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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an advance attributable to a trade-in vehicle's "negative equity" (*i.e.*, debt owed above and beyond the current collateral value of the trade-in vehicle) is part of the "purchase money security interest" arising from the sale of a new vehicle and therefore protected from bifurcation and cramdown by the "hanging paragraph" of 11 U.S.C. § 1325(a).

The resolution of this question depends entirely upon resolution of the following *state law* question:

> Whether an advance attributable to a trade-in vehicle's "negative equity" is a part of the "purchase money obligation" arising from the purchase of a new car, as defined under the California Commercial Code.

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PRELIMINARY STATEMENT

This matter arises out of the chapter 13 bankruptcy case of Respondent Marlene Penrod ("Penrod"). Petitioner AmeriCredit Financial Services, Inc. ("AmeriCredit") is a creditor of Penrod as assignee of a retail installment sales contract between Penrod and Hansel Ford car dealership.

In September 2005, Penrod purchased a 2005 Ford Taurus from Hansel Ford in Santa Rosa, California.[1] Pet. App. at 18a; *In re Penrod*, 392 B.R. 835, 838 (B.A.P. 9th Cir. 2008). The cash price of the Taurus was approximately $23,500, and with tax and license, the total amount Penrod paid for the Taurus was $25,600. Pet. App. at 18a; *Penrod*, 392 B.R. at 838. Penrod paid $1,000 down and at the same time traded in her 1999 Ford Explorer. Pet. App. at 3a-4a; *In re Penrod*, 611 F.3d 1158, 1159-60 (9th Cir. 2010). Although Penrod owed over $13,000 secured by the Explorer, she received a credit of only $6,000 for the trade-in of the vehicle. Pet. App. at 4a; *Penrod*, 611 F.3d at 1160. Therefore, there was more than $7,000 in "negative equity" (*i.e.*, the amount by which the indebtedness secured by the vehicle exceeded its trade-in value) with respect to

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[1] AmeriCredit sets forth additional facts not contained in the opinions of the lower courts based on its reading of the Retail Installment Sales Contract. Pet. at 5-6. The copy of this agreement placed in the record by AmeriCredit is extremely difficult to read. Pet. App. at 158a. AmeriCredit's interpretations of otherwise illegible portions of the contract should be disregarded.

the Explorer. Pet. App. at 4a; *Penrod*, 611 F.3d at 1160. The dealership paid off the outstanding balance owed on the Explorer, credited Penrod for the $6,000 trade-in value of the Explorer, and added approximately $7,000 to the indebtedness secured by the new Taurus. Pet. App. at 4a; *Penrod*, 611 F.3d at 1160. Penrod therefore ultimately borrowed approximately $31,700, of which at most $25,600 was attributable to the cost of the Taurus. Pet. App. at 4a; *Penrod*, 611 F.3d at 1160. According to the contract, Penrod was to pay 20% per annum interest on the entire principal balance of the loan, including both the amount advanced to finance her acquisition of the Taurus and the additional $7,000 in "negative equity." Pet. App. at 19a n.2; *Penrod*, 392 B.R. at 838 n.2. The contract itself separated the negative equity from the actual purchase price of the Taurus. Pet. App. at 158a. The dealership subsequently assigned the loan contract and related security interest in Penrod's Taurus to AmeriCredit. Pet. App. at 4a; *Penrod*, 611 F.3d at 1160.

A year and a half after purchasing the Taurus, Penrod filed for bankruptcy protection under chapter 13. Pet. App. at 4a; *Penrod*, 611 F.3d at 1160. On September 21, 2007, the bankruptcy court confirmed Penrod's plan, under which she retained the Taurus subject to that portion of AmeriCredit's claim secured by a purchase money security interest in the car. The plan required Penrod to, among other things, make future payments to AmeriCredit of $18,537.89 plus interest out of her future earnings. But, consistent with the holdings of all three courts below, Penrod's plan treated the portion of

AmeriCredit's claim that was based on the refinancing of past indebtedness associated with the Explorer as an unsecured claim, because the present value of the Taurus was exhausted by the remaining purchase money obligation secured by the Taurus, and the non-purchase money component of the original loan was not protected from bifurcation by the "hanging paragraph." Pet. App. at 4a-5a; *Penrod*, 611 F.3d at 1160.

In bankruptcy, the claims of secured creditors are, as a matter of course, split or "bifurcated" into two parts: a secured portion equal to the value of the collateral and an unsecured portion represented by any amount owed over the value of the collateral. 11 U.S.C. § 506(a). The amendments to the Bankruptcy Code in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") created a limited exception to this longstanding statutory treatment of secured creditors. For AmeriCredit to qualify for this special exception to the general bankruptcy rule of bifurcation, four requirements must be satisfied: (i) a purchase money security interest must secure the debt that is the subject of the claim, (ii) the debt must have been incurred less than 910 days before bankruptcy, (iii) the collateral must be a motor vehicle, and (iv) the motor vehicle must have been acquired for the personal use of the debtor.

The issue in this case is whether AmeriCredit holds a purchase money security interest in the Taurus to the full extent of AmeriCredit's claim. *See, e.g.*, Pet. B.A.P. Br. at 5. To the extent that AmeriCredit holds a qualifying purchase money

security interest in the Taurus, it is not subject to the ordinary bankruptcy rule of bifurcation. But to the extent that the portion of AmeriCredit's claim based on the refinancing of past indebtedness (as opposed to the acquisition price of new property) exceeds the present value of its collateral, the ordinary rule of bifurcation still applies. Penrod's position throughout this litigation is that AmeriCredit is, at most, entitled to special protection under the hanging paragraph only to the extent that monies were advanced to fund the purchase price of the Taurus, not the portion of the loan that effectively refinanced the "negative equity" in the Explorer.

The Bankruptcy Code does not define the term "purchase money security interest." The term, however, has acquired a particular meaning in commercial law that can be traced back to early common law. "Purchase money security interests" have been given preferential treatment in commercial law for centuries. That special treatment is carried forward into modern commercial law by the Uniform Commercial Code ("UCC"), as adopted by the State of California. The meaning of "purchase money security interest" has always excluded, and still today excludes, the refinancing of past indebtedness as part of a purchase money obligation.

