No. 11-166

In the Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC
and RADLAX GATEWAY DECK, LLC,
Petitioners,

v.

AMALGAMATED BANK,
Respondent.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Section 1129(b)(2)(A) of the Bankruptcy Code sets forth three alternative standards for determining whether a chapter 11 plan is "fair and equitable" to an objecting class of secured creditors. In this case, Petitioners (the Debtors) proposed a chapter 11 plan involving a sale of assets free of liens that satisfies one of these standards by providing their secured lender with the "indubitable equivalent" of its claim pursuant to § 1129(b)(2)(A)(iii). The courts below, however, held that the Debtors must proceed under § 1129(b)(2)(A)(ii) and allow their secured lender to "credit bid" (bid its debt in lieu of cash) at the sale.

The question presented is:

> Whether a debtor may pursue a chapter 11 plan that proposes to sell assets free of liens without allowing the secured creditor to credit bid, but instead providing it with the indubitable equivalent of its claim under 11 U.S.C. § 1129(b)(2)(A)(iii).

PARTIES BELOW

In addition to the parties listed in the caption, River Road Hotel Partners, LLC, River Road Expansion Partners, LLC, River Road Restaurant Pads, LLC, River Road Hotel Mezz, LLC, River Road Expansion Mezz, LLC, and River Road Restaurant Mezz, LLC were parties to the consolidated appeal before the court of appeals.

The Rule 29.6 statement for Petitioners RadLAX Gateway Hotel, LLC and RadLAX Gateway Deck, LLC is set forth in the Petition for a Writ of Certiorari.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in *River Road Hotel Partners, LLC v. Amalgamated Bank (In re River Road Hotel Partners, LLC)*, Nos. 10-3597 & 10-3598, is reported at 651 F.3d 642 and is set forth in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at 1a. The orders of the United States Bankruptcy Court for the Northern District of Illinois in *In re RadLAX Gateway Hotel, LLC*, No. 09–B–30047, and *In re River Road Hotel Partners, LLC*, No. 09–B–30029, are not reported and are set forth at Pet. App. 38a and 40a, respectively.

JURISDICTION

The United States Bankruptcy Court for the Northern District of Illinois had original jurisdiction over this case under 28 U.S.C. § 157. The bankruptcy court entered the order under review on October 5, 2010. The United States Court of Appeals for the Seventh Circuit had jurisdiction over Petitioners' appeal under 28 U.S.C. § 158. The court of appeals entered its judgment on June 28, 2011. Petitioners filed a timely Petition for a Writ of Certiorari on August 5, 2011, which the Court granted on December 12, 2011. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case turns primarily on the interpretation of 11 U.S.C. § 1129(b)(2)(A), which provides:

> (b)(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> (A) With respect to a class of secured claims, the plan provides—
>
> (i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for 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, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

This case also involves 11 U.S.C. §§ 102, 363(k), 1111(b), 1123(a)(5), and 1129(b)(1), which are set forth in full in the Appendix.

STATEMENT OF THE CASE

A. Overview

Although chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, was traditionally used to reorganize an ongoing enterprise, it has been increasingly used to facilitate the sale of a debtor's assets and orderly distribution of the proceeds pursuant to the Code's priority scheme. *See, e.g.,* Douglas G. Baird & Robert K. Rasmussen, Reply, *Chapter 11 at Twilight*, 56 STAN. L. REV. 673, 675–76 (2003) (noting that over half of large corporate chapter 11 cases in 2002 involved asset sales). To that end, § 1123(a)(5)(D) of the Code authorizes a debtor to sell its assets as a way to implement a chapter 11 plan. *See* 11 U.S.C. § 1123(a)(5)(D) ("a plan shall * * * provide adequate means for the plan's implementation, such as * * * [the] sale of all or any part of the property of the estate, either subject to or free of any lien * * *.").

