retention is not a creditor exercising control over property of the estate and therefore does not violate the automatic stay.[82]

The binary nature of "yes, it violates the stay" or "no, it does not violate the stay" meant that the Supreme Court had to adopt either the

77. *Compare In re* Fulton, 926 F.3d 916, 924 (7th Cir. 2019) (holding that creditors must turnover all property upon the debtor's filing for bankruptcy), *with In re* Denby-Peterson, 941 F.3d 115, 128 (3rd Cir. 2019) (holding that creditors are not required to turnover property immediately).

78. City of Chicago v. Fulton, 141 S. Ct. 585, 587 (2021).

79. 11 U.S.C. § 362(a)(3).

80. *See, e.g.*, Thompson v. Gen. Motors Acceptance Corp., 566 F.3d 699 (7th Cir. 2009) (emphasis omitted) (debtor defaulted on car payments and the creditor seized the car pre-petition); WD Equip., LLC v. Cowen (*In re* Cowen), 849 F.3d 943 (10th Cir. 2017) (lien placed on truck pre-petition and the creditor seized the car).

81. *See In re Fulton*, 926 F.3d at 920 (holding that creditors must turnover all property upon the debtor's filing for bankruptcy); Weber v. SEFCU (*In re* Weber), 719 F.3d 72 (2d Cir. 2013) (same); Motors Acceptance Corp. v. Rozier (*In re* Rozier), 376 F.3d 1323 (11th Cir. 2004) (per curiam) (same); Cal. Emp. Dev. Dep't v. Taxel (*In re* Del Mission Ltd.), 98 F.3d 1147 (9th Cir. 1996) (same); Knaus v. Concordia Lumber Co. (*In re* Knaus), 889 F.2d 773 (8th Cir. 1989) (same).

82. *See In re Denby-Peterson*, 941 F.3d at 119 (holding that creditors are not required to turnover property immediately); *In re Cowen*, 849 F.3d at 949–51(same); United States v. Inslaw, Inc., 932 F.2d. 1467 (D.C. Cir. 1991) (same).

majority's or the minority's approach.[83] Because the Supreme Court cannot change the statute, it must continue to deal with the text as is. While the majority approach effectuated more accurate policy goals, its analysis of the statutory text was flawed.[84] The minority approach, while more faithful to the text of the Bankruptcy Code, disadvantages debtors in a way that seems incongruous with the spirit of the Code.[85] Because neither approach fully addresses both the text of the Bankruptcy Code and the policy concerns behind it, the Supreme Court ruling on this issue remains inadequate. The *Fulton* case resulted in the Court adopting much of the minority approach, although its reasoning was based mostly on a natural reading of the text and potential problems with the turnover provision if § 363(a) were to be interpreted differently.[86]

A. Majority Approach: Policy and Practical Considerations with No Roots in the Text

The circuits previously following the majority approach adopted a debtor-friendly approach, holding that creditors are obligated to immediately turn over any property seized prior to the bankruptcy filing.[87] Under this approach, Chicago, located in the Seventh Circuit, would have to return any of the vehicles seized for unpaid parking tickets as soon as it had knowledge that the debtor had filed for bankruptcy.[88] The majority approach purported that it faithfully interpreted the text, although it did so by ignoring certain language in the automatic stay provision.[89] This approach, however, would have broadened the automatic stay, which is more in line with the policy considerations of giving the debtor a breathing spell and protecting assets from audacious creditors.[90] Ultimately, this approach succeeded

83. *In re Fulton*, 926 F.3d 916 (7th Cir. 2019), *cert. granted*, 140 S. Ct 680 (2019).

84. *See infra* Section II.A.

85. *See infra* Section II.B.

86. City of Chicago v. Fulton, 141 S. Ct. 585, 590–92 (2021).

87. *In re Fulton*, 926 F.3d at 924; Weber v. SEFCU (*In re* Weber), 719 F.3d 72, 81 (2d Cir. 2013); Motors Acceptance Corp. v. Rozier (*In re* Rozier), 376 F.3d 1323, 1324 (11th Cir. 2004) (per curiam); Cal. Emp. Dev. Dep't v. Taxel (*In re* Del Mission Ltd.), 98 F.3d 1147, 1152 (9th Cir. 1996); Knaus v. Concordia Lumber Co. (*In re* Knaus), 889 F.2d 773, 775 (8th Cir. 1989).

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

89. *See, e.g.*, *id.* at 923 (with the subheading "exercise control").

90. *See* United States v. Whiting Pools, Inc., 462 U.S. 198, 203–05 (1983) ("Congress intended a broad range of property to be included in the estate."); *In re* Sharon, 234 B.R. 676, 685 (B.A.P. 6th Cir. 1999) (holding that the onus is on creditors to return improperly seized assets and not on the debtor to go and get them).

in its policy considerations, but failed in its textual analysis, leading the Supreme Court to reject it.[91]

1. Textual Analysis: The Majority's Focus on "Exercise Control"

The majority approach elevated policy and practical considerations in its interpretation of the automatic stay and turnover provisions. This approach required creditors to return to the debtor property that had been seized pre-petition.[92] By reading § 362(a)(3) more liberally, this approach effectuates increased debtor protection and gives a bankruptcy petition more power. It does so by focusing on the "exercise control" language of § 362(a)(3) rather than the more complete phrase "any act . . . to exercise control."[93] "Exercising control" alone does not require an "act," whereas "any act . . . to exercise control" does require some affirmative activity.[94] This focus made it easier for the courts to conclude that "holding onto an asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use of an asset all fit within th[e] definition, as well as the commonsense meaning of the word[s 'exercise control']."[95] Because of this broader interpretation, courts could easily determine that there is no difference between property a creditor seized before the debtor filed for bankruptcy and passively retains and property a creditor seizes in the middle of a bankruptcy case. If courts equate maintaining possession with exercising control, then failure to return the property, "regardless of whether the original seizure was lawful, constitutes a prohibited attempt to 'exercise control over the property of the estate' in violation of the automatic stay."[96] Therefore, for example, even if the City of Chicago legally impounded a debtor's vehicle for failure to pay parking or traffic violations, it would have to immediately return the car when the debtors file for bankruptcy.[97] The majority courts treated the pre-petition seizure just as if the city had seized the car one year into the bankruptcy proceeding, which is clearly forbidden.