In accordance with this Court's decisions in *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 549 U.S. 443, 450-51 (2007), and *Butner v. United States*, 440 U.S. 48, 53-55 (1979), the courts below turned to California state law to

ascertain the meaning of "purchase money security interest." Based on California Commercial Code section 9103, the Court of Appeals, the bankruptcy appellate panel, and the bankruptcy court all properly concluded that funds advanced to pay off the negative equity on Penrod's Explorer did not constitute a purchase money obligation with respect to the Taurus, and, therefore, AmeriCredit did not hold a purchase money security interest to the full extent of its claim. Further, all three courts correctly rejected AmeriCredit's argument that California's Automobile Sales Finance Act, CAL. CIV. CODE §§ 2981 *et seq.* ("ASFA"), and the California Commercial Code should be construed together under the common law doctrine of *in pari materia* to alter what would otherwise be the meaning of the applicable California Commercial Code provision. Whether California statutes are properly construed *in pari materia* is also a California state law question involving numerous factors including the intent of the California legislature. The lower courts rightly interpreted California law with respect to the meaning of the California Commercial Code and the applicability of the *in pari materia* doctrine to exclude consideration of California's ASFA.

The courts below held, and AmeriCredit previously conceded, that this case turns solely on an interpretation of California law. Pet. App. at 7a, 30a; *Penrod*, 611 F.3d at 1161; *Penrod*, 392 B.R. at 843-44. The state law nature of this dispute makes it inappropriate for this Court's review. In any event, the courts below correctly limited application of the hanging paragraph to the "purchase money

security interest" in Penrod's Ford Taurus as that term of art has been understood both at common law and under modern commercial law in California, and elsewhere, for centuries.

RELEVANT STATE STATUTE

The facts of this matter are straightforward and summarized in the previous section. The California Commercial Code provision relevant to this case provides that:

> (a) In this section:
>
> (1) "Purchase money collateral" means goods or software that secures a purchase money obligation incurred with respect to that collateral.
>
> (2) "Purchase money obligation" means 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.
>
> (b) A security interest in goods is a purchase money security interest as follows:
>
> (1) To the extent that the goods are purchase money collateral with respect to that security interest. . . .

CAL. COM. CODE § 9103. In addition, Comment 3 states that:

> [T]he definition of "purchase-money obligation," 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 "purchase-money security interest" requires a close nexus between the acquisition of the collateral and the secured obligation.

Id. § 9103 cmt. 3.

REASONS FOR DENYING THE PETITION

A. As AmeriCredit Has Previously Argued, This Case Turns on the Meaning of the Term "Purchase Money Security Interest" Under the California Commercial Code and Therefore Does Not Involve a Circuit Split.

1. *The Meaning of "Purchase Money Security Interest" in This Case Is a Question of California Commercial Law.*

In bankruptcy, the claim of a secured creditor is, as a matter of course, split or "bifurcated" into two parts: a secured portion equal to the present value of the collateral and an unsecured portion represented by any amount owed over the value of the collateral. 11 U.S.C. § 506(a).[2] BAPCPA amended the Bankruptcy Code to create a limited exception to this basic principle by adding the following unnumbered paragraph to section 1325(a):[3]

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[2] Section 506(a)(1) provides, in pertinent part, that "[a]n allowed claim of a creditor secured by a lien on property . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim." 11 U.S.C. § 506(a)(1).

[3] Because the paragraph is unnumbered, most courts and commentators refer to it as the "hanging paragraph." It is usually cited as 11 U.S.C. § 1325(a)(*).

> For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a ***purchase money security interest*** securing the debt that is the subject of the claim, the debt was incurred within the 910-day [period[4]] preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

11 U.S.C. § 1325(a)(*) (emphasis added).

The hanging paragraph excepts two kinds of consumer purchase money obligations from traditional bankruptcy bifurcation: those incurred within 910 days of bankruptcy secured by personal use automobiles, and those incurred within one year of bankruptcy secured by other collateral. This case involves a debt secured by a personal use automobile.

Statutory construction begins with the plain language of the statute. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). The Bankruptcy

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[4] The word "period," apparently elided in BAPCPA itself, was recently added to the hanging paragraph by the Bankruptcy Technical Corrections Act of 2010, PUB. L. NO. 111-327, 124 STAT. 3557 (2010).

Code does not define the term "purchase money security interest." When, as here, a term, particularly a term of art directly drawn from common law and state commercial law, is not defined by the Bankruptcy Code, state law determines the scope of the parties' rights and obligations. *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450-51 (2007); *see also Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000); *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 329 (1993); *United States v. Kimbell Foods*, 440 U.S. 715, 740 (1979); *Butner v. United States*, 440 U.S. 48, 53-55 (1979). This rule makes sense, because in general bankruptcy law is not designed fundamentally to alter property rights. Rather, "a bankruptcy proceeding is principally a forum in which all of a debtor's creditors can gather, assemble the debtor's assets, and divide them among themselves, according to the rights that state law gives them." Douglas C. Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon*, 1982 SUP. CT. REV. 25, 35.

AmeriCredit's federal law claim is essentially that a special "federal rule of equity" preempts state law with respect to the proper scope of a "purchase money security interest." *See* Pet. at 14-20. This approach was unanimously rejected in *Butner v. United States*, 440 U.S. 48 (1979). In *Butner*, this Court was asked to determine the rights of a second mortgagee to rents collected during the period between the mortgagor's bankruptcy and the foreclosure sale of the property. *Id.* at 49. The circuits were split about whether the mortgagee's rights pursuant to a security interest were to be

determined by reference to state law or by reference to "a federal rule of equity." *Id.* at 52-53. Under this "federal rule of equity," some courts afforded mortgagees a security interest in rents even if state law did not recognize any such interest. *Id.* at 53. Similarly, in this case, AmeriCredit now seeks to have its claim recognized as a "purchase money security interest" regardless of any contrary meaning of this term of art under California state law.

In *Butner*, this Court rejected the concept of a "federal rule of equity," explaining that:

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving a windfall merely by reason of the happenstance of bankruptcy. The justification for application of state law are not limited to ownership interests; they apply with equal force to security interests . . . .

