Docket No. 10-1443

In the
Supreme Court of the United States

AMERICREDIT FINANCIAL SERVICES, INC.,
Petitioner,

v.

MARLENE A. PENROD,
Respondent.

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

AMICI CURIAE BRIEF FILED BY ALLY FINANCIAL INC., AMERICAN SUZUKI FINANCIAL SERVICES CO. LLC, BANK OF AMERICA, N.A., FORD MOTOR CREDIT CO. LLC, JPMORGAN CHASE BANK, N.A., NISSAN MOTOR ACCEPTANCE CORP., AND WELLS FARGO BANK, N.A. IN SUPPORT OF THE PETITIONER

Barkley Clark*
Katherine M. Sutcliffe Becker
Tracey M. Ohm
STINSON MORRISON HECKER LLP
1150 18th Street, NW, Ste. 800
Washington, D.C. 20036
Telephone: (202) 785-9100
Facsimile: (202) 572-9994
bclark@stinson.com
**Counsel of Record*
Counsel for Amici

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QUESTION PRESENTED

Did the Ninth Circuit err in holding that the portion of the Debtor's obligation attributable to the negative equity ("NE") in the vehicle she traded-in in connection with her retail installment sale transaction was not part of her "purchase money obligation" ("PMO") and, thus, not protected from cramdown by the Hanging Paragraph of 11 U.S.C. § 1325 ("HP")?

This issue should be reviewed by this Court because the Ninth Circuit decision in *In re Penrod*, 611 F.3d 1158 (9th Cir. 2010) (hereinafter abbreviated as "Op. __"), has created an 8 to 1 circuit split on an important and recurring federal question. In a conclusory opinion that made no meaningful attempt to address the unanimous appellate authorities to the contrary, the Ninth Circuit judicially rewrote a significant section of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and effectively repealed it with respect to a significant part of many motor vehicle retail installment sale obligations.

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INTEREST OF AMICI

Amici[1] are assignees of retail installment sale contracts ("RISCs") pursuant to which dealerships sell automobiles to retail buyers. They have been impacted by voluminous litigation concerning whether the HP applies to debt attributable to NE on a trade-in vehicle that is included in the amount financed under a RISC. The HP prohibits cramdowns of certain claims secured by motor vehicles "if the creditor has a purchase money security interest [PMSI] securing the debt that is the subject of the claim ...." 11 U.S.C. §1325(a)(9)(*).

Amici will be adversely affected by the Ninth Circuit decision because it "ignore[s] how automobiles are actually financed." *In re Penrod*, 636 F.3d 1175, 1176 (9th Cir. 2011) (Bea, J., dissenting). In addition to the adverse economic impact, the Circuit split produced jurisdictional differences with respect to the issue presented. Those differences impose additional administrative burdens on Amici with respect to their portfolios of RISCs. The *Penrod* decision also leaves open the possibility that debtors will seek to litigate the purchase-money nature of debt attributable to other expenses included in their RISCs, thereby exposing Amici to the continued risk and cost of litigation within the Ninth Circuit.

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[1] Both parties were given notice of, and have consented to, Amici filing a brief in support of AmeriCredit's Petition. Amici did not receive any financial contribution toward this brief from either party; neither party authored this brief.

SUMMARY OF THE ARGUMENT

The Ninth Circuit decision is a conclusory "outlier" in every sense. It failed to respond to well-reasoned decisions rendered by eight of its sister Circuits. *See generally In re Porch*, 2009 WL 3614439, *2 (Bankr. W.D. Pa. 2009) ("This Court hoped that it might have been able to add something to the analysis offered by these Courts of Appeals, but it is unable to do so as such opinions are thorough and comprehensive."). The decision also misconstrued and judicially amended the Uniform Commercial Code ("UCC") definition of a "PMSI"; employed a false distinction to disassemble a single secured transaction into discrete pieces; refused to consider established industry practice and related legislation; ignored the HP's legislative context and purposes; and created geographic variations with respect to a significant issue of bankruptcy law.

ARGUMENT

I. The Ninth Circuit Misconstrued The Term "PMSI" Used in the HP and Defined in UCC Article 9

AmeriCredit's petition presents a straightforward issue of statutory interpretation: Does the HP apply to a credit sale of an automobile that includes debt attributable to NE from a trade-in vehicle? Although the decision created an 8 to 1 circuit split, its analytical underpinnings are few in number and conclusory in nature. The Ninth Circuit said: "We acknowledge that our decision creates a circuit split, and we do not do this lightly." Op.