As a general rule, a chapter 11 plan must be accepted by all "impaired" classes of creditors (creditors that will receive less than the full amount of their claims) to be confirmed. *See* 11 U.S.C. §§ 1124, 1129(a)(8). Section 1129(b), however, permits confirmation of a plan despite the rejection by an impaired class of creditors—a "cramdown"—if certain conditions are satisfied. One of those conditions is that

the plan be "fair and equitable" to the dissenting class. Section 1129(b)(2)(A) specifies three alternative ways in which a chapter 11 plan can be "fair and equitable" to an objecting class of secured creditors: (i) if the secured creditor retains its lien and is paid deferred cash payments totaling at least the present value of its collateral; (ii) if the secured creditor is allowed to credit bid at the sale of its collateral free of its liens; or (iii) if the secured creditor will realize the "indubitable equivalent" of its secured claim. 11 U.S.C. § 1129(b)(2)(A).

In this case, the Debtors sought to sell substantially all their assets in bankruptcy through an open and advertised auction and to use the cash proceeds to fund a chapter 11 plan. In connection with the auction, the Debtors proposed bid procedures that, among other things, precluded their secured lender from credit bidding at the sale, but allowed the lender to bid cash like other bidders. If the lender objected to confirmation of the plan, the Debtors proposed to satisfy § 1129(b)(2)(A)(iii) by providing the lender with the indubitable equivalent of its claim, namely the cash proceeds from the sale net of certain liens and claims of higher priority.

The bankruptcy court and the Seventh Circuit denied the Debtors' request to conduct the auction without credit bidding, holding that any chapter 11 plan involving the sale of assets free of liens must occur under § 1129(b)(2)(A)(ii) of the Code, which requires a debtor to allow its secured creditor to credit bid at the sale of its collateral. This holding conflicts with *In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010), and *Scotia Pacific Co. v. Official Unsecured Creditors' Comm. (In re Pacific Lumber*

Co.), 584 F.3d 229 (5th Cir. 2009), which held that a debtor may sell assets free of liens in a chapter 11 plan without credit bidding by providing the secured creditor with the indubitable equivalent of its secured claim under § 1129(b)(2)(A)(iii). The Debtors submit that the Seventh Circuit incorrectly disregarded the plain language of § 1129(b)(2)(A), which permits confirmation of a chapter 11 plan as "fair and equitable" if any one of its three subparts is satisfied.

B. Factual Background

The Debtors own the Radisson Hotel at Los Angeles International Airport (LAX) and an adjacent, partially completed parking structure. J.A. 100–01. In November 2007, the Debtors obtained a $142 million construction loan from the Longview Ultra Construction Loan Investment Fund (the "Lender") to acquire the property, renovate the hotel, and build the new parking structure. J.A. 101 (Respondent Amalgamated Bank serves as trustee and administrative agent for the Lender). Due to the severe economic downturn beginning in 2008 and the Lender's refusal to advance funding to complete the parking structure, the Debtors filed voluntary petitions for chapter 11 relief in the United States Bankruptcy Court for the Northern District of Illinois in August 2009. J.A. 102–04. At the time of that filing, the Debtors owed the Lender over $120 million secured by a first priority lien on substantially all of the Debtors' assets. Pet. App. 5a.

The Debtors share common ownership with River Road Hotel Partners, LLC and certain other affiliated companies that owned the InterContinental Chicago O'Hare Hotel. The River Road entities also obtained a

loan from the Lender in 2007 and, due to the same economic pressures, filed for chapter 11 relief in the same court immediately before the Debtors' filing. Pet. App. 2a–3a. The two cases proceeded in parallel.

Early in the cases, the Debtors embarked on an extensive marketing campaign to solicit offers from outside investors to fund a plan of reorganization. J.A. 104–05. Due to the severe decline in property values and resulting disparity between the value of the Debtors' assets and the amount of secured debt, the Debtors were unable to attract equity investments or viable financing alternatives. The Debtors did, however, procure a buyer willing to acquire substantially all of the Debtors' assets for $47.5 million in cash. J.A. 106–07. In addition to the cash purchase price, the buyer agreed to fund distributions to unsecured creditors through a chapter 11 plan from the future profits of the hotel. J.A. 108. The buyer further agreed to subject its bid to higher and better offers at an open auction to be conducted after continued marketing efforts, but the buyer required the Lender to be prohibited from credit bidding at the sale. J.A. 108–09.