The majority courts also cited legislative history to support their reading of the text, though their analysis was often fleeting and

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

92. *In re Fulton*, 926 F.3d at 921; *In re Weber*, 719 F.3d at 79; *In re Rozier*, 376 F.3d at 1324; *In re Del Mission Ltd*., 98 F.3d at 1151; *In re Knaus*, 889 F.2d. at 775.

93. *See, e.g.*, *In re Fulton*, 926 F.3d at 923 (with the subheading "exercise control").

94. *See* 11 U.S.C. § 362(a)(3).

95. Thompson v. Gen. Motors Acceptance Corp., 566 F.3d 699, 702 (7th Cir. 2009).

96. *In re Knaus*, 889 F.2d at 775.

97. *See* CHI., ILL., MUN. CODE § 9-100-120 (making it legal to impound a debtor's vehicle); *In re Fulton*, 926 F.3d at 923 (requiring the creditor to return the seized asset once the debtor declares bankruptcy).

conclusory. These courts argued that because the language of the Code was amended from "to obtain possession" to "to obtain possession or . . . to exercise control," Congress intended to broaden the scope of § 362(a)(3).[98] According to this reasoning, the change from prohibiting mere possession indicated that Congress meant to encompass something more.[99] Bankruptcy courts following the majority approach often spoke of the legislative history in either veiled or clearly offered assumptions. One court phrased its legislative history analysis in these terms: the congressional amendment "hints [ ] that this kind of 'control' *might* be a broadening of the concept of possession . . . ."[100] Another court stated what Congress's intent was without explanation: the language "was added by the Bankruptcy Amendments and Federal Judgeship Act of 1984 to clarify that the automatic stay extends to any exercise of control over property of the estate . . . ."[101]

The legislative history, however, contains no explanation or commentary as to why Congress made this change.[102] While Congress clearly intended to expand the automatic stay by enacting changes to the code in 1984, the majority approach's conclusion that it *must* extend to all exercises of control over estate property is not definitive. Thus, while the majority approach's textual analysis was suspicious, its interpretation of § 362(a)(3) had a stronger foundation on other grounds.

2. Policy Concerns: A True Breath of Fresh Air

Policy and practical considerations mainly drove the majority's textual analysis, and this becomes clear when one considers the ramifications of any alternative interpretation. These courts sought to benefit the debtor by returning their property, which would in turn put creditors on a more even playing field. Relying on *Whiting Pools*, the Seventh Circuit in *In re Fulton* stated that the "primary goal" of reorganization bankruptcy is to "group *all* of the debtor's property together in his estate . . . this necessarily extends to all property, even property lawfully seized pre-petition."[103]

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98. *In re Del Mission Ltd.*, 98 F.3d at 1151.

99. *Thompson*, 566 F.3d at 702; *In re* Young 193 B.R. 620, 623 (Bankr. D.C. 1996).

100. Javens v. City of Hazel Park (*In re* Javens), 107 F.3d 359, 368 (6th Cir. 1997) (emphasis added).

101. Abrams v. Sw. Leasing and Rental Inc. (*In re* Abrams), 127 B.R. 239, 241 (9th Cir. B.A.P. 1991).

102. *In re Young*, 193 B.R. at 624 (citation omitted).

103. *In re* Fulton, 926 F.3d 916, 923 (7th Cir. 2019) (citing United States v. Whiting Pools, Inc., 462 U.S. 198, 203–04 (1983)).

Likewise, the court in *Thompson v. General Motors* also outlined major policy concerns shared by many circuit courts in the majority approach that favored placing the burden on the creditor to seek judicial relief.[104] First, the purpose of bankruptcy is to allow the debtor to "regain his financial foothold."[105] Therefore, while the Bankruptcy Code benefits both creditors and debtors, the primary goal is to aid the unfortunate debtor. In the case of a seized car, it greatly benefits the debtor to have her car returned to her. Without the car, it could be difficult for her to get to work, only compounding financial troubles. Second, adopting the alternative approach would give creditors too much bargaining power in that they could hold onto property until they subjectively felt they were adequately protected.[106] For example, the City of Chicago could demand not only insurance but also periodic payments to account for depreciation of the vehicle. Third, in *Whiting Pools,* the Court made clear that such self-help is prohibited under the Bankruptcy Code.[107] Creditors may not pursue collection efforts outside of the bankruptcy case.[108] Lastly, requiring a creditor to bear the costs of seeking relief assists not only the debtor but all of the creditors.[109] Having all creditors file one motion in court is far less demanding than having the debtor file "a myriad of motions" to recover his assets.[110] Filing turnover motions and enduring adequate protection proceedings often involves an attorney, whose fees come out of the "pot" of the debtor's assets. If the "pot" is needlessly depleted, all creditors end up with less than they would have had otherwise.

The majority courts adopted a broad reading of "exercise control" because it best enables a debtor to use her own property, which is vitally important for the completion of some bankruptcy cases. For example, perhaps only with the return of her car can a debtor get to work, which

104. *Thompson*, 566 F.3d at 706–07.

105. *Id.* at 706.

106. *Id.* at 707; s*ee also* TranSouth Fin. Corp. v. Sharon (*In re* Sharon), 234 B.R. 676, 685 (B.A.P. 6th Cir. 1999) ("A Chapter 13 debtor's right to possession and use of her car [should] not [be] dependent on the subjective judgment of a creditor . . . ."). Courts also see this as better policy for creditors who do not withhold a turnover and would suffer the cost because the debtor would be less able to pay all creditors back. *See* Knaus v. Concordia Lumber Co. (*In re* Knaus), 889 F.2d 773, 775 (8th Cir. 1989) (explaining that if creditors could maintain possession until they felt protected, "the powers of a bankruptcy court and its officers to collect the estate for the benefit of creditors would be vastly reduced").

107. *Whiting Pools*, 462 U.S. at 203–04.

108. *See Thompson*, 566 F.3d at 702 (holding that passively continuing to possess property is an exercise of control by creditors).

109. *See id.* at 707 (reasoning that allowing free use of assets by the debtor is better for both the debtor and creditors).