1161. Yet Amici respectfully submit that it proceeded to do exactly that. Indeed, each of the rationales it relied upon was rejected previously by other Circuits.[2]

Because Congress did not define the term "PMSI" used in the Bankruptcy Code, the Ninth Circuit agreed with its sister Circuits that the UCC is the proper place to turn for the definition of a "PMSI."[3] In doing so, however, it interpreted and applied the UCC definition in a manner that created a circuit split, both in its conclusion and in every element of its analysis.

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[2] The decision also conflicts with the otherwise universal trend in decisions holding that debt attributable to NE on a trade-in vehicle is a PMO. As illustrated by the list of cases in Appendix P to AmeriCredit's Petition, the first decisions on this issue were rendered in 2006. The early decisions that permitted cramdown of the NE obligation were either conclusory in nature or not well-reasoned and, thus, did not withstand the scrutiny of appellate review. Conversely, not a single bankruptcy court decision protecting the NE obligation as a PMO was reversed on appeal.

[3] The *Penrod* decision makes a security interest in an automobile less valuable within the Ninth Circuit than elsewhere. This result is contrary to the constitutional goal of "geographic uniformity" in bankruptcy laws. *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 188 (1902). The Ninth Circuit thus turned a blind eye to the presumption that Congress intended the HP to apply uniformly to the benefit of secured automobile creditors. *See also* U.S. Const. Art. 1, §VIII. (directing Congress to "establish ... *uniform* Laws on the subject of Bankruptcies throughout the United States.") (emphasis added).

The UCC definition of a "PMSI" focuses on the PMO that is secured by purchase-money collateral.[4] CAL. COM CODE §9103(a), (b)(1) (West 2001). The UCC defines a "PMO" as "an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used." *Id.* §9103(a)(2).

Comment 3 to CAL. COMM. CODE §9103(a)(2) (the "UCC Comment") states that: (i) the definition of a "PMO", the "price" of the collateral and the "value given to enable" its acquisition includes "obligations for expenses incurred ***in connection with*** acquiring rights in the collateral"; and (ii) "[t]he concept of [PMSI] requires a ***close nexus*** between the acquisition of the collateral and the secured obligation." (Emphasis added). The UCC Comment contrasts the requisite "close nexus" with a security interest that the debtor creates after acquiring the collateral. *Id.* ("[t]hus, a security interest does not qualify as a [PMSI] if a debtor acquires property on unsecured credit and *subsequently* creates the security interest to secure the purchase price") (emphasis added).

Amici will address each conflict that the *Penrod* decision created with the dispositive definitional language quoted above and with eight other Circuits.

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[4] The UCC definitions of a "PMSI" and a "PMO," and the related UCC Comment, are identical in all 50 states.

A. The NE Obligation Is Plainly An "Expense" That Penrod Incurred "In Connection With" Acquiring Her New Vehicle

The Ninth Circuit began its analysis with the following conclusory assertion: "AmeriCredit argues that the [NE] related to the [Explorer] Penrod traded in is an 'expense[] incurred in connection with acquiring rights in the collateral.' In doing so, AmeriCredit places more weight on this phrase than it can bear." Op. 1162.

This unsupported assertion creates a conflict with the reasoning employed by the other Circuits. The Eleventh Circuit, relying on the UCC Comment, explained: "[W]e see no persuasive reason why traditional transaction costs *and* the refinancing of reasonable bona fide [NE] in connection with the purchase of the new vehicle should not qualify as 'expenses' within the meaning of the comment." *In re Graupner*, 537 F.3d 1295, 1302 (11th Cir. 2008). Similarly, the Fourth Circuit considered and rejected the argument that the amount financed for the NE is not an "expense" incurred in connection with the acquisition of a new vehicle:

> Comment 3 is particularly instructive here because it provides that both "price" and "value given to enable" include numerous expenses that might not come within a common understanding of the term "price," namely: "obligations for expenses incurred in connection with acquiring

> rights in the collateral, sales taxes, duties, finance charges, ..."

In re Price, 562 F.3d 618, 626 (4th Cir. 2009); *accord In re Westfall*, 599 F.3d 498, 503-04 (6th Cir. 2010).

