No. 11-166

In The

Supreme Court of the United States

RadLAX Gateway Hotel, LLC and
RadLAX Gateway Deck, LLC, Petitioners

v.

Amalgamated Bank

*ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held, as a predicate question, that it had jurisdiction over this interlocutory appeal despite petitioners' abandonment of the plan ruled on by the bankruptcy court.

2. Whether under 11 U.S.C. § 1129(b)(2)(A)(iii) a Chapter 11 plan may sell at auction the collateral of a dissenting impaired secured creditor free and clear of the creditor's liens without permitting the creditor to credit bid as provided in 11 U.S.C. § 1129(b)(2)(A)(ii).

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INTRODUCTION

Contrary to petitioners' assertion, the petition presents nothing more than a shallow and academic division between the Third and Seventh Circuits over a narrow question of bankruptcy law—whether a secured creditor must be allowed to credit bid (i.e., bid the debt it is owed instead of cash) when a debtor's property is sold at auction under 11 U.S.C. § 1129(b)(2)(A). Far from being an entrenched division, the two rulings on either side of this conflict arose only in the last 18 months. There is no reason to believe that this conflict will not be resolved in the courts of appeals. Indeed, the complete absence of any court of appeals' decisions construing Section 1129(b)(2)(A)(ii) and (iii) during the first *three* decades since its enactment counsels strongly against this Court's immediate review. This is precisely the sort of question that should percolate in the federal appellate courts before this Court's review.

Moreover, and in any event, this case is a poor vehicle to resolve petitioners' question presented. The actual bankruptcy plan and bid procedures covered by the bankruptcy court's order can no longer be implemented, as they were abandoned and key terms expired. That was the only order over which the Seventh Circuit had appellate jurisdiction on this interlocutory appeal. Yet the Seventh Circuit nevertheless rejected respondent's contention that the appeal was moot. That predicate question of mootness—which itself is not certworthy—would have to be reviewed by this Court *before* it could reach the proper interpretation of 11 U.S.C. § 1129(b)(2).

If the question petitioners present is as important and recurring as they claim, this Court can review it in a future, suitable case. The court below correctly resolved that question here. This petition should be denied.

STATEMENT

A. Statutory Framework

1. The Bankruptcy Code provides that, when property encumbered by a lien is to be sold, a secured creditor holding the lien must be afforded certain protections. Among those protections, the secured creditor has the presumptive right under 11 U.S.C. § 363(k) to place what is commonly referred to as a "credit bid" for the property. A credit bid allows the secured creditor to bid for the property using the debt it is owed to offset the purchase price. Section 363(k) provides that "unless the court for cause orders otherwise," the holder of a "lien that secures an allowed claim" may "bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property." 11 U.S.C. § 363(k). A secured creditor may credit bid up to the full face amount of its claim even if the claim amount exceeds the value of the collateral (that is, even if the secured creditor is "undersecured"). *Cohen v. KB Mezzanine Fund II, LP (In re SubMicron Sys. Corp.)*, 432 F.3d 448, 459-460 (3d Cir. 2006).

The right to credit bid under Section 363(k) is well-recognized as an important check against the

undervaluation of collateral at sale in bankruptcy. *See, e.g.*, 7 COLLIER ON BANKRUPTCY, ¶ 1111.03[4] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010). A number of factors may cause a price obtained at the auction of collateral to be undervalued. Pet. App. 20a n.6. For example, quick timing and insufficient notice or marketing may result in potentially interested purchasers being unaware of the sale. Additionally, the debtor's existing management may stand to benefit if the assets are sold at a discount to an insider (or a buyer that includes an insider) who will preserve the existing business. *Gandal v. Telemundo Group, Inc.*, 997 F.2d 1561, 1562 (D.C. Cir. 1993); *Dynamic Corp. of Am. v. CTS Corp.*, 805 F.2d 705, 711 (7th Cir. 1986); Pet. App. 20a n.6. Credit bidding obviates many of these risks. If the secured creditor believes that it could generate a greater return on the collateral than that represented by the bidder's offer, then the secured creditor may bid up to the full amount of its claim toward the purchase price. At the same time, credit bidding does no harm to other creditors, since every penny of a cash bid would have to go into the secured creditor's pocket until that secured creditor has been paid in full. For the very same reason, preventing credit bidding does not benefit any other creditors or the debtor (though it may benefit the debtor's insiders); only when the stalking horse bid exceeds the secured creditor's full claim will there be any cash for any other creditors, let alone for the debtor.