110. *Id.*

benefits not only herself but also her creditors who expect to be repaid through a successful plan.[111]

B. Minority Approach: Faithful Adherence to the Text with Harsh Consequences

The three circuits in the minority approach—which the Supreme Court adopted—held that creditors do not have an affirmative obligation to immediately return property seized legally pre-petition.[112] This approach interprets the text of the automatic stay provision more completely, reading the entire phrase of the statute rather than focusing on certain words in isolation ("any act . . . to exercise control" rather than " . . . exercise control" alone).[113] Because this approach is now law, all debtors are subject to potential collection efforts by creditors who can enforce their debts outside of the bankruptcy process by maintaining possession.[114]

1. Textual Analysis: The Minority's Focus On "Act"

In 1991, the D.C. Circuit became the first circuit court to adopt the minority approach that passive retention of estate property does not violate § 362(a)(3).[115] In *United States v. Inslaw, Inc.*, the debtor was a corporation that created a case-tracking software under contract for the Department of Justice.[116] Even after the corporation filed for chapter 11 bankruptcy, the Department of Justice continued to use the software and introduced it into other U.S. Attorney offices.[117] The court held that since the debtor did not have a possessory interest in the tapes containing the software, the Department of Justice did not violate the automatic stay by maintaining possession.[118] The D.C. Circuit Court emphasized the "act" language of § 362(a)(3) in its textual analysis and claimed to be more accurately interpreting the statute when it stated that "[n]owhere in [§ 362(a)]'s language is there a hint that it creates

111. *In re Sharon*, 234 B.R. at 682.

112. *See In re* Denby-Peterson, 941 F.3d 115, 132 (3d Cir. 2019) (adopting the minority approach); Cowen v. WD Equip., LLC (*In re* Cowen), 849 F.3d 943, 950 (10th Cir. 2017) (adopting the minority approach); United States v. Inslaw, Inc., 932 F.2d. 1467, 1474 (D.C. Cir. 1991) (adopting the minority approach).

113. *See, e.g.*, *Inslaw*, 932 F.2d at 1474.

114. *See Thompson*, 566 F.3d at 706 (reasoning that the minority approach allows for creditors in possession to exercise more power).

115. *Inslaw*, 932 F.2d. at 1474.

116. *Id.* at 1468.

117. *Id.* at 1468–69.

118. *Id.* at 1472.

an affirmative duty to remedy past acts of . . . harassment as soon as a debtor files a bankruptcy petition."[119]

The other circuits that joined the minority approach better elaborated why the focus is on the "any act" language—perhaps because they had more to prove as the majority approach grew stronger.[120] Instead of focusing on "exercise control," as did the majority, the minority approach turned first to the beginning of the provision and asked if "any act" had occurred.[121] Breaking the grammar down even more finely, one judge wrote that " 'any act' is the prepositive modifier of [the] infinitive phras[e]."[122] Because holding onto something does not change the "status quo," no act occurs at all.[123] This means that an exercise of control (like maintaining possession) alone is not sufficient to violate the automatic stay.[124] To violate the stay in these circuits, the creditor must have actually done something, such as seized the vehicle, *after* the bankruptcy case had begun.

While the courts advocating for the majority approach insisted that the legislative history supported their interpretation, the minority circuits asserted that their approach held more closely to congressional intent. The Tenth Circuit in *In re Cowen* stated that "Congress does not 'hide elephants in mouseholes.' . . . If Congress had meant to add an affirmative obligation . . . to turn over property belonging to the estate, it would have done so explicitly."[125]

The legislative history analysis differed slightly among courts in the minority.[126] The D.C. Circuit in *Inslaw* stated that "Congress gave no explanation" when it added the "exercise control" language to § 362(a), though it mentioned in passing that one court had traced the language back to the 1978 Bankruptcy Act.[127] The 1978 Act Senate Report reveals Congress intended for the property covered by the automatic stay to be only "property over which the estate has control or

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119. *Id.* at 1474.

120. *See In re* Denby-Peterson, 941 F.3d 115, 125 (3d Cir. 2019) (interpreting "any act" to require an affirmative, not passive, act); Cowen v. WD Equip., LLC (*In re* Cowen), 849 F.3d 943, 949 (10th Cir. 2017) (interpreting "any act" to require "doing something", which does not include "passively holding onto an asset").

121. John T. Gregg, *Big Things Have Small Beginnings–Passive Retention of Property of the Estate Repossessed Prepetition*, 28 NORTON J. BANKR. L. & PRAC. 220, 236–41 (2019).

122. *In re Cowen*, 849 F.3d at 949.

123. Gregg, *supra* note 121.

124. Denby-Peterson v. Nu2u Auto World, 595 B.R. 184, 190 (D.N.J. 2018).

125. *In re Cowen*, 849 F.3d at 949–50 (citing Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468).

126. *See, e.g.*, *In re* Denby-Peterson, 941 F.3d 115, 124 (3d Cir. 2019); *In re Cowen*, 849 F.3d at 949–50; United States v. Inslaw, Inc., 932 F.2d 1467, 1473 n.3 (D.C. Cir. 1991).

127. *Inslaw*, 932 F.2d at 1473 n.3.

possession."[128] Therefore, property seized pre-petition, such as a car with overdue parking tickets, could not fall under the automatic stay because the debtor did not have possession of the car when the case began. The Tenth Circuit, on the other hand, relied solely on the 1984 amendments to the Code.[129] It held that Congress's addition of the word "control" meant only to distinguish the new language from acts to obtain possession, which were already prohibited.[130] In this way, the court argued, Congress meant to prohibit only other *acts* that exercise control, such as a creditor selling off estate property that was in its possession or taking advantage of intangible property that was not concretely in anyone's possession.[131] In the vehicle cases, this means the city is prohibited only from selling the debtors' vehicles that it had seized prior to the filings.[132] Lastly, the Third Circuit did not rely on the legislative history at all, asserting that the language "act . . . to exercise control" clearly indicated that maintaining possession of estate property does not violate the automatic stay.[133] Even though the minority circuits could not agree why the legislative history did support (or was irrelevant to) their collective interpretation, the minority's strongest textual arguments rested on the plain meaning of the words in the Code. And because the plain meaning argument itself does not require a consideration of legislative history, it therefore remains persuasive.[134]

2. Policy Concerns: Protecting Creditors' Rights

While textual arguments drive the minority approach, the Third Circuit claimed that its approach also effectuates bankruptcy's policy goals, albeit different goals from the debtor-friendly majority approach.[135] The Third Circuit asserted "that one of the automatic stay's primary purposes is '*to maintain the status quo* between the

128. S. REP. NO. 95-989, at 50 (1978).

129. *See In re Cowen*, 849 F.3d at 949–50 (relying on statutory amendments to assist in statutory interpretation).