The Tenth Circuit also had little trouble characterizing NE as an "expense" incurred in connection with the sale: "[W]e discern no significant difference between the expense of discharging [NE] on a trade-in and some of the other examples listed in the Official Comment." *In re Ford*, 574 F.3d 1279, 1285 (10th Cir. 2009). Judge Posner, writing for the Seventh Circuit, summed it up succinctly: "[T]he UCC comment [] says that a [PMSI] includes 'obligations for expenses incurred in connection with acquiring rights in the collateral' – and that seems a pretty good description of [NE]." *In re Howard,* 597 F.3d 852, 857 (7th Cir. 2010); *see also Penrod*, 636 F.3d at 1176 ("[T]he amount of money the dealer paid the bank is every bit as much a part of the dealer's cost to sell the Taurus as is the factory invoice."). Automobile dealers and purchasers certainly would consider NE to be an "expense" incurred in connection with the sale.

B. The Characterization of the NE Obligation as an "Antecedent Debt" Is Demonstrably Incorrect

The Ninth Circuit asserted, in conclusory fashion, that "[t]he payment of Penrod's [NE] .... is the payment of an antecedent debt, not an expense incurred in buying the new vehicle." Op. 1162. That characterization has been rejected explicitly by the Fifth and Sixth Circuits and the New York Court of

Appeals (whose reasoning was relied upon by the Second Circuit in *In re Peaslee*, 585 F.3d 53, 57 (2d Cir. 2009)), and implicitly rejected by the Fourth, Seventh and Eleventh Circuits.

The antecedent debt characterization is plainly erroneous. The "present" vs. "antecedent" nature of the secured obligation at issue cannot be determined in the abstract without examining how that obligation was created and whether it was already owed to the secured party who assigned it to AmeriCredit. The Ninth Circuit did not undertake the analysis required to answer these questions.

Its failure to do so is remarkable given that the Fifth and the Sixth Circuits previously had explained cogently why the "antecedent debt" characterization was misplaced:

> Debtors further assert that the [NE] relates to an antecedent debt, and therefore does not qualify as "value given to enable." This argument fails for the simple reason that the portion of Debtors' obligation to Nuvell owed on account of [NE] does not, in fact, amount to a refinance of antecedent debt. *See In re Muldrew,* 396 B.R. 915, 926 (E.D.Mich.2008). Prior to financing the [NE] in connection with their purchase of the new vehicle, Debtors owed Nuvell nothing[5]. They owed the

[5] Although the Sixth Circuit stated that the Debtors owed nothing to the dealer's assignee (Nuvell), it noted earlier in its decision that the NE obligation was created by the dealer's

> debt secured by the trade-in vehicle to an unrelated third-party. The obligation secured by the vehicle-including the [NE] portion-consisted of all new credit funded by Nuvell.

Westfall, 599 F.3d at 505 (citing *In re Dale*, 582 F.3d 568, 575 (5th Cir. 2009)); *see also Peaslee*, 913 N.E.2d 387, 390 (N.Y. 2009). The *Muldrew* decision explained that:

> The amount Muldrew financed to pay off the [NE] on his trade-in vehicle involved *a new, smaller amount, a new lender, a new piece of collateral, and a new contract. In short, it was not "antecedent debt."* The [NE] was part of the bargained-for total cash price of the new vehicle ... as well as the value Graff gave to enable Muldrew to gain rights to and enjoy use of the collateral. A closer nexus to the collateral can hardly be imagined.

Muldrew, 396 B.R. at 926 (emphasis added). Accordingly, rather than being an antecedent debt, the NE obligation is a child of the new secured transaction.

The Fourth Circuit implicitly recognized the distinction between new value and antecedent debt when it noted that the UCC Comment:

> does point out a particular circumstance in which a 'close nexus' does not exist: when the debtor first acquires property using

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payoff advance and was payable initially to the dealer under the RISC, which it assigned to Nuvell.

> unsecured credit and only later creates a security interest in the property to pay off the unsecured debt. *But that sort of staggered transaction did not take place here.* To the contrary, [the dealership] created its security interest in the new car simultaneously with its financing of the ... [NE].

Price, 562 F.3d at 627 (citation omitted and emphasis added); *see also Howard*, 597 F.3d at 857 ("[t]he difference between that example [from the UCC Comment] and this case is that *wrapping [NE] into the [PMSI] is often necessary to enable the purchase of the car* ....") (emphasis added); *Graupner*, 537 F.3d at 1301. The "staggered transaction" described by the UCC comment and the Fourth Circuit is an example of a security interest granted with respect to an "antecedent debt."

Simply stated, the term "antecedent debt" cannot properly be applied to a new obligation, secured by new collateral, under a new RISC. The new obligation was created when the dealer, a new creditor, gave new value by making the trade-in payoff advance to the holder of the existing obligation, thereby enabling the dealer to clear the title to the trade-in vehicle.