2. Section 1129 governs the confirmation of Chapter 11 plans. 11 U.S.C. § 1129. One requirement for confirmation is that, for each class of claims or interests, "such class has accepted the plan" or "is not impaired under the plan." 11 U.S.C. § 1129(a)(8). Section 1129(b) provides an exception to that requirement, permitting the debtor to "cram down" the plan over the objections of an impaired class. To invoke the cramdown provision, the plan must "not discriminate unfairly, and [be] fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1).

For a plan to be "fair and equitable" with respect to a class of secured claims,[1] the plan must satisfy Section 1129(b)(2)(A). That provision includes three methods—each set forth in a distinct subsection—for meeting the "fair and equitable" requirement.

Under subsection (i), the plan may provide that the secured creditors "retain the liens" and receive full payment of the claim through revised payment terms at a market rate of interest. *Id.* § 1129(b)(2)(A)(i) ("deferred cash payments totaling at least the allowed amount of such claims").

Under subsection (ii), the plan may provide for the sale of the property free and clear of liens, as long

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[1] Each secured claim normally is placed in a class by itself. *Brady v. Andrew (In re Commercial W. Fin. Corp.)*, 761 F.2d 1329, 1338 (9th Cir. 1985).

as the secured creditor is allowed to credit bid under Section 363(k). *Id.* § 1129(b)(2)(A)(ii) (allowing "the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale").

Under subsection (iii), the plan may provide "for the realization by [the secured creditors] of the indubitable equivalent of [their] claims." *Id.* § 1129(b)(2)(A)(iii). Examples include surrendering the property to the creditor or providing suitable substitute collateral (also known as a replacement lien). 7 COLLIER ON BANKRUPTCY ¶ 1129.04[2][c] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010).

Petitioners here seek to invoke subsection (iii) to "cram down" a plan over the objection of respondent, an impaired secured creditor, with a plan that provides for the sale of encumbered property free and clear of liens but does not allow for Section 363(k) credit bidding, as required by clause (ii).

B. Factual Background

Petitioners RadLAX Gateway Hotel, LLC and RadLAX Gateway Deck, LLC own and operate a Radisson Hotel and an adjacent, incomplete parking structure near the Los Angeles International Airport. Petitioners obtained a $142 million loan in 2007 to purchase the property, renovate the hotel, and build the parking structure. Pet. App. 3a-4a.

Respondent Amalgamated Bank is the trustee of lender Longview Ultra Construction Loan Investment Fund, in its capacity as administrative agent for itself and co-lender U.S. Bank National Association. *Id*. at 4a, 41a n.2. U.S. Bank National Association is successor-in-interest to the Federal Deposit Insurance Corporation, as receiver for San Diego National Bank. *Id*. at 41a nn.2-3.

To secure the 2007 loan to petitioners, the lenders obtained a blanket lien on all of petitioners' assets. Bankr. Ct. Dkt. 235 at 6.

During construction of the parking facility, petitioners incurred substantial construction overruns. In 2009, petitioners exhausted their committed funding from the lenders and were unable to secure additional funding or restructuring of the loan. Pet. App. 4a.

Petitioners filed for relief under Chapter 11 in August 2009. As of the filing of the bankruptcy petition, petitioners owed more than $120 million on the loans, with over $1 million in interest accruing each month. *Id*. at 4a-5a.

C. Proceedings Below

1. Bankruptcy court

Petitioners submitted for confirmation a reorganization plan in which they proposed to sell at auction substantially all of their assets free and clear of the liens. *Id*. at 5a. Petitioners also submitted proposed

bid procedures to govern the sale of their assets at the plan auction. Petitioners proposed to sell their assets to a stalking horse bidder for only $47.5 million, subject to a higher bid at auction. *Id*. at 5a-6a.[2] Harp Group, Inc., an entity owned and controlled by petitioners' principal, Peter G. Dumon, was a minority-interest owner of the stalking horse bidder. If the stalking horse bidder were to prevail at the auction, the existing management company would continue managing the hotel. That management company also is owned and controlled by Dumon. Bankr. Ct. Dkt. 206 at 7.

Petitioners' proposal would have precluded the lenders from protecting their interests by credit bidding at the auction. Respondent, as the lenders' administrative agent, objected to petitioners' proposed bid procedures. Pet. App. 6a.