Id. at 55 (citation and quotation marks omitted).

Butner is a cornerstone for modern United States bankruptcy law as it has developed in our

complex federal system. *Butner*'s teaching continues to apply in many different bankruptcy contexts. *See, e.g.*, Thomas H. Jackson, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 21-27 (Harvard 1986); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 818 n.3 (1987).

Moreover, historic practice supports reference to state law for the meaning of "purchase money security interest" in the hanging paragraph. In particular, courts have freely borrowed from state commercial law when applying Bankruptcy Code provisions dealing with "purchase money security interests." *See, e.g.*, *In re Billings*, 838 F.2d 405, 406 (10th Cir. 1988) (noting while interpreting 11 U.S.C. § 522(f) that "courts have uniformly looked to the law of the state in which the security interest is created" to define "purchase money security interest"); *Pristas v. Landaus of Plymouth, Inc.*, 742 F.2d 797, 800 (3d Cir. 1984) (same approach to section 522(f)); *In re Pan Am. Corp.*, 125 B.R. 372, 376 (S.D.N.Y.), *aff'd*, 929 F.2d 109 (2d Cir. 1991) (same approach to former section 1110).

Based on these principles, *every* federal court of appeals and most lower courts have turned to *state law* to ascertain the meaning of the term "purchase money security interest" in the hanging paragraph. *See, e.g.*, *In re Westfall*, 599 F.3d 498, 502 (6th Cir. 2010) (defining purchase money security interest in accordance with Ohio law); *In re Howard*, 597 F.3d 852, 855 (7th Cir. 2010) (same under Illinois law); *In re Dale*, 582 F.3d 568, 573 (5th Cir. 2009) (same under Texas law); *In re Mierkowski*, 580 F.3d 740,

742 (8th Cir. 2009) (same under Missouri law); *In re Ford*, 574 F.3d 1279, 1283 (10th Cir. 2009) (same under Kansas law); *In re Peaslee*, 547 F.3d 177, 184-85 (2d Cir. 2008) (stating that "state law governs the definition of [purchase money security interest] in the hanging paragraph"); *In re Look*, 383 B.R. 210, 216 (Bankr. D. Me. 2008) (defining purchase money security interest in accordance with Maine law); *In re Mancini*, 390 B.R. 796, 800 (Bankr. M.D. Pa. 2008) (same under Pennsylvania law).

AmeriCredit's suggestion that the Court of Appeals' opinion conflicts with the decisions of eight other circuits and the decision of New York's highest court is incorrect for this reason. The parties agree that the decision below turns on an issue of California state law. Pet. at 4 n.1 ("The parties agree that the Uniform Commercial Code, as applicable in California, applies to the transaction between Petitioner and Respondent."). Yet there is no circuit split regarding the definition of purchase money security interest under the California Commercial Code. All the conflicting decisions cited by AmeriCredit involved the law of other states, not California.[5]

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[5] The fact that California Commercial Code section 9103 is drawn from the UCC, a model statute sponsored by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, does not somehow convert the question determined below into a matter of federal law. This Court does not sit to resolve conflicting interpretations of the UCC or other so-called uniform state

footnote continued on next page...

Although the provisions of the California Commercial Code are similar to provisions enacted by some other states, the Court of Appeals was obliged to interpret California law consistently with the approach taken by the courts of *California, see Ford*, 574 F.3d at 1287 n.1 (Tymkovich, J., dissenting), not the holdings of other state courts.

The decision in *Reiber v. GMAC, LLC (In re Peaslee)* illustrates this point. 547 F.3d 177 (2d Cir. 2008), *certified question answered by In re Peaslee*, 913 N.E.2d 387 (N.Y. 2009), *answer to certified question conformed to In re Peaslee*, 585 F.3d 53 (2d Cir. 2009). Faced with the same issue presented in this matter, the Second Circuit Court of Appeals certified the question to the New York Court of Appeals "[b]ecause we believe that the New York Court of Appeals should be given the opportunity to address this important and recurring question of *New York state law*." 547 F.3d at 179 (emphasis added) The court noted that section 9-103 of the New York UCC "does not make clear whether rolled-in negative equity falls within the definition of 'purchase-money obligation,' and New York courts have not yet considered" the question. *Id.* at 185. Accordingly, the Second Circuit panel stated that "[w]e believe that these questions – *which are exquisitely state law issues, despite their relevance to our interpretation of the Bankruptcy Code – are best*

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laws. *Cf.* Pet. at 21-27. AmeriCredit's complaints about disuniform interpretation of the UCC should be directed to the Permanent Editorial Board for the UCC, not this Court.

considered by New York's highest court. We therefore offer the New York Court of Appeals the opportunity to guide us, should it opt to do so." *Id.* at 186 (emphasis added).[6]

The same logic applies here. The question whether a trade-in vehicle's "negative equity" is a part of the "purchase money obligation" under the California Commercial Code, on which the outcome of this case turns, is a question for the California Supreme Court to decide in the final instance, not this Court. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (identifying the reason underlying the adequate and independent state ground doctrine as "the partitioning of power between the state and federal judicial systems. . . . We are not permitted to render an advisory opinion . . . ."), *abrogated on other grounds by Michigan v. Long*, 463 U.S. 1032 (1983); *Murdock v. City of Memphis*, 87 U.S. 590, 631 (1874) ("[W]e think it

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[6] The specific question certified was "[i]s the portion of an automobile retail installment sale attributable to a trade-in vehicle's 'negative equity' a part of the 'purchase-money obligation' arising from the purchase of a new car, as defined under New York's U.C.C.?" *Peaslee*, 547 F.3d at 186.

equally clear that it has been the counterpart of the same policy to vest in the Supreme Court, as a court of *appeal* from the State courts, a jurisdiction limited to the questions of a Federal character which might be involved in such cases." (emphasis in original)).

Each court of appeals to consider the issue presented here has looked to the law of the state in which the case originated to determine the definition of purchase money security interest. The sharply divided New York Court of Appeals only construed New York law, not California law. These courts have considered state commercial codes, and in some cases other state statutes, to give the term meaning. The outcome of this case turns on the meaning of "purchase money obligation" under a specific state's law, and in particular, under the California Commercial Code as interpreted by California courts.