C. The Assertion That NE Financed in Connection with a Sale is Not "Sufficiently Connected" to the Purchase of the New Vehicle Conflicts With the UCC "Close Nexus" Test

The Ninth Circuit stated: "While all things are connected at some level, the question here is whether the [NE] on Penrod's [trade-in] was sufficiently connected to the purchase of the Ford Taurus to establish a [PMSI]. We hold that it is not." Op. 1162. This assertion is inconsistent with the UCC "close nexus" standard and the conclusion reached by eight other Circuits.

Under the UCC Comment, which the Ninth Circuit agreed was applicable, the test for purchase-money status is whether the secured obligation bears a "close nexus" to the acquisition of the vehicle. The panel did not effectively refute the reasoning of its sister circuits, which had concluded that there was a close nexus between the financing of the NE on the trade-in vehicle and the purchase of the new vehicle.

The Eighth Circuit, for example, recognized the close connection between the debt resulting from paying off the NE on the trade-in and the purchase of the new vehicle:

> Since the parties here agreed to include the [NE] as part of the total sale price of the new vehicle, the [NE] was "an integral part of" and "inextricably intertwined" with the sales transaction. The [NE] financing of the trade-in and

> the new-car purchase were a "package deal." *Id.* Therefore, there was "a close nexus" between the acquisition of the new vehicle and the [NE] financing.

In re Mierkowski, 580 F.3d 740, 743-44 (8th Cir. 2009), *quoting Graupner*, 537 F.3d at 1302. The Fourth Circuit likewise had little trouble concluding that there was a "close nexus":

> The Prices claim, however, that our interpretation of "[PMO]" has no limitation-that if we find a "close nexus" here, then a "close nexus" will exist whenever a lender bundles an otherwise unrelated transaction with the purchase of a new car. This claim is hyperbolic. In reality, trading in an old car bears a close nexus to-and enables-the purchase of a new car, because it allows the purchaser to utilize the value of the trade-in.

Price, 562 F.3d at 627. Rather than directly addressing the other Circuit's analyses, the Ninth Circuit substituted its amorphous and subjective "sufficiently related" standard for the UCC "close nexus" standard.

D. The Ninth Circuit Invoked a False Distinction that Disregards Dispositive Text to Artificially Bifurcate a Single Secured Transaction

The Ninth Circuit sought to disconnect the financing of the NE obligation from the new secured transaction with the following assertion: "While the trade-in and new purchase may be performed at the same time, or use one unified document, this does not automatically mean that there is a [PMSI]." Op. 1162. The sole support cited for this non-sequitur is a dissenting opinion that included the following statement: "'[t]he realities of such [automobile sale] transactions frequently *require* the financing of [NE] to facilitate the sale, but the focus should be on price or value given as defined by Article 9, and not what is *necessary* to entice sellers and lenders into the transaction.'" *Id.* (emphasis added) (quoting *In re Mierkowski*, 580 F.3d at 746 (Bye, J., dissenting)).

The Ninth Circuit did not explain how its acknowledgment that the financing of NE is effectively required to facilitate the sale of a new vehicle supported its inconsistent conclusion that there is not a "close nexus" between the financing of the NE and the acquisition of the new vehicle. In reality, the purported distinction between expenses that are necessary to "facilitate the sale", and those that are part of the "price" or the "value given to enable" is a false distinction[6]. It contradicts the

[6] The Ninth Circuit begins its analysis of the UCC definition of PMSI by invoking the seminal article by Grant Gilmore, the father of Article 9. *The Purchase Money Priority*, 76 HARV. L. REV. 1333 (1963). In that article, Professor Gilmore explains

UCC "close nexus" standard for determining "purchase-money" status, and the UCC reference to value given to "enable" the acquisition of collateral. The dissent to the Order Denying AmeriCredit's Petition for Rehearing En Banc acknowledged the falsity of this purported distinction: "If the transfer of title of the Explorer to the Taurus dealer did not 'enable' the sale of the Taurus to Penrod, then words have lost their meaning." *Penrod*, 636 F.3d at 1179.