The bankruptcy court rejected petitioners' bid procedures because they did not allow for credit bidding. The court held that petitioners "may not use [the indubitable equivalence standard of] section 1129(b)(2)(A)(iii) to sell their assets free and clear of liens." *Id*. at 42a. Rather, to auction their assets free and clear, petitioners "must comply with the specific requirements of section 1129(b)(2)(A)(ii)," which

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[2] A stalking horse bid is an initial bid on a debtor's assets from an interested buyer chosen by the debtor. *Contrarian Funds LLC v. Aretex LLC (In re WestPoint Stevens, Inc.)*, 600 F.3d 231, 239 n.3 (2d Cir. 2010).

provides for credit bidding under Section 363(k). *Ibid.* After a trial, the court also concluded that there was no "cause" to deny credit bidding under Section 363(k), rejecting, among other theories, the petitioners' claims that the respondent and the other lender committed some kind of wrongdoing in the administration of the loan. *Id.* at 43a.

Petitioners appealed, and the bankruptcy court certified the appeal directly to the Seventh Circuit under 28 U.S.C. § 158(d)(2)(B)(i) and Rule 8001(f)(2)(A)(i) of the Bankruptcy Rules. *Id.* at 30a.

The asset purchase agreement between petitioners and the stalking horse bidder established various milestones, several of which have not been met during the pendency of the appeal. Each missed milestone affords the stalking horse bidder the right to terminate the agreement. Bankr. Ct. Dkt. 283, § 4.4, at 18-19. Petitioners also acknowledged that the stalking horse bid was worth many millions of dollars less than respondent's claim, and that petitioners therefore would not attempt to confirm the proposed plan. C.A. Dkt. 18 at A-7 to A-8; Bankr. Ct. Dkt. 402-1, at 13-14.

2. *Proceedings in the court of appeals*

The Seventh Circuit unanimously affirmed the bankruptcy court.

The court first rejected respondent's argument that the issue on appeal was moot. The court based that conclusion on petitioners' filing of an amended asset purchase agreement that "largely resembled" the agreement that was submitted with the original reorganization plans. Pet. App. 8a. The court further concluded that, even if the original plan were based on asset purchase agreements that had expired, this appeal fit within the exception to mootness for cases that, "due to timing issues, would otherwise evade review." *Ibid*.

On the merits, the court of appeals rejected petitioners' argument that Section 1129(b)(2)(A)(iii) permits a cramdown plan to auction collateral free and clear of liens without credit bidding. *Id*. at 16a-17a. The court concluded that Section 1129(b)(2)(A)(ii) governs all sales of property free and clear of liens and that subsection (iii) "can only be used to confirm plans that propose disposing of assets in ways that can be distinguished from those covered by Subsections (i) and (ii)." *Id*. at 17a.

As the court of appeals explained, under petitioners' proposed interpretation, "plans could qualify for [confirmation] under Subsection (iii) even if they seek to dispose of encumbered assets in the ways discussed in Subsections (i) and (ii), but fail to meet these Subsections' requirements." *Id*. at 22a. But that "understanding of Section 1129(b)(2)(A)(iii) is unacceptable because it would render the other subsections of the statute superfluous." *Id*. at 23a. And it would "place[] the two clauses in conflict" and "allow

the general [i.e., clause (iii)] to subsume the specific [i.e., clause (ii)]," contravening a canon of statutory construction. *Id*. at 23a n.7 (internal quotations omitted).

The court of appeals noted that there would be no reason for Congress to "state that a plan must meet certain requirements if it provides for the sale of assets in particular ways and then immediately abandon those requirements in a subsequent subsection." *Id*. at 23a. Thus, the "infinitely more plausible interpretation" is that each clause "stat[es] the requirements for a particular type of sale" and "'conclusively govern[s] the category of proceedings it addresses.'" *Id*. at 23a-24a (brackets omitted) (quoting *Bloate v. United States*, 130 S. Ct. 1345, 1355 (2010)).

Moreover, the court of appeals reasoned that petitioners' interpretation "treats secured creditors' interests in a way that sharply conflicts with the way that these interests are treated in other parts of the Code." *Id*. at 24a. "Sections 363(k) and 1129(b)(2)(A)(ii) provide a secured creditor with the right to credit bid whenever a debtor attempts to sell the asset that secures its debt free and clear of its lien." *Id*. at 24a-25a. "By granting secured parties this ability [to credit bid], the Code provides lenders with means to protect themselves from the risk that the winning auction bid will not capture the asset's actual value." *Id*. at 19a. "If a secured lender feels that the bids that have been submitted in an auction do not accurately reflect the true value of the asset

and that a sale at the highest bid price would leave them uncompensated, then they may use their credit to trump the existing bids and take possession of the asset." *Ibid.* Thus, "the Code promises lenders that their liens will not be extinguished for less than face value without their consent." *Id*. at 19a-20a. Accordingly, the court concluded that petitioners' interpretation "would not provide secured creditors with the types of protections that they are generally accorded elsewhere in the Code." *Id*. at 25a.