130. *Id.* at 949 (citing Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who Is "Exercising Control" Over What?*, 33 BANKR. L. LETTER, Sept. 2013, Westlaw 33 No. 9 BLL-NL 1).

131. *Id.* at 950.

132. The City of Chicago did, however, improperly sell some of the seized vehicles for scrap metal in order to offset the ticket debts. Oral Argument at 11:21, *In re* Fulton, 926 F.3d 916 (7th Cir. 2019) (No. 18-2527), http://media.ca7.uscourts.gov/sound/2019/cm.18-2527.18-2527_05_14_2019.mp3 [https://perma.cc/D7XX-ZK58].

133. 11 U.S.C. § 362(a)(3); *see In re* Denby-Peterson, 941 F.3d 115, 124–25 (3d Cir. 2019) (claiming that because the language is unambiguous, the court need not look to legislative history).

134. *See generally* Yates v. United States, 574 U.S. 528, 537–39 (2015) (discussing at depth the plain-meaning rule of statutory interpretation).

135. *In re Denby-Peterson*, 941 F.3d at 126.

debtor and [his] creditors, thereby affording the parties and the [Bankruptcy] Court an opportunity to appropriately resolve competing economic interests in an orderly and effective way.' "[136] Many cases repeated this "status quo" language as a maxim.[137] In Chicago, the city argued that the status quo would allow the city to continue keeping the cars in impound lots, exactly where they were before the debtor filed her bankruptcy petition.[138] This seems to further a policy of not giving debtors a possessory interest that they did not have at the beginning of the case, but this argument is nowhere explicitly stated in the circuit cases.

C. Strengths and Weaknesses of Each Approach

Because policy concerns drove the majority's textual interpretation, critics of the approach found fault with the choice to analyze only the "exercise control" language of the statute and not the more complete phrase, "any act . . . to exercise control . . . ."[139] If a court adopts the language's plain meaning, the inclusion of the word "act" prohibits affirmative actions taken only after the debtor files for bankruptcy. If a creditor seized the property pre-petition, it is not "acting" at all because it is not changing its position.[140] The City of Chicago even argued that if "any act . . . to exercise control" includes every possible exercise of control over property of the estate, then the words "any act" become surplusage.[141] In the city's mind, "any act" is

136. *Id.* (alterations in original) (quoting Taylor v. Slick, 178 F.3d 698, 702 (3d Cir. 1999)).

137. *See, e.g.*, *In re* Winters, 604 B.R. 54, 59 (Bankr. D. Utah 2019) (quoting First Nat'l Bank v. Roach (*In re* Roach), 660 F.2d 1316, 1319 (9th Cir. 1981)) ("[The creditor] merely maintained the status quo . . . . This is consistent with the purpose of the automatic stay provision."); *In re* New Am. Food Concepts, Inc., 70 B.R. 254, 257–58 (Bankr. N.D. Ohio 1987) ("In litigation concerning the automatic stay, the Code generally seeks to leave matters in a status quo posture, . . . to provide a reasonable opportunity for a financially distressed debtor, its creditors, and the Court to determine whether there are reasonable prospects for the debtor's survival.").

138. Petition for Writ of Certiorari, *supra* note 49, at 19.

139. 11 U.S.C. § 362(a)(3); *see* Brubaker, *supra* note 130 ("The majority position is highly dubious . . . driven more by certain 'practical considerations' . . . than a sound, principled interpretation of the meaning of the relevant Code provisions." (footnote omitted)); *see also* Anne Zoltani & Janice Miller Karlin, *Examining § 362(a)(3): When "Stay" Means Stay*, 36 AM. BANKR. INST. J., May 2017, at 20 (discussing the difference between a focus on "exercise control" and "any act to exercise control").

140. *See* United States v. Inslaw, Inc., 932 F.2d 1467, 1474 (D.C. Cir. 1991) (making it clear that the act to exercise control over estate property must occur post-petition); John C. Chobot, *Some Bankruptcy Stay Metes and Bounds*, 99 COM. L.J. 301, 307–08 (1994) (discussing how an affirmative act is required to violate the stay).

141. Petition for Writ of Certiorari, *supra* note 49, at 19–20 (citing Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 698 (1995)).

obviously included in any "exercise of control."[142] Therefore, the more specific word must be controlling.[143]

Additionally, requiring an affirmative action by the creditor makes clear why Congress included the turnover provision in a completely different section of the Code.[144] If the turnover power was a supplemental explanation of what creditors must do under the automatic stay, it would not be free standing with no mention of its connection to the automatic stay.[145] The minority's analysis of the legislative history was more measured and did not assume that Congress intended to broaden the stay as widely as the majority claimed.[146] After all, Congress does not hide elephants in mouseholes.[147]

The majority's approach, however, would have better enabled a debtor to actually complete her plan. Without the necessary transportation to go to work, a chapter 13 debtor will default, risking dismissal of her case.[148] A debtor's life will not be the fresh start envisioned by the Bankruptcy Code.[149] Instead, following dismissal, she will be in an even worse position—having spent time and money on the case without receiving the discharge of debt. The majority's interpretation would benefit not only debtors, then, but also creditors, who, upon dismissal, lose their collective action benefits and return to individualized efforts.[150]

Even if a case is not dismissed, creditors are better off if a debtor can access her vehicle. Because a debtor's payment plan uses the last six months of income to determine the debtor's ability to pay creditors in chapter 12 and 13 cases, creditors also benefit if the debtor's income

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142. *Id.*

143. *See, e.g.*, Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 21 (2012) (discussing the "ancient interpretive principle that the specific governs the general (*generalia specialibus non derogant*)").

144. Brubaker *supra* note 39, at 4.

145. *Id.* at 6, 7.

146. *See* WD Equip., LLC v. Cowen (*In re* Cowen), 849 F.3d 943, 949–50 (10th Cir. 2017) (citing Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)) ("If Congress had meant to add an affirmative obligation—to the automatic *stay* provision no less, as opposed to the *turnover* provision—to turn over property belonging to the estate, it would have done so explicitly.").

147. *Whitman*, 531 U.S. at 468.

148. 11 U.S.C. § 1307(c).