In June 2010, the Debtors filed a joint chapter 11 plan proposing the auction sale of substantially all their assets, with the proceeds to be used to fund a chapter 11 plan for the benefit of their creditors. J.A. 14. In support of their plan, the Debtors filed a motion asking the bankruptcy court to approve bid procedures specifying that the sale would be conducted pursuant to § 1123(a), § 1123(b), and § 1129(b)(2)(A)(iii) of the Code, and that no secured creditor would be permitted to credit bid at the sale. J.A. 118. The Lender objected that the plan could not be confirmed unless the Lender

was permitted to credit bid at the auction pursuant to § 1129(b)(2)(A)(ii). J.A. 2.

C. The Bankruptcy Court Opinion

In October 2010, the bankruptcy court denied the Debtors' bid procedures motion. Pet. App. 38a, 40a. The court acknowledged that the Third Circuit in *Philadelphia Newspapers* had approved nearly identical bid procedures and held that a chapter 11 plan involving an auction sale of assets free of liens without credit bidding could be confirmed by providing the secured creditor with the indubitable equivalent of its secured claim under § 1129(b)(2)(A)(iii). Pet. App. 42a. The bankruptcy court found the dissenting opinion in *Philadelphia Newspapers* more persuasive, however, and held that the Debtors could not proceed with the auction unless they allowed credit bidding and pursued confirmation pursuant to § 1129(b)(2)(A)(ii). *Id*. Recognizing the importance of the issue to a broad range of bankruptcy cases, the bankruptcy court certified an immediate appeal to the Seventh Circuit. Pet. App. 30a, 33a.

In the meantime, the bankruptcy cases continued and the Lender filed a motion for relief from the automatic stay pursuant to § 362(d)(1) and § 362(d)(2) of the Code to pursue its state law foreclosure rights against its collateral. The bankruptcy court denied that motion. For their part, the Debtors filed an amended chapter 11 plan and an amended asset purchase agreement in the bankruptcy court, both of which were virtually identical to their predecessors except that (1) the purchase price for the Debtors' assets rose to $55 million to account for the appreciation in value of the assets during the

bankruptcy cases, and (2) the deadlines for approval of the bid procedures motion and other events were extended. J.A. 174.

D. The Seventh Circuit Opinion

The Seventh Circuit accepted the Debtors' direct appeal and consolidated it with the related cases involving the River Road entities. J.A. 163–64. The court of appeals heard argument in April 2011 and issued an opinion affirming the bankruptcy court's decision in June 2011. Pet. App. 1a.

As an initial matter, the Seventh Circuit rejected the Lender's argument that the appeal was moot, finding that the Debtors had not abandoned their proposed auction or chapter 11 plan. Pet. App. 8a (citing the Debtors' amended asset purchase agreement and their pursuit of the appeal). The court further reasoned that in any event, the case fit squarely within the well-established exception to mootness for cases that are capable of repetition, yet evade review due to timing issues. Pet. App. 8a–9a.

On the merits, the Seventh Circuit concluded that § 1129(b)(2)(A) did not have a plain meaning because subsection (iii) does not specify whether it applies to any type of chapter 11 plan or, instead, only to plans not covered by subsections (i) and (ii). Pet. App. 17a. Having established an ambiguity, the court looked beyond the plain text to canons of statutory interpretation, legislative history, and secured creditor protections found in other parts of the Code to conclude that any plan involving the sale of assets free of liens could not be confirmed under subsection (iii), but only under subsection (ii).

E. Subsequent Events, Including the Court's Grant of Certiorari

Shortly after the Seventh Circuit's decision, in July 2011, the bankruptcy court confirmed the Lender's chapter 11 plan in the related River Road cases. The River Road entities therefore did not seek review of the Seventh Circuit's ruling.

The RadLAX bankruptcy cases have not concluded, however, and the Debtors petitioned for a writ of certiorari. The Court granted the petition on December 12, 2011. Noting that the Court had granted certiorari, the bankruptcy court denied the Lender's renewed motion for relief from the automatic stay. J.A. 8.