Petitioners did not move to stay issuance of the mandate. The case is now proceeding in the bankruptcy court.

REASONS THE PETITION SHOULD BE DENIED

A. The Petition Presents Only A Shallow And Academic Disagreement Between The Third And Seventh Circuits

1. As the Seventh Circuit recognized, the divided Third Circuit's ruling in *In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010), conflicts with the decision below. But the mere existence of this narrow conflict hardly warrants this Court's immediate intervention; rather, it is a recent anomaly that may be resolved in the courts of appeals.

Both the Third and Seventh Circuit decisions are a recent development in bankruptcy law. Since the Bankruptcy Code was enacted in 1978, *see* Pub. L. No. 95-598, 92 Stat. 2635 (1978), *no* court of appeals

construed the interplay between Section 1129(b)(2)(A)(ii) and (iii) until 2009. As Judge Ambro recognized in his dissent, "few in the first 30 years of Bankruptcy Code jurisprudence read" that provision to permit the auction of collateral free and clear of liens while precluding credit bidding. *Philadelphia Newspapers*, 599 F.3d at 319 (Ambro, J., dissenting).

Indeed, bankruptcy commentators have described the Third Circuit's ruling as novel and unexpected. Far from reflecting a persistent conflict in the courts of appeals that might compel the Court's review, commentators have described *Philadelphia Newspapers* as a "surprise" reading of the Bankruptcy Code "over 30 years after enactment of § 1129(b)." Ralph Brubaker, *Cramdown of an Undersecured Creditor Through Sale of the Creditor's Collateral: Herein of Indubitable Equivalence, the § 1111(b)(2) Election, Sub Rosa Sales, Credit Bidding, and Disposition of Sale Proceeds,* 29 NO. 12 BANKR. L. LETTER 1, 7 (2009); *see also* Vincent S. J. Buccola and Ashley C. Keller, *Credit Bidding and the Design of Bankruptcy Auctions*, 18 GEO. MASON L. REV. 99, 100 (2011) ("Until very recently," the right to engage in "credit bidding was not in jeopardy, as bankruptcy courts had virtually no authority to enjoin the practice" under the prevailing law.). Novel rulings—like that of the Third Circuit—are precisely the type of decisions that often are revisited by a court of appeals the second time around. Until the already-divided Third Circuit has had an opportunity to reconsider *Philadelphia Newspapers* in light of the Seventh Circuit's

express rejection of its decision, review by this Court would be premature.

The so-called "persistence" of the two-court conflict is belied by the few decisions addressing the issue, and the fact that neither court yet has been presented with an opportunity to revisit its ruling. Petitioners also are incorrect that the question presented will evade review. The rapid succession of decisions on the precise question presented—two rulings in the past 18 months—disproves petitioners' assertion that this case presents a "rare opportunity" to review the question. Pet. 14. If the issue is as important as petitioners contend, this Court will have opportunities in the future to address it.

2. Petitioners attempt to bolster the shallow split with the Fifth Circuit's decision in *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009). But they cannot show that the outcome would have been different in that court of appeals than in the court below. As the Seventh Circuit recognized (Pet. App. 16a n.4), *Pacific Lumber* has little relevance to the present dispute. Indeed, the Fifth Circuit held that the precise question at issue here had not been preserved, as there was no challenge to the absence of an auction. The Fifth Circuit's decision thus creates no conflict warranting this Court's review.

In contrast to this case, *Pacific Lumber* involved a fair and equitable determination where the value of the collateral was decided by the bankruptcy court in a *judicial valuation* rather than by a sale by auction

without credit bidding. Moreover, the case was on review following plan confirmation—when the precise valuation of the collateral had been determined—rather than in the interlocutory posture of this dispute.

In *Pacific Lumber*, the bankruptcy court held a hearing at which it "heard extensive valuation testimony" including from "eight valuation experts." 584 F.3d at 238, 248. The court valued the collateral at $510 million, and the reorganization plan proposed to pay that amount in cash to the secured creditor. *Id.* at 238-239, 246-247. The Fifth Circuit held that Section 1129(b)(2)(A) did not foreclose judicial valuation and payment in full of the secured creditor's claim because it would give the debtor the indubitable equivalent of its claim. *Id.* at 245-246. "Whatever uncertainties exist about indubitable equivalent, paying off secured creditors in cash can hardly be improper if the plan accurately reflected the value of the Noteholders' collateral." *Id.* at 247.