Two other Circuits have characterized the purported distinction between enabling the installment sale transaction to occur and enabling the buyer to acquire rights in the collateral as "meaningless":

> It would make little sense to attempt artificial distinctions between portions of a single transaction that enabled the acquisition of rights in the vehicle and portions that supposedly did not.... From a practical perspective, that distinction is meaningless. If [NE] financing enabled the transaction in which the new car was acquired, then, in reality, the [NE] financing also

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that one of the UCC bedrock principles "is to free the purchase money concept from artificial limitations; rigid adherence to particular formalities and sequences should not be required." *Id.* at 1372. Professor Gilmore would be shocked by the "artificial limitations" that the Ninth Circuit imposed on the concept of a "PMO." *See*, *Penrod*, 636 F.3d at 1176 ("Would anyone extend this line of credit and payoff the buyer's [NE] on her old car if he could not get a [PMSI] ... in the total amount of the debt he assumed? Not if he wanted to stay in business.").

> enabled the acquisition of rights in the new car.

Price, 562 F.3d at 625; *accord*, *Dale* 582 F.3d at 574.

The Tenth Circuit also rejected an attempt by the debtors to artificially separate the credit sale of the new vehicle and the trade-in of the old vehicle into discrete pieces: "It may be theoretically possible to split the exchange of vehicles into two separate transactions, but that is not how the parties treated the deal. They signed a single [RISC] encompassing the trade-in of the old vehicle and the sale of the new vehicle." *Ford*, 574 F.3d 1279; *see also Mierkowski*, 580 F.3d. at 742.

E. The UCC Comment Does Not Impose A "Similarity" Requirement

The Ninth Circuit concluded that "[NE] cannot fall under the 'other similar obligations' category because [NE] is unlike the examples listed in Comment 3." Op. 1162 (citation omitted). This statement is premised on the erroneous assumption that "obligations for expenses incurred in acquiring rights in the collateral" are not a distinct type of PMO in the UCC Comment.

The assertion that NE is unlike the other examples listed in the UCC Comment is, in fact, plainly inconsistent with the text of the UCC Comment. The Comment contains an illustrative list of PMOs. The first item on this illustrative list is grammatically independent of the other types of enumerated PMOs. It thus is a discrete category of obligations that are deemed to bear a "close nexus"

to the purchase of the collateral: "obligations for expenses incurred *in connection with* acquiring rights in the collateral..." CAL. COM. CODE §9103 cmt. 3 (emphasis added).

The Sixth Circuit noted the free-standing nature of this type of obligation: "[R]egardless of whether [NE] financing qualifies as an 'other similar obligation,' it remains an obligation for an expense 'incurred *in connection with* acquiring rights in the collateral,' and satisfies the definition of a PMSI." *Westfall*, 599 F.3d at 504 (emphasis added); *accord In re Howard,* 597 F.3d at 857. However, in concluding that NE "cannot fall under the 'other similar obligations' category because [it] is unlike the other examples listed in Comment 3," the Ninth Circuit deprived the first item on the PMO list of its free-standing nature.

It is telling that, in advancing the "similarity" argument, the Ninth Circuit and the two dissents upon which it relied rewrote the definitional language in the UCC Comment (as opposed to quoting the words that actually are there). The Ninth Circuit quoted the New York Court of Appeals dissent for the proposition that "[NE] will 'typically be larger, and more readily separable from the purchase transaction itself, than *such things as* sales tax, duties and finance charges.'" Op. 1162, *quoting In re Peaslee*, 913 N.E. 2d at 391, (Smith, J., dissenting) (emphasis added). There is no basis in the text of the UCC Comment for the asserted distinctions based upon the size of an expense or whether it is "more readily separable from the purchase transaction." Similarly, the dissent in *Ford* rewrote the text of the UCC Comment by

inserting the phrase "such as" after the reference to "expenses incurred in acquiring rights in the collateral" – an act of judicial legislation. *Ford*, 574 F.3d at 1289 ("The items on Comment 3's list – *such as* sales tax, finance charges....") (emphasis added) (Tymkovich, J., dissenting).

Although the Ninth Circuit and the two dissenting opinions insert the words "such as" or "such things as" into their paraphrase of the UCC Comment, the Comment contains no such language. If there were a similarity requirement of the type suggested by the Ninth Circuit, the Comment would read: "obligations for expenses incurred in connection with acquiring rights in the collateral *[such as]* sales taxes, duties..." The Comment does not contain the words "such as" or words to that effect and therefore does not contain a similarity requirement of the type suggested by *Penrod*.

As the Tenth Circuit explained in rejecting the argument that the UCC Comment limits a "PMO" to the "cash price plus transaction costs": "[The Drafters] could easily have done so. Instead, we are left with *the language the drafters actually used*, which we conclude is broad enough to encompass [NE] on trade-in vehicles." *Ford*, 574 F.3d at 1285 (emphasis added); *Price*, 562 F.3d at 626 ("As this extensive list of expenses makes clear, neither 'price' nor 'value given to enable' have the strictly cabined meaning in the UCC that appellees suggest.").