149. Stellwagen v. Clum, 245 U.S. 605, 617 (1918).

150. *See* 11 U.S.C. § 1307 (regarding potential dismissal); TranSouth Fin. Corp. v. Sharon (*In re* Sharon), 234 B.R. 676, 682 (B.A.P. 6th Cir. 1999) (illustrating the majority approach); Melissa Sanchez & Sandhya Kambhampati, *How Chicago Ticket Debt Sends Black Motorists into Bankruptcy*, PROPUBLICA (Feb. 27, 2018), https://features.propublica.org/driven-into-debt/chicago-ticket-debt-bankruptcy/ [https://perma.cc/C9H2-HCM2] (illustrating the cycle of Chapter 13 bankruptcy filings by car owners with unpaid tickets, dismissals, and efforts to collect by Chicago). The collective action benefits of bankruptcy are widely known. *See, e.g.*, MARGARET HOWARD & LOIS R. LUPICA, BANKRUPTCY: CASES AND MATERIALS 13 (6th ed. 2015) (explaining how bankruptcy law is in part "a device for the resolution of the collective interests of creditors").

was larger.[151] While purporting to protect creditors' rights, the minority approach ultimately disadvantages them because there is a decreased chance of a successful plan completion and lower plan payments from the beginning.[152]

Therefore, one can view a choice between the majority and minority approaches as a choice between the lesser of two evils. Either the policy goals are met or the text of the statute is adhered to, but one cannot achieve both.

D. The Ultimate Decision

The Supreme Court in *City of Chicago v. Fulton* acknowledged the policy concerns at issue but chose to ground its holding in the statute's text and legislative history.[153] By parsing the key words "stay," "act," and "exercise control," the Court determined that the "status quo" interpretation adopted by the minority approach was "the most natural reading."[154] In short, the Court's choice not to separate the verb "act" from "exercise control" proved fatal to the majority approach because "saying that a person engages in an act to exercise his or her power over a thing communicates more than merely having that power."[155]

The Court also focused on the potential "serious problems" with the turnover provision if § 362(a)(3) were to forbid passive retention.[156] Although not a major worry for the lower courts, the Supreme Court was concerned with the superfluity of a turnover provision if the automatic stay were to cover passive retention.[157] Additionally, because the turnover provision does not require the return of property of "inconsequential value," any other reading of § 362(a)(3) would contradict § 542.

The Court also addressed the legislative history of the Code, adopting the Tenth Circuit's interpretation of the 1984 amendments. The Court argued that reading the automatic stay as imposing a turnover obligation would be too large of a change for Congress to enact without at least including a cross-reference to § 542 or an explicit

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151. *See* 11 U.S.C. § 1325 (explaining how the bankruptcy court determines a debtor's disposable income to inform how her payment plan should look at confirmation of the plan).

152. *See* Bankr. Judges Div., *Bankruptcy Basics*, ADMIN. OFF. OF THE U.S. CTS. 22–28 (Nov. 2011), https://www.uscourts.gov/sites/default/files/bankbasics-post10172005.pdf [https://perma.cc/PGQ5-SQT6] (outlining the basics to bankruptcy, which it purports to be beneficial to both debtors and creditors).

153. City of Chicago v. Fulton, 141 S. Ct. 585, 592–94, (2021) (Sotomayor, J., concurring).

154. *Id.* at 590 (majority opinion).

155. *Id.* (internal quotations omitted).

156. *Id.* at 590–92.

157. *Id.* at 590–91.

statement of its new breadth.[158] The Court, however, stated that it "need not decide how the turnover obligation [of] § 542 operates" in the *Fulton* case.[159]

Notably, Justice Sotomayor emphatically voiced her concerns about how the Court's decision would disproportionately affect minority debtors.[160] She described the vicious cycle debtors are placed in when left without access to their cars and how the city's passive retention interferes "not only with debtors' ability to earn an income and pay their creditors but also with their access to childcare, groceries, medical appointments, and other necessities."[161] Although the Court did not address the turnover provision's operation, Justice Sotomayor noted that turnover proceedings are "essentially full civil lawsuits" and deny debtors' access to their vehicles for far too long.[162] Despite the Court's hands being tied, she pled for Congress to intervene.[163]

III. SOLUTION: CONGRESS SHOULD FORBID "ANY EXERCISE OF CONTROL" OVER ESSENTIAL PROPERTY

Any decision regarding the interpretation of the automatic stay provision was bound to have a profound impact on not only chapter 13 cases but also chapters 11 and 12,[164] as the automatic stay covers all chapters of bankruptcy.[165] Debtors need access to their vehicles in order to get to work and make payments under their plans, or they risk having their cases dismissed, particularly in chapter 13 cases.[166] Chapter 11 debtors also operate as debtors in possession, meaning they should have access to their property as they stand in for the role of the trustee.[167] Lastly, chapter 12 bankruptcy for family farmers and fisherman will be greatly affected by the decision as it also involves a

158. *Id.* at 591–92.

159. *Id.* at 592.

160. *Id.* at 593–94 (Sotomayor, J., concurring).

161. *Id.* at 594.

162. *Id.*

163. *Id.* at 595.

164. *See* Bankr. Judges Div., *supra* note 152, at 22–28 (explaining bankruptcy basics). Chapter 7 bankruptcy is liquidation bankruptcy, where a debtor's property is liquidated save for a few exemptions. HOWARD & LUPICA, *supra* note 150, at 17. Chapter 12 is similar to chapter 13, but it is only for family farmers and family fisherman. *Id.* at 19. Chapter 11 is a reorganization bankruptcy and is used mainly by businesses, though it is available to individuals. *Id.* at 18. In Chapter 11, the business is allowed to maintain control of business operations. *Id.*

165. 11 U.S.C. § 103(a).

166. *Id.* § 1307. Dismissal means that a debtor cannot obtain a discharge of her debt, the main goal of filing for bankruptcy.

167. *See* HOWARD & LUPICA, *supra* note 150, at 18 (explaining chapter 11 bankruptcy). Any Supreme Court decision, however, would affect chapter 11 debtors unless it explicitly limits its interpretation of the automatic stay to chapter 12 and 13.

repayment plan. Debtors in chapter 12 may need trucks, equipment, and other property necessary to continue running their businesses in order to complete the plan.[168]

The Supreme Court, however, had only two choices in resolving this issue—either possession of property of the estate seized pre-petition violates the automatic stay, or it does not. In selecting one of the possible choices, the Supreme Court was forced to adopt either the textually dubious yet policy conscious majority approach, or the textually faithful yet practically problematic minority approach. Therefore, even though the split is now resolved, its resolution does not present the best solution for anyone. As it stands, the provision's text does not effectuate the policy goals of the Bankruptcy Code.[169] Thus, the Court was left with a dilemma in which it was incapable of rendering a satisfactory solution.