Moreover, the Fifth Circuit acknowledged that the credit bidding might be "imperative in some cases" under Section 1129(b)(2)(A)(ii)—such as when the sale (and thus the property's valuation) is done by auction. *Id.* at 246. But whether an auction was required for the valuation of the collateral in that case—and thus whether there needed to be credit bidding in an auction—was not before that court. As the Fifth Circuit explained, the creditors had failed to preserve—and thus had waived—any challenge to the absence of an auction. *Id.* at 247 ("[Creditors] have

not challenged on appeal the court's finding that they will receive more value under the [judicial valuation] than they could have received in * * * a foreclosure auction.").

After 30 years of no circuit precedent on the meaning of Section 1129(b)(2)(A)(ii) and (iii), only a few appellate court decisions address the propriety of a sale of collateral by auction without permitting credit bidding. Rather than intervene now to address an issue in its infancy, this Court should permit the issue to percolate in the courts of appeals.

B. Review Is Unwarranted Because Resolution Of The Shallow Conflict Will Not Affect The Outcome Of Most Disputes

In any event, the issue does not warrant this Court's review because its resolution will have no bearing on the resolution of most bankruptcy asset sales.

The decision below, as well as that of the Third Circuit, affect a clear minority of bankruptcy cases. Most asset sales in bankruptcy do not occur under the cramdown provisions of Section 1129. In the ordinary course, the trustee sells the assets under 11 U.S.C. § 363. As commentators have recognized, "[t]he holding in *Philadelphia Newspapers* will likely have a limited impact on asset sales in bankruptcy because most asset sales occur during the case under § 363, which permits credit-bidding." Gregory F. Pesce, *The Irrelevance of* Philadelphia Newspapers, 8 AM. BANKR.

INST. LITIG. COMM. NEWS, NO. 3 (May 2011). Because "assets are rarely sold off as part of a plan of reorganization" under Section 1129, there is "little to suggest that [any conflict] will have a major impact on how asset sales occur in bankruptcy cases." *Ibid.*

Moreover, the insignificance of the question presented is underscored by the fact that most secured lenders can replicate the result of the ruling below even where credit bidding is prohibited at auction. At an asset sale without credit bidding, secured creditors in the Third Circuit can still bid using—in essence—their secured claim. Rather than credit bid per se, a secured creditor can bid cash, which should "be returned to the lender, producing the same result as if it had credit bid." Brad B. Erens & David A. Hall, *Secured Lender Rights in 363 Sales and Related Issues of Lender Consent*, 18 AM. BANKR. INST. L. REV. 535, 562 (2010). Indeed, that is what happened in *Philadelphia Newspapers*: "the lenders who were denied the right to credit bid ultimately prevailed at auction in any case by submitting the highest cash bid at auction." *Id.* at 562-563.

C. This Case Is Not A Suitable Vehicle To Resolve The Conflict

Petitioners' cramdown plan was based entirely on an asset purchase agreement in which its stalking horse bidder would purchase (subject to higher bids) the property at auction. But since the bankruptcy court certified this case to the Seventh Circuit, that

plan has become no longer viable and has been abandoned by petitioners.

That abandonment makes this case a particularly poor vehicle to review petitioners' question presented for two reasons. First, to resolve that question, the Court would have to review the Seventh Circuit's predicate ruling that the issue sought to be reviewed is not moot, despite the absence of an operative plan. Second, even if not moot, the case is not suitable for review because the only proposed plan before the Court is outdated and could not be implemented even if revived by this Court.

1. The Seventh Circuit incorrectly held the issue was not moot and this Court would have to decide and affirm that ruling to reach the merits

The bankruptcy court certified for interlocutory appeal its order rejecting the bid procedures in petitioners' proposed cramdown plan and asset purchase agreement. Because that particular plan is no longer viable, the appeal should have been dismissed as moot. *United States v. Juvenile Male*, 131 S. Ct. 2860 (2011).