Even though the UCC Comment does not require that PMOs be "similar" to the illustrative expenses other than those "incurred in connection with acquiring rights in the collateral", other Circuits

have concluded that the NE obligation would meet such a requirement. All the expenses specified in the UCC Comment are similar in the following respect: they all bear a "close nexus" to the acquisition of the collateral. This is equally true of NE that is financed in connection with the acquisition of a new vehicle. *Price*, 562 F.3d at 627 ("the pertinent feature shared by all of the listed expenses is that they are incurred 'in connection with' the acquisition of the new car -- just like [NE] financing"); *see also Mierkowski*, 580 F.3d at 742.

F. The Purported Distinction Between "Seller" and "Lender" PMSIs Conflicts with the Text of the UCC Comment, Which Employs A Single "Close Nexus" Test for Determining Purchase-Money Status

The Ninth Circuit discusses at length the distinction between a PMSI taken by an installment "seller" and one taken by a "person who by making advances or incurring obligations gives value to enable." Op. 1164. The Ninth Circuit explains the distinction between the types of PMSIs as follows: "A seller obtains a [PMSI] through a dealer financed sale, where the merchandise goes out the door upon the credit of the buyer." *Id.* By contrast, "[a] lender such as a finance company ... obtains a [PMSI] when it makes funds available to the purchaser to buy the merchandise." *Id.* The import of this distinction, according to the Ninth Circuit, is that "[a]s a dealer-financed transaction, 'price' should be used instead

of 'value given to enable.'"[7] *Id.* at n.3. *But see Penrod*, 636 F.3d at 1178-79.

The Ninth Circuit failed to acknowledge, however, that the distinction it drew is immaterial because the purchase-money status of either type of "PMO" is determined by reference to the same UCC Comment:

> As used in subsection (a)(2), *the definition of "[PMO]," the "price" of collateral or the "value given to enable" includes* obligations for expenses incurred in connection with acquiring rights in the collateral, sales taxes, duties, finance charges, interest, freight charges, costs of storage in transit, demurrage, administrative charges, expenses of collection and enforcement, attorney's fees, and other similar obligations.
>
> The concept of [PMSI] requires a close nexus between the acquisition of collateral and the secured obligation.

CAL. COMM. CODE §9103, cmt. 3 (emphasis added). The UCC Comment thus treats installment sales and purchase-money loans of money as two sides of the same PMO coin and subjects them to the same standard for determining purchase-money status --

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[7] This purported distinction has been rejected by the other Circuits. *E.g., Dale*, 582 F.3d at 574 ("We accordingly look to both prongs [price and value given]."); *Westfall*, 599 F.3d at 503 ("These [appellate] decisions generally hold that [NE] meets both the 'price' and 'value given to enable' prongs of the PMSI definition. We agree....").

the "close nexus" standard. The UCC Comment provides that this standard is met by an obligation "for expenses incurred in connection with acquiring rights in the collateral."

II. The *Penrod* Decision Conflicts With Decisions of Sister Circuits Recognizing the Relevance of State Consumer Credit Regulatory Laws Authorizing the Financing of NE

In addition to the UCC, many states have consumer credit laws regulating automobile retail installment sales and the RISCs that evidence them. Many of these state consumer credit regulatory laws expressly authorize the inclusion of debt attributable to NE on a trade-in vehicle in the "amount financed" or the "price" of a vehicle financed under a RISC.[8]

The California Automobile Sales Finance Act ("AFSA") is a case in point. It provides that the "cash price" under a "conditional sale contract"[9] shall include "the cash price of . . . services related to the sale, including . . . payment of a prior credit or lease balance remaining on property being traded in." CAL. CIV. CODE §2981(e). It defines a "conditional sale contract" as:

> [a] contract for the sale of a motor vehicle between a buyer and a seller...under which possession is

[8] Appendix O to the AmeriCredit Petition identifies 35 state consumer credit regulatory statutes that so provide.

[9] "Conditional sale contract" is the term used in the ASFA to describe what other states refer to as a RISC.

> delivered to the buyer and...[a] lien on the property is to vest in the seller *as security for the payment of part or all of the price*, or for the performance of any other condition.

Id. §2981(a)(1)(B)(emphasis added). These definitions confirm that the NE obligation included in the RISC entered into by Penrod is a "PMO."