As a further indication of the fundamentally state law nature of this dispute, California Commercial Code section 9103(h) deliberately gives California's courts the discretion to determine the rules applicable to purchase money transactions involving consumer-goods, such as Penrod's car.[7] Although not all states have enacted UCC section 9-

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[7] Section 9103(h) provides that "[t]he limitation of the rules in subdivisions (e), (f), and (g) to transactions other than consumer-goods transactions is intended to leave to the court the determination of the proper rules in consumer-goods transactions." CAL. COM. CODE § 9103(h).

103(h),[8] the California legislature's decision to include subsection (h) expressly "leave[s] to the court the determination of the proper rules in consumer-goods transactions." CAL. COM. CODE § 9103(h). Moreover, the special treatment of consumer-goods transactions under the UCC demonstrates that the drafters invited variation in the interpretation of the term "purchase money security interest" among the states particularly with respect to consumer transactions. Accordingly, the definition of the term "purchase money security interest" in consumer-goods transactions is an open-textured question of state law, one not suitable for this Court's resolution.

In sum, no court of appeals has treated interpretation of the term "purchase money security interest" as a question of federal law. As a result, this Court cannot authoritatively resolve the question presented. Rather, the Court's decision interpreting California Commercial Code section 9103 would remain subject to any subsequent, contrary conclusion by the California state courts. Therefore, certiorari should be denied.

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[8] *See* FLA. STAT. ANN. § 679.1031 (eliminating "other than a consumer-goods transaction" from relevant text); IDAHO CODE ANN. § 28-9-103 (same); IND. CODE ANN. § 26-1-9.1-103 (same); KAN. STAT. ANN. § 84-9-103 (same); LA. REV. STAT. ANN. § 10:9-103 (same); MD. CODE ANN., COM. LAW § 9-103 (same); NEB. REV. STAT. § 9-103 (same); N.D. CENT. CODE § 41-09-03 (same); S.D. CODIFIED LAWS § 57A-9-103 (same).

2. *AmeriCredit Failed to Raise Its "Federal Law" Argument Before the Bankruptcy Court and Bankruptcy Appellate Panel and Instead Relied Solely on California Law.*

Despite the readily apparent state law nature of the issue, AmeriCredit has now purported to discover that the question presented in this case is one of "federal law" controlled by the plain text of the Bankruptcy Code "Without the Need to Consult State Law." Pet. 9th Cir. Reply Br. at 24. Until filing its brief in the Ninth Circuit, however, AmeriCredit insisted that the resolution of the case turned solely on state law. More specifically, AmeriCredit argued that "Whether a Creditor has a 'Purchase Money Security Interest' is Determined by Reference to State Law Not The Bankruptcy Code." Pet. B.A.P. Br. at 8. Similarly, before the bankruptcy court, AmeriCredit devoted all but the introductory section of its brief to California state law arguments. Pet. Bankr. Ct. Br. at 5-23. AmeriCredit belatedly raised its "federal law" argument for the first time on appeal to the Ninth Circuit. Pet. 9th Cir. Br. at 9-27. Penrod responded that any "federal law" argument had been waived because AmeriCredit had not raised it below and because AmeriCredit adopted the opposite position before the bankruptcy court and bankruptcy appellate panel. Resp. 9th Cir. Br. at 15-16. The Ninth Circuit panel properly declined to address AmeriCredit's new argument.

"[O]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]." *Taylor v. Freeland & Kronz*, 503 U.S. 638,

646 (1992) (quoting *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curiam*)); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). Accordingly, when, as here, the only purported federal issue raised by the petition was waived by the petitioner below, and not passed on by the lower courts, certiorari review is routinely denied. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (declining to address whether application of the ADA to state prisons is a constitutional exercise of Congress's power because the issue, although raised in petitioner's brief, was not addressed by the lower courts); *Taylor*, 503 U.S. at 646 (declining to consider petitioner's argument that Bankruptcy Code section 105(a) permits courts to disallow exemptions based on good faith); *see also Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (dismissing writ and declining to apply constitutional standard to complex statutes without benefit of lower court review).

AmeriCredit's own categorical statements to the lower courts that this case turns on state law, as opposed to federal law, were correct. That fact, particularly when combined with AmeriCredit's failure to timely raise its "federal law" theories, weighs strongly against granting certiorari.

3. *The Court of Appeals Properly Rejected AmeriCredit's Argument That California's ASFA Should Be Read In Pari Materia with the California Commercial Code.*

As part of its state law argument, AmeriCredit urged the lower courts to use the California ASFA to define the scope of purchase money obligations and purchase money security interests in cars sold at retail. Pet. App. at 11a, 44a; Pet. 9th Cir. Br. at 44-52; Pet. B.A.P. Br. at 16-18; Pet. Bankr. Ct. Br. at 11-12; *Penrod*, 611 F.3d at 1163; *Penrod*, 392 B.R. at 849. The courts below rejected AmeriCredit's argument that the California ASFA and the California Commercial Code should be construed together under the *in pari materia* doctrine. Pet. App. at 11a-12a, 44a-45a; *Penrod*, 611 F.3d at 1163; *Penrod*, 392 B.R. at 849-50. Under this doctrine, two closely-related statutes enacted for the same purpose are construed in light of one another. Whether two particular state statutes should be construed *in pari materia* is an inherently state law question implicating various considerations, including a state legislature's intent. Pet. App. at 46a-47a; *Penrod*, 392 B.R. at 850. Again, the final word on the relevance of California's ASFA to the meaning of California Commercial Code section 9103 belongs to the California Supreme Court.

Under California law, a statute that is modeled on another statute and shares the same legislative purpose is considered *in pari materia* with the other and should be interpreted consistently. *See Med. Bd. of Cal. v. Superior Court*, 88 Cal. App. 4th 1001 (2001). Furthermore, the "[c]haracterization of the

object or purpose is more important than characterization of subject matter in determining whether different statutes are closely enough related to justify interpreting one in light of the other. It has been held that where the same subject is treated in several acts having different objects the statutes are not *in pari materia.* The adventitious occurrence of . . . similar subject matter, in laws enacted for wholly different ends will normally not justify applying the rule." *Walker v. Superior Court*, 47 Cal. 3d 112, 124 n.4 (1988) (quotation marks omitted).