Contrary to the Seventh Circuit's holding, petitioners' submission of a new plan that "largely resembled the agreement that was submitted in connection with the original reorganization plans" did not preserve the Seventh Circuit's jurisdiction over the dispute. Pet. App. 8a. An interlocutory appeal

under 28 U.S.C. § 158(d)(2) is treated like a certified question under 28 U.S.C. § 1292(b). *E.g.*, *Wilborn v. Wells Fargo Bank, N.A.* (*In re Wilborn*), 609 F.3d 748, 752 (5th Cir. 2010). Just as in Section 1292(b), the scope of an appeal under Section 158(d)(2) is the specific "judgment, order, or decree" certified for appeal and issues fairly included within it. *United States v. Stanley*, 483 U.S. 669, 677 (1987); *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996). Here, the bankruptcy court's order denying the specific bid procedures of the original reorganization plan was the only order certified for interlocutory appellate review. Pet. App. 31a. So the Seventh Circuit's jurisdiction was limited, as is this Court's, to that "certified order." *Stanley*, 483 U.S. at 677; *Yamaha Motor*, 516 U.S. at 205.[3]

Because the plan the bankruptcy court reviewed has been abandoned, the interlocutory appeal seeking approval of the bid procedures in that plan has become moot. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) ("It has long been settled that a federal court has no authority 'to give opinions

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[3] Section 158(d)(2) was recently added in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1233(a), 119 Stat. 23, 202-203. Very few courts have addressed this provision. But to address petitioners' question presented, this Court would have to decide the scope of appellate review when a bankruptcy court certifies, and a court of appeals accepts, an order for interlocutory review under 28 U.S.C. § 158(d)(2). That question is not independently worthy of this Court's review, and, in any event, it is premature to address this jurisdictional issue given the paucity of judicial authority on it.

upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895))). Moreover, because the new plan does not fall within the scope of the certified order, the Seventh Circuit was without appellate jurisdiction to rule on it. Thus, the court of appeals could not have approved that new plan as meeting the indubitable equivalent requirement of 11 U.S.C. § 1129(b)(2)(A)(iii), nor could it have reinstated the original plan that had been abandoned. Neither could this Court.

The court of appeals also was wrong that this case can be decided because it is capable of repetition while evading review. Pet. App. 7a-9a. That exception requires the action's duration to be too short to be fully litigated. *Juvenile Male*, 131 S. Ct. at 2865. As the Third Circuit's resolution of *Philadelphia Newspapers* shows, bid procedures in cramdown plans can be drafted so that the opportunity to confirm them will not expire before completion of appellate review. To be sure, the plan here expired before the completion of appellate proceedings, but it did not do so out of necessity. Rather, petitioners' own actions (submission of the original plan nearly a year into the case, and submission of a superseding plan) and design (drafting the original plan so that it would expire if certain benchmarks were not met) caused the plan to expire. Bankr. Ct. Dkt. 283, § 4.4, at 18-19, § 8.2(g), at 30. Petitioners thus are responsible

for their being in jeopardy of not being positioned to proceed to confirmation with their new plan in time to prevent confirmation of a creditor-proposed plan or relief from the automatic stay of 11 U.S.C. § 362(a) and foreclosure by respondent. Indeed, the Bankruptcy Code gave petitioners a period of at least 180 days in which they had the *exclusive* right to propose and obtain confirmation of such a plan. 11 U.S.C. § 1121(c)(3). Their failure to do so is insufficient to fall within the mootness exception.

2. *In any event, the absence of a viable plan makes this a poor vehicle for review*

Even if not moot, the absence of a viable plan that could be reviewed and reinstated by this Court strongly counsels against review.

If petitioners were correct (and they are not) that some cramdown plans that do not permit credit bidding at auction could nevertheless be confirmable under Section 1129(b)(2)(A)(iii) as providing the "indubitable equivalent," the answer to that question would turn on the specifics of the given plan. Even in the Third Circuit, "indubitable" means "not open to question or doubt." *Philadelphia Newspapers*, 599 F.3d at 310 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 1154 (1971)). Thus, as the divided Third Circuit acknowledged, the indubitable equivalent of the lenders' claim is "the unquestionable value of [the] lender's secured interest in the collateral." *Ibid.* For a proposed cramdown plan to meet that standard,

the bid procedures *collectively* must be designed to provide the "indubitable equivalen[ce]."

Here, there no longer is an actual, viable plan before this Court to review. This Court should not determine the question presented by petitioners in a vacuum. Even if petitioners' theory of the statutory scheme were correct, the overall procedures of a plan would be vital to determine whether the plan could meet the "indubitable equivalent" standard. As the court below recognized, there are a "number of factors that create a substantial risk that assets sold in bankruptcy auctions will be undervalued." Pet. App. 20a. Of particular concern is that "existing management may have an incentive to favor 'white knight' bidders favorably disposed to preserving the existing business over others who might enter higher bids." *Id*. at 20a n.6.