The Court's decision will affect hundreds of thousands of debtors, either positively or negatively.[170] Last year alone, 774,940 people and businesses filed for bankruptcy.[171] Specifically, 283,413 of those people filed for chapter 13 bankruptcy.[172] Because the Court adopted the minority approach, all property seized pre-petition will not be returned to any debtor until she initiates a turnover proceeding and, if requested by the creditor, provides some type of adequate protection such as proof of insurance or periodic payments for depreciation of her car.[173]

The best solution for addressing the policy goals must be to correct the text, so debtors can regain their property. The corrected language must be tailored, however, to require creditors to return to debtors only the property that is possibly needed to complete the plan. In this way, creditors would be required to return essential items, such as cars, but not luxury items, such as stereos.

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168. *Id.* at 19.

169. *See supra* Section II.A.2 (analyzing the majority approach's emphasis of policy over strict textualism).

170. *See Just the Facts: Consumer Bankruptcy Filings, 2006-2017*, U.S. CTS. (Mar. 7, 2018), https://www.uscourts.gov/news/2018/03/07/just-facts-consumer-bankruptcy-filings-2006-2017 [https://perma.cc/U4N5-87U5] (showing hundreds of thousands of chapter 7 and 13 bankruptcy filings every year over the past decade).

171. *Bankruptcy Filings Increase Slightly*, U.S. CTS. (Jan. 28, 2020), https://www.uscourts.gov/news/2020/01/28/bankruptcy-filings-increase-slightly [https://perma.cc/QN3H-DFQU].

172. *Id.*

173. *See supra* Section II.B (discussing the implications of the minority approach).

A. Possibility of Congressional Intervention

This Note proposes Congress amend the Bankruptcy Code to resolve the lingering concerns and effectuate the policy and practical goals that are at the heart of the Bankruptcy Code. The phrase "any act . . . to exercise control" can be made clearer by amending the provision to read that a stay is applicable to "any exercise of control over property of the estate that the debtor may require for the successful completion of its payment plan confirmed in a chapter 12 or 13 case." This language will effectuate the pro-debtor policy by removing improper impediments to a successful completion of a bankruptcy plan, and it will resolve the textual ambiguities with which both the majority and minority approaches struggled.[174]

The amendment would expressly affect only chapter 13 and 12 debtors.[175] Debtors would receive property necessary to the completion of their payment plans, most likely their vehicles, immediately upon filing. With the immediate return of their cars, the debtors will be able to travel to work, earn money, and make payments on their plan with less difficulty.

Congress does not often amend the Bankruptcy Code.[176] The Code's last major overhaul was fifteen years ago, when Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").[177] BAPCPA altered the automatic stay in several ways, such as allowing continued collections of domestic support obligations and eliminating the stay if there are indications that the debtor has filed the bankruptcy petition with dishonest interests.[178] Many viewed BAPCPA as creditor friendly, as it made filing for bankruptcy more difficult and included harsh consequences for "fraudulent" debtors.[179] It also required debtors to undergo credit counseling within 180 days before filing for bankruptcy, often dissuading people from filing.[180]

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174. *See supra* Section II.A.2 (discussing the textual interpretation adopted by the majority approach); *supra* Section II.B.2 (discussing the textual interpretation adopted by the minority approach).

175. This Note purposefully limits the amendment to cover only these chapters.

176. *See* HOWARD & LUPICA, *supra* note 150, at 15. The different versions of the Bankruptcy Code have been enacted in 1800, 1803, 1867, 1898, 1938, 1978, 1984, and 2005. *Id.* at 14–15.

177. *Id.* at 15.

178. Stuart Larsen, *Understanding the New Semi-automatic Stay*, 25 AM. BANKR. INST. J., Mar. 2006, at 22, 22, 74–75.

179. Rachel Ruser, Note, *Analysis of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)*, 2 SPNA REV. 86, 86 (2006).

180. *See* 11 U.S.C. § 109(h) (a person may not be a debtor if they have not undergone credit counseling); Andrew S. Erickson, *Pre-Petition Credit Counseling*, 39 AM. BANKR. INST. J., Jan.

Recently, however, Congress has shown interest in amending the Code.[181] In 2019, Congress enacted the Small Business Reorganization Act.[182] These amendments to the Bankruptcy Code created special provisions related to small business debtors in chapter 11 and addressed certain issues with preferential transfers.[183] Congress expects the new Act to greatly aid small business debtors in reorganization efforts, proof that perhaps Congress realized BAPCPA was overly harsh on debtors.[184] The SBRA reduces the costs of filing a chapter 11 petition and automatically assigns a trustee to the case.[185] As a result, a debtor will be less likely to make the mistakes that are grounds for dismissal under BAPCPA.[186] These recent Congressional actions suggest hope that future amendments are possible and would be beneficial to debtors.

B. Amending the Text to Effectuate Underlying Policy

1. The Automatic Stay Provision

Congress should amend § 362(a)(3) to read "any exercise of control over property of the estate that the debtor may require for the successful completion of its payment plan confirmed in a chapter 12 or 13 case." As the Court's decision in *Fulton* made clear, there is at present no way to follow the policy goals of the Bankruptcy Code and still remain faithful to the text.[187] Congress must speak directly to the issue.

2020, at 42, 42 ("[T]he taking of the credit-counseling course requirement pre-petition . . . became an obstacle for individuals to overcome.").

181. James B. Bailey & Andrew J. Shaver, *What New Bankruptcy Law Means for Small Businesses*, BIRMINGHAM BUS. J., https://www.bizjournals.com/birmingham/news/2019/11/25/what-new-bankruptcy-law-means-for-small-businesses.html (last updated Dec. 2, 2019, 9:24 AM CST) [https://perma.cc/Y6NZ-2M8X].

182. Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. This act amends the Bankruptcy Code.

183. *House and Senate Pass Small Business Reorganization Act of 2019*, 38 AM. BANKR. INST. J., Sept. 2019, at 8, 8.

184. *See id.* (noting the Act was a bipartisan measure that would "streamline the bankruptcy process by which small business debtors reorganize and rehabilitate their financial affairs").

185. Lei Lei Wang Ekvall & Timothy Evanston, *The Small Business Reorganization Act: Big Changes for Small Businesses*, BUS. L. TODAY (Feb. 14, 2020). https://www.americanbar.org/groups/business_law/publications/blt/2020/02/small-business-reorg/ [https://perma.cc/G546-AENT].