California's ASFA was enacted in 1961 to provide comprehensive protection to California retail motor vehicle buyers. *Hernandez v. Atl. Fin. Co.*, 105 Cal. App. 3d 65, 69 (1980); *see also* 15 ASSEMBLY INTERIM COMMITTEE REPORTS NO. 24, FINANCE AND INSURANCE REPORT 7 (Comm. Print 1960) (noting the importance of protecting the unsophisticated motor vehicle consumer). When originally enacted, ASFA required better disclosure of financing terms, as well as maximum allowable finance charges, prohibitions on certain sale contract provisions, and limitations on the repossession and resale of consumer vehicles. Nearly 50 years later, the ASFA remains first and foremost a "buyer protection act." *See, e.g., Juarez v. Arcadia Fin., Ltd.*, 152 Cal. App. 4th 889, 901 (2007).

By contrast, Division 9 of the California Commercial Code "provides a comprehensive scheme for the regulation of security interests in personal property and fixtures." CAL. COM. CODE § 9101 cmt. 1. Although the California Commercial Code applies to automobile financing as a species of personal property financing, the Court of Appeals was correct

in holding that the fundamental disparity in their purposes, scope, and function precludes the two statutes from being considered *in pari materia* under California law.[9] The primary purpose of the California Commercial Code is to facilitate and regulate the creation and enforcement of security interests in personal property (whether held by businesses or consumers), not consumer protection. CAL. COM. CODE § 9101 cmt. 1.

The Court of Appeals' decision, as well as those of the bankruptcy appellate panel and the bankruptcy court, are in accord with this Court's clear directives that state law controls the substance of claims in bankruptcy, and the resolution of this case turns solely on the definition of "purchase money security interest" under California law. As the issue presented is fundamentally one of state, rather than federal, law, this case is a poor choice for certiorari review. The "circuit split" touted by AmeriCredit is based on different interpretations of state law, and the highest courts of those individual states are the final arbiters of disputes over defined

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[9] Penrod agrees with all the lower court decisions in this case and all the decisions of other courts of appeals that Penrod's case involves a question of state, not federal, law. If, however, this Court concludes that the case properly presents an issue of federal law and grants certiorari on that issue, then this Court should preclude AmeriCredit from arguing that California's ASFA is controlling or persuasive or otherwise attempting to relitigate the subsidiary California law question of the proper scope and application of the *in pari materia* doctrine.

terms in their states' statutes. This Court does not sit as the final arbiter of state law issues, even when such issues may affect bankruptcy law. Proper respect for state law sovereignty over state law issues precludes certiorari review of this case.

B. The Court of Appeals' Interpretation of "Purchase Money Security Interest" Under California Law Is Consistent with the Long-Established Meaning of That Term of Art at Common Law, Under Modern Commercial Law, and with the Legislative Purpose of the Hanging Paragraph.

If this Court were to grant certiorari and decide a matter of California state law, the Court would find that the decision below fully comports with a proper and comprehensive review of the relevant California statute and was correctly decided.

1. *Under the California Commercial Code, the Repayment of a Pre-Existing Debt Does Not Constitute a Purchase Money Obligation.*

The Court of Appeals began its analysis of the term "purchase money security interest" by turning to the applicable state law, California Commercial Code section 9103. Pet. App. at 7a-8a; *Penrod*, 611 F.3d at 1161. Under section 9103, the starting point for defining a "purchase money security interest" is a "purchase money obligation," which means "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." CAL. COM. CODE

§ 9103(a)(2). This language encompasses two kinds of purchase money obligations. Pet. App. at 7a-8a, 33a-34a; *Penrod*, 611 F.3d at 1161; *Penrod*, 392 B.R. at 844-45.

One kind of purchase money obligation described in section 9103(a)(2) is known as an "enabling loan" whereby a third-party lender provides funds to a borrower to purchase goods from a seller. The lender's purchase money obligation arises from value that the lender gave to the borrower to enable the borrower to acquire rights in the collateral, and which value the borrower, in fact, used to acquire the collateral. For example, a credit union may obtain a purchase money security interest by loaning money to a borrower for the purpose of buying a car if the borrower in fact uses the loan to purchase a vehicle from a car dealer.

The second kind of purchase money obligation described in section 9103(a)(2), which is applicable in this case, is a credit sale transaction in which the seller extends credit to the buyer. When a car dealer extends credit to a borrower to purchase a vehicle, the transaction is a credit sale. Under California law, the transaction will maintain its character as a credit sale transaction even if the original seller assigns its rights as a creditor to another entity, as happened in this case. *See, e.g.*, *Johnson v. County of Fresno*, 111 Cal. App. 4th 1087, 1096 (2003) (reciting state law principle that an assignee stands in the shoes of the assignor).

In credit sales transactions, the seller's purchase money security interest extends to all or

part of the "price" of the collateral. CAL. COM. CODE § 9103(a)(2). The comment to California Commercial Code section 9103 states that the "price" for purposes of defining a "purchase money obligation" may include obligations for expenses incurred in connection with acquiring rights in the collateral, sales taxes, duties, finance charges, freight charges, costs of storage in transit, demurrage, administrative charges, expenses of collection and enforcement, and attorney's fees. CAL. COM. CODE § 9103 cmt. 3. "Price" may also include other obligations that are similar to those items on the enumerated list. *Id.* Those items are standard transaction costs incident to the sale and delivery of the newly acquired collateral, in this case Penrod's Ford Taurus. BLACK'S LAW DICTIONARY 398 (9th ed. 2009) (defining "transaction cost" as "[a] cost connected with a process transaction, such as a broker's commission, the time and effort expended to arrange a deal, or the cost involved in litigating a dispute").