The Ninth Circuit summarily rejected AmeriCredit's suggestion that it "invoke the *in pari materia* doctrine to read the ASFA and Article 9 together, to construe the term 'price of the collateral.'" Op. 1163. It asserted instead that "the purpose of the ASFA 'cash price' definition is to disclose to consumers that they are responsible for [NE] charges" and "says nothing about whether those charges result in a [PMSI]." Op. 1163.

Penrod failed to recognize that the AFSA comprehensively regulates automobile retail installment sales, and the RISCs that evidence them, virtually from cradle to grave. (*See* AmeriCredit Petition at 28 n.13.) To the extent that the AFSA regulates the disclosure of NE charges, it does so in the context of its substantive regulation of the terms and conditions of RISCs. In short, the ASFA authorization to include debt attributable to NE in a RISC represents a legislative policy determination that the NE obligation bears a "close nexus" to the retail installment sale of the new vehicle.

In concluding that the ASFA "cash price" definition should not be read *in pari materia* with the UCC "PMO" definition because the two statutes

have different purposes, the Ninth Circuit also mischaracterized the standard for applying the *in pari materia* doctrine. As construed by the California courts, the key to determining whether one statute should be interpreted in light of another is whether the two statutes cover the same subject matter.[10] Although ASFA and Article 9 of the UCC have different purposes (they would be redundant if they did not), they cover different aspects of the same subject: *secured retail installment sales of automobiles.* Given that common ground, if the UCC definition of the "price" (and, thus, a "PMO") is thought to be unclear, there is no reason **not** to rely upon the ASFA definition of the "cash price" in construing it.[11]

The decision of the Ninth Circuit to "ignore the ASFA's 'cash price' definition," Op. 1163, conflicts with decisions of sister Circuits recognizing the import and related nature of state consumer credit regulatory laws authorizing the financing of NE in connection with financed sales of automobiles. *See Mierkowski*, 580 F.3d at 743; *Graupner*, 537 F.3d at 1301; *see also Peaslee*, 913 N.E.2d at 390 (finding that the New York Motor Vehicle Retail Instalment Sale Act definition of the "cash sale price" was "not inconsequential[].").

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[10] *Droeger v. Friedman, Sloan & Ross,* 54 Cal.3d 26, 50 (1991); *Isobe v. Unemployment Ins. Appeals Bd.,* 12 Cal.3d 584, 590 (1974).

[11] *See also* CAL. COMM. CODE §9201(b) and (c) ("A transaction subject to this division is subject to any applicable rule of law which establishes a different rule for consumers; to ... the [ASFA], Chapter 2b...").

Finally, *Penrod*'s description of the Seventh Circuit decision in *Howard* is telling. Although the Ninth Circuit stated that the Seventh Circuit had "recognized that laws such as the ASFA are not helpful in determining the 'price of the collateral,'" the Seventh Circuit, in fact, noted that the Illinois Motor Vehicle Retail Installment Sales Act "is at least evidence that [NE] is indeed a common element of a credit purchase of a car, and this will turn out to be important in our analysis." 597 F.3d at 857. Thus, notwithstanding the Ninth Circuit's suggestion to the contrary, no other Circuit has characterized the NE provisions of state consumer credit regulatory laws such as the ASFA as inconsequential.

III. The Ninth Circuit Ignores the Context in Which Congress Legislated and the Purposes of the HP

Although this case concerns the HP, the Ninth Circuit did not consider the context in which it was enacted and the reasons for its enactment. As a result, it misconstrued the HP and the UCC in a crabbed manner that conflicts with decisions of sister Circuits.

A. The legislative context

The HP was not enacted in a vacuum. The prevailing industry practices and the existing regulatory context informed Congress when it penned the HP. As the Eleventh Circuit noted,

Congress is deemed to legislate with an awareness of pertinent industry practices:

> If Congress did not intend for the [HP] to apply to a trade-in's [NE] . . . it would have the effect of excluding a substantial number of lawful auto finance transactions that were industry practice when BAPCPA was enacted (a practice that Congress is presumed to have known about). This would be an absurd result...

Graupner, 537 F.3d at 1303. The Ninth Circuit made no mention of the industry practice prevailing at the time of enactment.