Moreover, a plan that precludes credit bidding but has an initial stalking horse bid that is *greater* than the secured creditors' claims is far different from a plan without credit bidding where the stalking horse bid is less than both the secured creditors' liens and the market value of the property.[4] And the

[4] In the case of the oversecured creditor credit bidding at auction, the creditor would bid cash in addition to the value of its secured claim. As the court below explained, "[w]hat constitutes the 'indubitable equivalent' of a creditor's secured claim depends on the amount of the creditor's lien and the current value of the secured asset." Pet. App. 18a. For an oversecured claim, "the indubitable equivalent of the creditor's claim is its face value. For instance, where a creditor has a $100,000 lien on

(Continued on following page)

timing and notice provided by the bid procedures can significantly affect the likelihood that an auction will determine the actual market value of the property, *ibid.*—which amounts to the indubitable equivalent of the claim where, as here, the secured creditor is undersecured. *Id.* at 18a ("If a creditor's claim is undersecured, then the indubitable equivalent of the creditor's secured claim equals the current value of the asset.").

3. *Even if the Court were to grant review and agree with petitioners' legal theory, it would not alter the judgment below*

In this case, even if the Court were to review the expired asset purchase plan, it would not result in reversal of the judgment below. That is further reason to deny review.

The abandoned plan's bid procedures did not provide respondent with the "indubitable equivalent" of its claim. Because respondent has a lien on substantially all of petitioners' assets, the value of the secured claim is the lesser of the amount of the debt ($120 million) or the value of petitioners' property. Petitioners' stalking horse bidder has offered to pay only $47.5 million for the property. *Id.* at 6a. But that significantly undervalues the true worth of the

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an asset worth $500,000 a reorganization plan will only give the creditor the indubitable equivalent of [the creditor's] claim if it gives it something worth $100,000." *Ibid.*

property. Indeed, petitioners acknowledged that the stalking horse bid was a floor, not the actual value, and that it was far less than their own appraisals. C.A. Dkt. 18 at A-7 to A-8; Bankr. Ct. Dkt. 402-1 at 12-14. Moreover, petitioners have conceded that the property is worth significantly more than the stalking horse bid, and for that reason have abandoned that plan, which is the one the bankruptcy court and the Seventh Circuit reviewed. C.A. Dkt. 18 at A-7 to A-8; Bankr. Ct. Dkt. 402-1 at 13-14.

To be sure, the property still *could* fetch more than the stalking horse bid at auction if the defunct plan were somehow resurrected. But that does not mean that the plan itself provides the secured creditor the "indubitable equivalent" of its claim. Indeed, the Third Circuit might reach a different result on these facts: it was not confronted with bid procedures where the minimum bid was *less* than what even the debtors believed the property to be worth.

D. The Decision Below Is Correct

Review also is unwarranted because the Seventh Circuit's ruling is correct. Notably, both of the amici supporting certiorari would urge affirmance if this Court were to grant plenary review. There is no need for such review of a correct decision. To the extent the shallow two-court division persists or expands, the Court should defer review until another court of appeals agrees with the Third Circuit.

1. The statutory text gives the secured creditor the presumptive right to credit bid

The text of Section 1129(b)(2)(A) gives secured lenders a presumptive right to credit bid when a cramdown plan proposes to sell collateral free and clear of liens. Section 1129(b)(2)(A)(ii) provides that when "the plan provides * * * for the sale * * * of any property that is subject to the liens securing such claims, free and clear of such liens," then the sale must be "subject to section 363(k)." 11 U.S.C. § 1129(b)(2)(A)(ii). Section 363(k) guarantees the secured creditor the right to credit bid at the auction "unless the court for cause orders otherwise." *Id.* § 363(k).

Petitioners' argument that a cramdown plan involving the sale of assets need not include credit bidding is based solely on the word "or" in Section 1129(b)(2)(A). But statutory construction is a "holistic endeavor." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

Examining the text of the statute as a whole, Section 1129(b)(2)(A) contains three clauses, each of which governs exclusively where it is applicable. As Judge Ambro explained, the three clauses provide "distinct routes that apply specific requirements depending on how a given plan proposes to treat the claims of secured creditors." *Philadelphia Newspapers*, 599 F.3d at 325 (Ambro, J., dissenting); Pet. App. 22a-23a. The requirements of clause (i) govern

where the plan proposes that the secured creditors "retain the liens." 11 U.S.C. § 1129(b)(2)(A)(i). Clause (ii) governs where the plan proposes "the sale * * * of any property that is subject to the liens securing such claims, free and clear of such liens." *Id.* § 1129(b)(2)(A)(ii). Clause (iii) applies where the plan proposes a situation not covered in clause (i) or (ii) but that will give the debtor the "indubitable equivalent" of its claim. *Id.* § 1129(b)(2)(A)(iii). Clause (iii) is "not designed to supplant clauses (i) and (ii) where they plainly apply." 599 F.3d at 326 (Ambro, J., dissenting); Pet. App. 24 ("[P]lans could only qualify as 'fair and equitable' under Subsection (iii) if they proposed of disposing the assets in ways that are not described in Subsections (i) and (ii).").