The Court of Appeals, as well as the bankruptcy appellate panel and the bankruptcy court, correctly concluded that under California law, the satisfaction of a pre-existing claim, or antecedent debt, is not included in this list or similar to those items on the list. Negative equity is not a transaction cost. It is not a cost of the sale and delivery of the new car, but instead arises out of a past debt of the buyer to another creditor incurred in connection with a different transaction. Negative equity is therefore conceptually and analytically distinct from the actual price of the vehicle and its ancillary charges. Indeed, the very contract Penrod signed reflects awareness of

this distinction between price and negative equity by separating the contractual description of the two components of the transaction. *See* Pet. App. at 158a.

As the bankruptcy appellate panel aptly observed, "negative equity is essentially another creditor's unsecured claim," Pet. App. at 28a, *Penrod*, 392 B.R. at 842, and the substitution of a new liability for an old liability could not properly be considered an "expense" incurred in connection with acquiring the collateral. Pet. App. at 9a; *Penrod*, 611 F.3d at 1162. The Court of Appeals properly held that the payment of another creditor's unsecured claim does not represent any part of the price of the vehicle or associated costs arising directly from the sale. Pet. App. at 9a; *Penrod*, 611 F.3d at 1162. Lastly, the court correctly rejected AmeriCredit's entreaties to use California's ASFA to redefine the proper scope of a purchase money obligation under the California Commercial Code to mean something different (and broader) in the case of a security interest in a consumer's car than in any other kind of property subject to the same language in the California Commercial Code. Pet. App. at 11a; *Penrod*, 611 F.3d at 1163.

2. *The Long-Established Common Law Meaning of "Purchase Money Security Interest" Has Consistently Excluded Antecedent Claims.*

The holding of the Court of Appeals comports with the long history of the "purchase money security interest" at common law. Indeed, "the idea that a purchase-money interest prevails over antecedent claims against the vendee or his property has venerable roots." Grant Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333, 1340 (1963); *see also United States v. New Orleans R.R.*, 79 U.S. (12 Wall.) 362, 365 (1870) (establishing that purchase money obligations are distinct from and would receive priority over antecedent claims).

By the end of the 19th century, in order to prevent manipulation of the purchase money priority to defraud senior security holders, courts had sharply distinguished purchase money security obligations from antecedent claims: only those claims "directly related to the acquisition of the property" were entitled to the privileged status of purchase money security interests. Gilmore, *supra*, at 1345 (quotation marks omitted); *see also Venner v. Farmers' Loan & Trust Co.*, 90 F. 348, 355 (6th Cir. 1898) (holding that claimant was required to show that his claim was "in fact the purchase price of the conveyed property, for the implied lien of a vendor will not arise out of any general indebtedness or other liability at large"); *Harris v. Youngstown Bridge Co.*, 90 F. 322, 333 (6th Cir. 1898) (granting

purchase money priority exclusively "to the extent of sums expended" in the purchase of property).

More specifically, only funds that were applied in fact to the actual purchase of the collateral in question could receive purchase money priority. As Circuit Judge (later Chief Justice) Taft explained:

> When . . . that which is given the appearance of a . . . purchase-money lien is really only a device to secure money borrowed for other purposes . . . than the buying of the [collateral] in question, then the attempt to supplant the first lien of the mortgage . . . is a fraud upon the mortgage, and the pseudo purchase-money lien must be postponed . . . .

Harris, 90 F. at 329 (Taft, J.).

As the *Harris* court made expressly clear, money borrowed for purposes other than the actual purchase of goods, *i.e.*, the payment of antecedent debt, could not receive purchase money priority. As such, the decisions of the Court of Appeals, the bankruptcy appellate panel, and the bankruptcy court are all consistent with the time-honored understanding that money used to refinance antecedent debt is not entitled to enjoy the priority afforded to purchase money security interests.

3. *Former California Commercial Code Section 9107, the Precursor to Current California Commercial Code Section 9103, Adopts the Common Law Approach Excluding Antecedent Debt.*

The exclusion of antecedent debt from purchase money classification also finds textual support in the original version of California Commercial Code Division 9, which draws directly from common law purchase money principles.

Division 9's original definition of "purchase money security interest" was codified at former California Commercial Code section 9107, which provided:

> A security interest is a "purchase money security interest" to the extent that it is
>
> (a) Taken or retained by the seller of the collateral to secure all or part of its price; or
>
> (b) Taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

CAL. COM. CODE § 9107 (repealed 1999).

Subsection (a), upon which the relevant portion of current California Commercial Code section 9103

dealing with credit sales transactions is based, simply adopts the pre-UCC notion that a security interest can receive purchase money priority only if the funding supplied is in fact applied to the actual purchase. Subsection (a) applies this principle in a straightforward manner by requiring that the security interest actually constitute a portion or all of the purchase price. Accordingly, "[t]here is nothing novel" in subsection (a) distinguishing it from preexisting common law jurisprudence. Gilmore, *supra*, at 1372-73.

The Official Comments, both new and old, provide further guidance. In particular, Comment 2 to former section 9107 states:

> This Section therefore provides that the purchase money party must be one who gives value "by making advances or incurring an obligation": the quoted language excludes from the purchase money category any security interest taken as security for or in satisfaction of a pre-existing claim or antecedent debt.

CAL. COM. CODE § 9107 (repealed 1999) cmt. 2.

Although this comment is not expressly reprinted in the comments to the revised version of the definition in California Commercial Code section 9103, Comment 1 to current section 9101 explains that "the Comments to former Article 9 will remain of substantial historical value and interest" and "also will remain useful in understanding the background

and general conceptual approach of this Article." *See also In re Crawford*, 397 B.R. 461, 465-66 (Bankr. E.D. Wis. 2008) ("[I]t appears that the definition of [purchase money security interest] under former UCC § 9-107 has essentially not changed, and that Comment 2 to former § 9-107 is currently applicable, although that Comment was not retained in the Official Comments to the Revised Article 9.").

Moreover, Comment 5 to current California Commercial Code section 9103 notes that subsections (b) and (c) (describing when a security interest in goods and software is a purchase money security interest) are limited to goods and software, but also explains that "[o]therwise, no change in meaning from former [section 9107] is intended." *See also* CAL. COM. CODE § 9101 cmt. 4.e. (making clear that "[t]he substantive changes" between prior section 9107 and new section 9103 "apply only to non-consumer-goods transactions").