186. Amy E. Vulpio, *New Subchapter V May Be the Bankruptcy Lifeline Small Businesses Need to Survive COVID*-19, WHITE & WILLIAMS LLP, https://www.whiteandwilliams.com/resources-alerts-New-Subchapter-V-May-be-the-Bankruptcy-Lifeline-Small-Businesses-Need-to-Survive-COVID-19.html (last updated Apr. 15, 2020) [https://perma.cc/TWC3-W4QU].

187. *See supra* Section II.A (explaining the majority approach's interpretation of Section 362 and its shortcomings).

The new language proposed by this Note reconciles the contradictory approaches to the automatic stay. As both claimed to interpret the Code's plain meaning, Congress should make the relevant provisions even clearer.[188] The new language of the statute should amend the automatic stay provision to prohibit "any exercise of control over property of the estate that the debtor may require for the successful completion of its payment plan confirmed in a chapter 12 or 13 case." Congress will also have to make slight changes to the turnover provision and indicate that it overrides the adequate protection provision.[189]

Congress should altogether eliminate the word "act" from the automatic stay, which currently reads "any act to obtain possession of property of the estate . . . or to exercise control over property of the estate."[190] The courts that took the majority approach ignored the words "any act," interpreting only "exercise control" in their plain meaning analysis.[191] Conversely, in their approach, the minority and Supreme Court interpreted "any act" to mean that only an affirmative action by a creditor violates the automatic stay,[192] significantly narrowing the breadth of the automatic stay. By eliminating the "act" language, any textual arguments regarding "act" become moot, allowing the text to match the policy considerations.[193] "Any exercise of control" includes maintaining possession as well as all other methods of control, not only affirmative acts.[194] In this way, Congress can allow bankruptcy courts to adopt a more equitable approach without stretching the language of the Code.

Further, amending the text would address lingering policy concerns. The automatic stay is intended to aid in the collective action of bankruptcy. Without grouping together the debtor's property in the estate, individual creditors can impermissibly pressure the debtor into paying them back first, without regard for other creditors who may have

188. *See* Zoltani & Karlin, *supra* note 139, at 20–21 (analyzing the textual arguments of the majority approach and the Tenth Circuit, which at the time of their article was the only court not following the majority).

189. *See* 11 U.S.C. § 542 (the turnover provision); *id.* § 361 (the adequate protection provision).

190. *Id.* § 362(a)(3).

191. For example, see *In re* Fulton, 926 F.3d 916, 923 (7th Cir. 2019) (with the subheading "Exercise Control").

192. *See* Zoltani & Karlin, *supra* note 139, at 61 (noting the Tenth Circuit's determination that "some action is required to violate the automatic stay").

193. *See supra* Section II.B.2. While the minority approach does give some attention to the exercise control language, it does so considering only what types of acts are prohibited. Ralph Brubaker, *supra* note 130.

194. In fact, this is already how the majority has been interpreting the automatic stay. *See supra* Section II.A.

priority by law.[195] Prior to the ruling in *In re Fulton*, the City of Chicago was pressuring debtors in exactly this way when it seized vehicles before a person filed for chapter 13 bankruptcy and then refused to return them.[196] Before the city would release a car, it required a motorist to "agre[e] to prioritize paying off ticket debt in their bankruptcy payment plan . . . . This assured the city it would get paid back more of what it was owed . . . ."[197] By removing this tactic, Congress can effectuate the "equality of distribution between similarly -situated creditors," a key goal in bankruptcy.[198] While current numbers have not been released, it would appear that the application of the automatic stay to pre-petition property could affect 3,800 debtors in Chicago alone.[199] With the amendments this Note proposes, all debtors would be positively impacted and able to retrieve their property without the lengthy turnover proceedings currently required.

The addition of the words "property of the estate that the debtor may require for the successful completion of its payment plan" would require creditors to take affirmative action in regard only to property that is essential for a debtor's success in bankruptcy. For example, a creditor would not have to return an expensive stereo system a debtor offered as collateral, but it would have to return a tractor seized from a family farmer debtor. The suggested new language would alleviate some of the burdens on creditors, requiring that they return only property that is obviously necessary to a successful completion of the plan.

Further, the proposed language would not overly broaden the automatic stay. There are two limitations to the language that make the amendment less dramatic. First, by specifying that the property must be arguably necessary for the completion of a payment plan confirmed in a chapter 12 or 13 case, this provision would affect only debtors who have filed in those chapters. Payment plans do not exist in cases filed under chapter 7,[200] and most businesses file under chapter

195. Thompson v. Gen. Motors Acceptance Corp., 566 F.3d 699, 702 (7th Cir. 2009) (citing United States v. Whiting Pools, Inc., 462 U.S. 198, 203–04 (1983)).

196. *See* 926 F.3d 916, 930–31 (7th Cir. 2019) (holding that vehicles seized pre-petition must be returned to the debtor upon filing for bankruptcy); Sanchez, *supra* note 9.

197. Sanchez, *supra* note 9.

198. HOWARD & LUPICA, *supra* note 150, at 15.

199. *See* Sanchez, *supra* note 9. The officials have not stated since *In re Fulton* how many cars they had been incorrectly holding, but prior to the initiation of the now-prohibited policy, they released 3,800 vehicles to debtors once the debtors filed for bankruptcy in 2016. *Id.*

200. HOWARD & LUPICA, *supra* note 150, at 17–19. Because chapter 12 applies only to family farmers and fisherman, I will not be discussing the implications of the language on chapter 12 extensively.

11.[201] The new language would affect a little over one third of all bankruptcies filed.[202] Second, by requiring that the property be important to the completion of a plan, the provision would not apply in all chapter 12 or 13 cases. If a creditor has possession of property of the estate, the creditor would be required to return the property only if the debtor would require it in order to earn money to pay off the plan.

One criticism of this amendment is that it simply adds more text for courts to interpret. But because many of the previous circuit court decisions regarding the interpretation of the text centered around a concern for the return of the debtor's vehicle, the application would be workable.[203] Once Congress amends the language of § 362(a)(3), the clearest application of the provision will be to require returning property that can be promptly assessed as critical for the debtor's successful competition of a payment plan.[204] Even in chapter 12 cases, the application of the new language should not be difficult. Examples of "property of the estate that the debtor may require for the successful completion of a payment plan" should appear readily—for example, farm equipment, fishing nets or boats, and delivery trucks easily fall within the new language proposed by this Note.