That result is consistent with two fundamental rules of statutory construction, both of which are violated by petitioners' reading. First, as the court below observed, "when 'there is an inescapable conflict between general and specific * * * provisions of a statute, the specific will prevail.'" Pet. App. 23a (quoting NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2A SUTHERLAND STATUTES & STATUTORY CONSTRUCTION § 46:5); *see also Bloate v. United States*, 130 S. Ct. 1345, 1354 (2010) ("[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment" (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932))). As the court of appeals concluded, "[a]llowing plans to use Subsection (iii) to accomplish

a sale free of liens without according lenders the procedural protections prescribed by clause (ii) 'places the two clauses in conflict' and would allow the general to subsume the specific." Pet. App. 23a n.7 (quoting *Philadelphia Newspapers*, 599 F.3d at 329 (Ambro, J., dissenting)); *see also Philadelphia Newspapers*, 599 F.3d at 329 (Ambro, J., dissenting) ("It seems Pickwickian to believe that Congress would expend the ink and energy detailing procedures in clause (ii) that specifically deal with plan sales of property free of liens, only to leave general language in clause (iii) that could sidestep entirely those very procedures.").

Second, petitioners' reading "is unacceptable because it would render [clauses (i) and (ii)] superfluous." Pet. App. 23a. It is a "'cardinal principle of statutory construction' * * * that * * * no [provision] 'shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted). Petitioners' reading violates this principle, because if clause (iii) "permits a debtor to sell an asset free and clear of liens without permitting credit bidding, then it is difficult to see what, if any, significance [clause] (ii) can have." Pet. App. 23a.

2. Petitioners' interpretation conflicts with other provisions of the Bankruptcy Code

Denying credit bidding under clause (iii) also would sharply conflict with how other provisions of the Bankruptcy Code treat secured creditors' interests.

Id. at 24a. The Bankruptcy Code was designed to preserve the secured creditor's benefit of its bargain. Jason S. Brookner, Pacific Lumber *and* Philadelphia Newspapers: *The Eradication of a Carefully Constructed Statutory Regime Through Misinterpretation of Section 1129(b)(2)(A) of the Bankruptcy Code*, 85 AM. BANKR. L.J. 127, 142 (2011); *Philadelphia Newspapers*, 599 F.3d at 331 (Ambro, J., dissenting). A key right of a secured creditor under state law is the right to foreclose on the collateral in the case of default. While other provisions of the Bankruptcy Code were specifically enacted to preserve that benefit of the secured creditor's bargain, petitioners' construction of Section 1129(b)(2)(A) would nullify that benefit.

Reflecting Congress' commitment to protecting secured creditors, Section 363 and Section 1111 work in tandem to prevent them from being underpaid, and preclude debtors from speculating on the value of the collateral. Pet. App. 24a-25a; *Philadelphia Newspapers*, 599 F.3d at 333-334 (Ambro, J., dissenting). When collateral is to be sold, Section 363(k) provides a mechanism to preserve the benefit of a secured creditor's collateral by granting the right to credit bid. The creditor may bid up to the entire amount of its allowed claim, and as long as it is not outbid, it can purchase the collateral without any cash out of pocket, which essentially effects a repossession. Credit bidding is useful when a creditor believes the value of its collateral exceeds what would otherwise be obtained at auction. Under Section 1111(b), an undersecured creditor may elect to have its claim

treated as if it were fully secured. If the creditor makes this election, the debtor must either pay the creditor in full or surrender the collateral.

Section 1129(b)(2)(A)(ii) preserves these protections when confirming a cramdown plan that proposes to sell collateral free and clear of liens, by expressly incorporating Section 363(k). As the court of appeals explained, petitioners' interpretation "ignore[s] the protections for secured creditors recognized in other Code provisions." Pet. App. 25a. The court thus correctly rejected that reading. *See Timbers of Inwood Forest*, 484 U.S. at 371 (looking to other provisions of Bankruptcy Code to clarify provision at issue).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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