The express exclusion of antecedent debt from the definition of "purchase money security interest" under former section 9107 is founded in long-standing traditions at common law. Moreover, nothing suggests a departure from these historical practices, especially considering that the two kinds of "purchase money obligations" under current section 9103 are identical to those set forth under former section 9107.

Therefore, despite AmeriCredit's claim to the contrary, the Court of Appeals, the bankruptcy appellate panel, and the bankruptcy court were

correct in holding that funds advanced to refinance antecedent debt are not purchase money obligations under California law. As a result, a lien securing an obligation related to antecedent debt does not qualify as a "purchase money security interest." By limiting the definition of purchase money security interests, the California Commercial Code properly circumscribes the exceptional treatment afforded to such security interests to only those obligations that directly relate to the buyer's acquisition of the purchase money collateral.

4. *The Hanging Paragraph Was Enacted to Address the Problem of Drive-Off Depreciation, Not Negative Equity.*

AmeriCredit wrongly suggests that the Court of Appeals' decision will frustrate significant federal policies as evidenced by the title of the legislative section that contained the hanging paragraph. That title, "Restoring the Foundation for Secured Credit," however, does not imply that consumer auto lenders should now receive special protection from bifurcation for refinancing old debts. *See* Pet. App. at 28a; *Penrod*, 392 B.R. at 842 (citing *Dean v. Davis*, 242 U.S. 438 (1917)). Treating refinanced antecedent debt as secured by a purchase money security interest in new collateral has never been part of the "Foundation for Secured Credit."

Rather, the hanging paragraph, with its clearly defined timeframe and specification of claims covered, resulted from Congress' concern with the rapid depreciation of motor vehicles and other

consumer goods obtained on credit at retail. It is a well-known fact that new automobiles immediately lose ***significant*** value when they are driven off the dealer's lot and become used automobiles. *See, e.g.*, *In re Robson*, 369 B.R. 377, 382 (Bankr. N.D. Ill. 2007) ("Generally, vehicles depreciate the most when they are newest . . . ."); *In re Johnson*, 380 B.R. 236, 250 (Bankr. D. Or. 2007) ("[F]rom the language of the [h]anging [p]aragraph itself and its limited legislative history, it is clear that the [h]anging [p]aragraph was designed to combat . . . [the] taking advantage of the substantial depreciation that occurs immediately when a new car is driven off the lot . . . ."); *see generally* William C. Whitford, *A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. ILL. L. REV. 143, 178 (2007) (describing this consideration as an animating part of the BAPCPA legislation); Dienna Ching, *Does Negative Equity Negate the Hanging Paragraph?*, 16 AM. BANKR. INST. L. REV. 463, 501 (2008) (noting that the legislative history surrounding the hanging paragraph centers around depreciation concerns). In view of this fact, Congress apparently believed that, in order to facilitate large loan-to-value ratios and longer terms in consumer auto finance, a purchase money obligation less than two and one half years old should be excepted from the normal bifurcation of secured claims based on the value of the collateral in chapter 13 cases. Rapid drive-off depreciation, not negative equity financing, is the problem that the hanging paragraph addresses. For this reason the special protection of the hanging paragraph is limited to the purchase price of vehicles acquired

within two and a half years of the consumer's bankruptcy filing.

Here, AmeriCredit, in addition to advancing the price of Penrod's new Taurus, chose to pay a debt (negative equity) that Penrod owed to another creditor (the lender on her trade-in Explorer). Under Penrod's confirmed chapter 13 plan, AmeriCredit will receive the full amount of the remaining principal due for the purchase of the Taurus, $18,537.89, plus interest. The plan, however, properly treats the funds advanced to pay off the negative equity as an unsecured debt.

A chapter 13 debtor, such as Penrod, is obligated to commit his or her projected disposable income to the plan. 11 U.S.C. § 1325(b); *see Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). Net disposable income is effectively determined after deducting secured loan repayment from the consumer debtor's current monthly income. 11 U.S.C. §§ 1325(a)(5) & 1325(b)(2). Distribution of projected disposable income in chapter 13 is almost always a zero-sum game because the claims against the debtor typically far exceed the debtor's projected disposable income under the plan. Thus, an unduly broad reading of the California Commercial Code's definition of purchase money obligation will have two effects. First, it may make many chapter 13 plans infeasible because the amount required to pay the negative equity (*i.e.*, a prior creditor's unsecured debt) must be paid in full, and may therefore exceed current monthly income. Second, even if the higher car payment will not exhaust the consumer's current monthly income, it will allocate more of the debtor's

income to the car lender, such as AmeriCredit, at the expense of debtor's other unsecured creditors. *See* Pet. App. at 28a; *Penrod*, 392 B.R. at 842-43. Neither the text of the hanging paragraph nor the underlying legislative history even hints that Congress intended such a result. No policy, express or implied, supports a construction of purchase money obligations that favors repayment of refinanced past debt rolled into car loans over other unsecured debts.

Additionally, AmeriCredit's view would create an incentive for potential chapter 13 debtors such as Penrod to file for bankruptcy earlier than they might otherwise. After all, assuming that Penrod had owned her 1999 Ford Explorer for more than 910 days prior to the date she acquired the Taurus, none of the indebtedness relating to her Explorer would have been protected by the hanging paragraph. Had Penrod filed her bankruptcy before trading in the Explorer, Bankruptcy Code section 506(a) would have operated to bifurcate the indebtedness and allowed Penrod to "strip" any secured indebtedness in excess of the Explorer's value. Had Penrod done so and then traded the Explorer in for the Taurus, the secured claim remaining against the Taurus would be similar to those produced by the Court of Appeals' construction of the hanging paragraph. Put differently, AmeriCredit's proposed regime would encourage debtors to file bankruptcy before acquiring a new car. There is nothing to suggest Congress intended to enact a rule that could be circumvented in this fashion, particularly given the heavy costs associated with chapter 13 debtors filing for

bankruptcy earlier than would otherwise be necessary.