2. Amending Other Provisions

Congress should also resolve some of the confusion surrounding the turnover provision of the Bankruptcy Code.[205] This could include a cross-reference between the automatic stay provision and the turnover provision to address the Court's concerns about superfluity contradiction and about making large changes explicit.[206] Due to the hedged requirement regarding property required for successful completion of a payment plan, not all property, the language would no longer be superfluous.[207] It would no longer be contradictory because of

201. *Chapter 11 – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics (last visited Jan. 31, 2021) [https://perma.cc/6Y56-MBVV].

202. *See Bankruptcy Filings Increase Slightly*, *supra* note 171. 774,940 total bankruptcies were filed in 2019, and only 284,008 were chapter 12 or 13.

203. *See*, *e.g*, Thompson v. Gen. Motors Acceptance Corp., 566 F.3d 699 (7th Cir. 2009) (debtor defaulted on car payments and the creditor seized the car pre-petition); WD Equip., LLC v. Cowen (*In re* Cowen), 849 F.3d 943 (10th Cir. 2017) (lien placed on truck pre-petition and the creditor seized the car).

204. *See* Sanchez, *supra* note 9 (explaining the difficulties chapter 13 debtors face in making plan payments when they do not have access to their vehicle that they drive to work).

205. *See* 11 U.S.C. § 361 (the adequate protection provision); *Id.* § 542 (the turnover provision); Brubaker, *supra* note 130.

206. City of Chicago v. Fulton, 141 S. Ct. 585, 591–92 (2021).

207. *Id.* at 591.

the same limiting language in the amended § 362.[208] Finally, it would bring to light the interaction between the sections and acknowledge that this is a major change in statutory turnover requirements.[209]

Congress should also make clear that the turnover provision controls over the adequate protection provision, which it could do with a minor reference between the provisions. One reason many creditors maintain possession of property of the estate is because they do not see the turnover provision as mandatory until adequate protection over their security interest has been provided by the court.[210] Without requiring turnover to happen first, however, the proposed automatic stay amendments will not be as effective. If a creditor may hold onto vehicles until they receive court-ordered adequate protection, the policy arguments that support the idea that maintaining possession of property of the estate violates the automatic stay are reduced. The debtor will still have to undergo court proceedings in order to regain possession of her property.[211] Therefore, by clarifying that the turnover provision has priority over the adequate protection provision, many of the policy goals would be embedded into the statute.

Adequate protection is a valid concern of creditors, as returning a vehicle without insurance could cause serious problems if the debtor gets in a car accident or otherwise destroys the car.[212] But creditors have ample protection to avoid such a concern.[213] In the automatic stay provision itself, the Code requires a court to "grant relief from the stay . . . for cause, including the lack of adequate protection of an interest in property of such party in interest."[214] The creditor may seek stay relief without notifying the debtor.[215] Courts will not potentially nullify liens by returning uninsured vehicles to debtors. As one court noted, courts "take[ ] the lack of insurance seriously and will not permit a debtor to obtain or retain possession of a vehicle that is not adequately

208. *Id.*

209. *Id.* at 592.

210. *See, e.g.*, Brief for Petitioner, *supra* note 76 at 9.

211. *In re* Denby-Peterson, 941 F.3d 115, 128 (3d Cir. 2019).

212. Hon. Eugene R. Wedoff, *Return of Vehicles Seized Before a Chapter 13 Filing; Does the Debtor Have to File a Turnover Motion?*, 38 AM. BANKR. INST. J., APR. 2019, at 14, 14.

213. *Id.*

214. 11 U.S.C. § 362(d)(1).

215. Wedoff, *supra* note 212, at 14.

insured."[216] Additionally, creditors may, from the beginning of the case, refuse to return an uninsured vehicle.[217] Courts can "retroactively validate" a vehicle's retention by granting a relief from the stay, preventing any sanctions against the creditor for not returning the vehicle.[218] These alternative measures give reassurance to creditors with legitimate concerns regarding adequate protection while requiring creditors who seek only to enforce their own repayment to return an insured vehicle immediately upon a debtor's filing for chapter 13.[219]

CONCLUSION

In chapter 13 cases, a debtor often requires her vehicle to earn money to make her plan payments. As the law currently stands, however, creditors such as the City of Chicago are able to take these vehicles and not return them to the debtor, even after she files for bankruptcy. Section 362(a) of the Bankruptcy Code is supposed to offer debtors a chance to breathe by halting the collection efforts of all creditors.[220] Because the Bankruptcy Code envisions collective action as an effective tool to fairly repay creditors, it also protects a debtor's remaining assets from dissipation by aggressive creditors trying to cut the line.[221] The automatic stay could be a mechanism to return some of the most essential property to a debtor, thus effectuating the purpose of the Bankruptcy Code. The Court, however, could not transform the words of the Code to fit the purpose by itself. Therefore, Congress should heed Justice Sotomayor's request to reconsider the language in §§ 362(a) and 542 and clarify what the automatic stay requires of creditors.[222]

This Note proposes that Congress amend § 362(a)(3) to codify language that would best effectuate the fundamental policy goals of the Bankruptcy Code. Specifically, Congress should prohibit any exercise of control over property of the estate that the debtor may require for

216. Stephens v. Guaranteed Auto, Inc. (*In re* Stephens), 495 B.R. 608, 615 n.8 (Bankr. N.D. Ga. 2013).

217. Wedoff, *supra* note 212, at 14.

218. *Id.*

219. *Id.*; Sanchez, *supra* note 9.

220. 11 U.S.C. § 362(a).

221. HOWARD & LUPICA, *supra* note 150, at 13.

222. City of Chicago v. Fulton, 141 S. Ct. 585, 595 (2021) (Sotomayor, J., concurring).

successful completion of a payment plan confirmed in a chapter 12 or 13 case. This new language would clarify the current textual ambiguities in the automatic stay provision, allow debtors to regain possession of essential property, and maintain creditors' current rights of adequate protection in a way that would benefit all parties involved in a chapter 12 or 13 bankruptcy case.

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* J.D. Candidate, 2021, Vanderbilt University Law School; B.A., 2018, University of Notre Dame. Thank you to the editors and staff of the *Vanderbilt Law Review* for their hard work and thoughtful feedback throughout an unprecedented year. This Note is dedicated to my parents, whose endless support and encouragement made me the person I am today.