The industry practice prevailing at the time of enactment also was reflected in federal and state consumer credit regulatory laws. The Official Staff Commentary to Federal Reserve Board Regulation Z, the implementing regulation for the federal Truth in Lending Act ("TILA"), contained detailed guidance authorizing automotive creditors to disclose NE on a trade-in as part of the "Amount Financed" and the "Total Sale Price" in a credit sale transaction.[12] Moreover, existing state consumer credit regulatory laws and decisions in 36 states expressly authorized NE to be included in the purchase-money package that is an automobile RISC. (*See* Section II *supra*; AmeriCredit Petition, App. O). In contrast to some of its sister Circuits, *Penrod* disregarded the import of the federal and state consumer credit regulatory

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[12] *See* 12 C.F.R. Part 226, Supp. I, ¶¶ 2(a)(18)-3, at 582, 18(j)-3, at 700 (2011).

laws that formed part of the regulatory landscape on which Congress legislated.

B. The purposes of the HP

The *Penrod* decision offers only two sentences regarding the legislative policies of the statute it purported to construe: "The [HP] prevents the bifurcation of certain claims. Bifurcation occurs when a creditor's claim is split into secured and unsecured claims." Op. 1161.

1. The anti-bifurcation purpose

After acknowledging that one purpose of the HP is to curb the practice of bifurcating the claims of automotive creditors, the Ninth Circuit flouts that purpose by creating a new form of bifurcation or cramdown. Under *Penrod*, the claims of automotive creditors are bifurcated into an unsecured claim for the portion of the debt attributable to the NE and a secured claim attributable to the remainder of the debt.

The Fourth Circuit noted that subjecting NE to this type of bifurcation conflicts with the Congressional goal of "protect[ing] secured car lenders from having their claims bifurcated in Chapter 13." *Price*, 562 F.3d at 628. Indeed, even the dissent in the New York Court of Appeals conceded that treating the NE obligation as a PMO produces:

> a result more consistent with Congress's purpose in enacting the

> "[HP]" as part of ...[BAPCPA]. The purpose of the HP ... is to protect sellers and other financiers of automobile purchases against ... "cram down" ...

Peaslee, 913 N.E.2d at 392-93 (Smith, J., dissenting).

2. The fair treatment purpose

A second purpose of the HP, reflected in the title of the section of the enacting legislation, is "Giving Secured Creditors Fair Treatment in Chapter 13." As discussed in AmeriCredit's Petition, pp. 12-14, the principal purpose of BAPCPA was to establish a "means test" that would require many debtors to file Chapter 13, rather than Chapter 7, bankruptcy proceedings. *Price*, 562 F.3d at 629. This change favored unsecured creditors such as credit card issuers by requiring more credit card holders to file payment plans under Chapter 13. However, automotive creditors would have been harmed by this change because Chapter 7 debtors often reaffirm their vehicle finance obligations whereas Chapter 13 debtors seek to cramdown their secured automotive debt.

Automotive creditors therefore sought a compromise that would protect their full secured claims from cramdown. The HP is the legislative compromise intended to ensure that secured creditors receive "fair treatment" in Chapter 13 proceedings. *Price,* 562 F.3d at 629 ("the [HP] was intended to protect secured creditors in one narrow area as part of a statute that generally favored their unsecured counterparts."). This prompted the Sixth

Circuit to observe that "[t]he hanging-sentence architects intended only good things for car lenders and other lienholders." *Westfall*, 599 F.3d at 501-02. Denying cramdown protection to a vital component of modern secured vehicle financing is hardly a "good thing" for lienholders like AmeriCredit.

3. The contract-enforcement purpose

Another purpose of the HP, as indicated in the subsection of the enacting legislation, is "Restoring the Foundation for Secured Credit." In a decision involving a different HP issue, the Seventh Circuit concluded that this subsection heading "implies replacing a contract-defeating provision such as § 506 with the agreement freely negotiated between debtor and creditor." *In re Wright*, 492 F.3d 829, 832 (7th Cir. 2007); *see also* CAL. COMM. CODE §1103(a)(2) (urging courts to construe the UCC in a manner that respects the contract of the parties and industry practice). *Penrod* frustrates this contract-preservation purpose by refusing to enforce the RISC as written and effectively eliminating the NE obligation from the secured "package deal" struck by the parties.

Penrod thus conflicts with all three of the purposes underlying the HP, as well as decisions of sister Circuits.

CONCLUSION

Amici urge this Court to grant AmeriCredit's Petition for Certiorari.

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Respectfully submitted,

BARKLEY CLARK

Barkley Clark
Katherine M. Sutcliffe Becker
Tracey M. Ohm
Stinson Morrison Hecker LLP
1150 18th Street, NW, Suite 800
Washington, D.C. 20036
Telephone: (202) 785-9100
Facsimile: (202) 572-9994
Counsel for Amici

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