Because the treatment of AmeriCredit's claims is entirely consistent with longstanding bankruptcy policy and the actual purpose behind the hanging paragraph, this case does not present the occasion for certiorari review.

C. AmeriCredit's Claim That California Automobile Dealers Will Be Forced to Deny Financing to California Consumers Is Untrue and Unsupported by the Record.

AmeriCredit and its *amici* urge this Court to grant certiorari because of their contention that if the Court of Appeals' decision stands, automobile financers and dealers will have no choice but to deny financing to all purchasers of motor vehicles with negative equity throughout the Ninth Circuit. *See, e.g.*, Pet. at 31-32 ("Dealers and their financing sources will have no choice but to deny this financing to all purchasers of motor vehicles in states in the Ninth Circuit."); Br. of Am. Bankers Ass'n as Amicus Curiae in Supp. of the Pet'r at 3-5 (ominously suggesting that the decisions below create a "price tag" that "the public can ill-afford" and may include the lack of further lender "participation in this particular sector of consumer financing").

This doomsday rhetoric is both untrue and unsupported by the record. AmeriCredit has never produced or submitted any evidence to the Court of Appeals, the bankruptcy appellate panel, or the bankruptcy court or cited any authority to support

its claim that the markets for the sale of automobiles and automobile financing will collapse in California and the rest of the western United States absent this Court's imminent intervention to protect "negative equity" financing from bifurcation in chapter 13 consumer debt plans. These cataclysmic assertions fall under their own weight. Moreover, these notions are utterly inconsistent with how retail auto sales have *increased* in California since the decision below was entered. New car sales in California topped 1.1 million in 2010.[10] Since the Court of Appeals decided this issue in July 2010, new car sales in California have steadily *risen* from nearly 84,000 in August 2010 to more than 104,000 in February 2011.[11] Industry data show that California automobile sales are accelerating at a faster pace than much of the rest of the country.

Indeed until 2005, during long periods of time when retail auto sales regularly reached record levels that still today have not been matched, all

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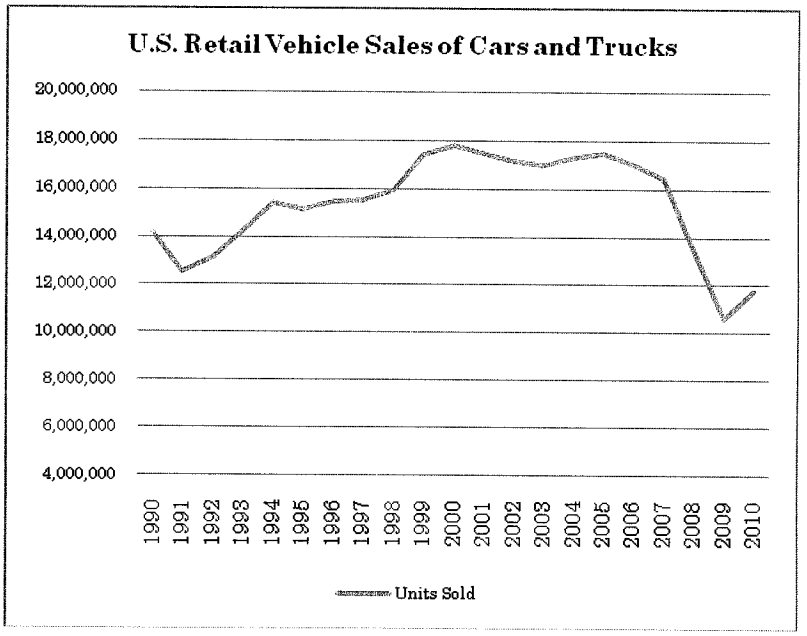
[10] National Automobile Dealers Association, *NADA Data 2011: State of the Industry Report*, at 17, available at http://www.nada.org/Publications/NADADATA/2011/default (last visited July 22, 2011).

[11] *See California Economic Indicators, January-February 2011*, at 5 (August 2010 data), available at http://www.dof.ca.gov/HTML/FS_DATA/indicatr/documents/CEI1102FINAL.pdf (last visited July 22, 2011); *California Economic Indicators, May-June 2011*, at 6 (February 2011 data), available at http://www.dof.ca.gov/HTML/FS_DATA/indicatr/documents/CEI%201106%20FINAL.pdf (last visited July 22, 2011).

purchase money financing of consumer automobiles was routinely subject to bifurcation in chapter 13 plans.



WARD'S MOTOR VEHICLE FACTS AND FIGURES 17 (James W. Bush et al. eds., 2010); WARD'S AUTO, *Key Automotive Data*, available at http://wardsauto.com/keydata (last visited July 22, 2011).

Auto lenders lend consumers funds in excess of the value of the cars securing such loans because they anticipate voluntary repayment, not involuntary collection upon default and bankruptcy. Bifurcation or no bifurcation, auto lenders do better in chapter 13 than by repossessing vehicles of a value less than the debts they secure. The price of default, bankruptcy, and repossession is a cost of doing business. Business will continue, Californians

will continue to buy cars, and they will do so on credit under the decision below just as they did long before there was a hanging paragraph and when the general rule of bankruptcy bifurcation applied throughout the Nation. It is illogical to suggest that limiting the special protection from bifurcation for negative equity financing of personal cars will cause the market to be less favorable than periods in which no protection at all from bifurcation existed, whether the deficiency claim arose from negative equity, drive-off depreciation, or otherwise. Indeed, the legal environment for consumer auto lenders even after the decision below remains more favorable than in the pre-2005 era because the non-negative equity component of the purchase financing continues to enjoy special treatment under the hanging paragraph.

In short, there is no reason to believe that AmeriCredit's maximalist, non-plain-meaning interpretation of the scope of the protection from bifurcation afforded to car loans by the hanging paragraph has magically become the essential predicate for vibrant retail markets in automobiles and the related financing in the last few years. Although review by this Court is unnecessary and unwarranted in any event, such review certainly should not be prompted by hyperbolic and false claims about the practical ramifications of the decision below.

CONCLUSION

For the foregoing reasons, the Court should deny AmeriCredit's petition for a writ of certiorari.

Respectfully submitted,

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