SUMMARY OF THE ARGUMENT

Section 1129(b)(2)(A) of the Bankruptcy Code unambiguously provides three alternative ways to provide "fair and equitable" treatment to a secured creditor, as required to confirm a chapter 11 plan over its objection: (i) the secured creditor retains its lien on the collateral and receives deferred cash payments equal to the present value of the collateral; (ii) the secured creditor is allowed to credit bid at the sale of its collateral free of its lien; or (iii) the secured creditor realizes the "indubitable equivalent" of its secured claim.

In this case, the Debtors propose selling substantially all of their assets free of liens at an open and advertised auction pursuant to bid procedures that prohibit any secured creditor from credit bidding (but permit cash bidding). To confirm the plan over the Lender's objection, the Debtors intend to provide the

Lender with the indubitable equivalent of its claim under § 1129(b)(2)(A)(iii). Nothing in the plain language of the statute prohibits the Debtors from conducting the auction and pursuing confirmation under subsection (iii).

Numerous features in the statutory text support this conclusion. First, the three alternatives are connected by the disjunctive "or," indicating that any one of the three standards, alone, satisfies the "fair and equitable" requirement. Second, the introductory phrase "the plan provides" in § 1129(b)(2)(A) indicates that it is the plan proponent (here the Debtors) that decides which of the three alternatives to pursue. Third, the word "includes" in § 1129(b)(2) makes clear that the plan proponent is not limited in its choice among the three alternatives.

Congress knew how to limit the use of the "indubitable equivalent" standard. In § 361(3)—the only other section of the Code to use the phrase—Congress limited the scope of the "indubitable equivalent" standard by specifying what it does not include. 11 U.S.C. § 361(3). Similarly, Congress could have added the phrase "except as provided in subsections (i) and (ii) of this section" to the beginning of § 1129(b)(2)(A)(iii) as it did when limiting the application of numerous other sections in the Code. Section 1129(b)(2)(A)(iii) contains no such limitation, convincing evidence that Congress intended to give debtors flexibility to confirm any type of chapter 11 plan—even one involving the sale of collateral free of liens—over the dissent of their secured creditor so long as the plan provides the indubitable equivalent of the creditor's secured claim.

Had Congress truly intended to provide an absolute right to credit bid in all sales under chapter 11, it would have imposed such a requirement in § 1123(a)(5)(D), which governs the sale of collateral under a chapter 11 plan. That statute expressly permits the sale of property "either subject to or free of any lien" as a way to implement a chapter 11 plan, but it does *not* include any right to credit bid at such a sale. 11 U.S.C. § 1123(a)(5)(D).

This omission is in stark contrast to § 363(k), which governs the sale of collateral outside a chapter 11 plan. Section 363(k) permits the sale of encumbered property and, unlike § 1123(a)(5)(D), expressly requires that secured creditors have the presumptive right to credit bid. Congress declined to extend the application of § 363(k) to all sales in a chapter 11 plan. The Court has long recognized that when Congress includes a specific provision in one part of a statute, but excludes it in another part of the same statute, the disparate treatment is purposeful and should be respected.

The text of § 1129(b)(2)(A) is unambiguous and permits a debtor to sell assets free of liens without credit bidding so long as it provides the secured creditor with the indubitable equivalent of its secured claim at plan confirmation. Applying the plain language of § 1129(b)(2)(A) ensures the uniform application of secured creditor protections under the Code. Section 506(a) limits a creditor's secured claim in bankruptcy to the *present value* of its collateral. It is that value that is entitled to be preserved during the course of the bankruptcy case, pursuant to § 361 and § 362(d)(1), and realized by the secured creditor at confirmation of the chapter 11 plan, pursuant to

§ 1129(b)(2)(A). Providing the indubitable equivalent of the secured claim under § 1129(b)(2)(A)(iii) where property is sold free of liens without credit bidding is entirely consistent with this scheme of protections.

Alternative canons of statutory construction do not alter the analysis. The credit bidding requirement under subsection (ii) is not "more specific" than the indubitable equivalent requirement under subsection (iii). Rather, subsection (ii) affords a *procedural* protection (a right to credit bid) that protects the creditor's interest in the present value of its collateral, whereas subsection (iii) provides a *substantive* protection (a right to the indubitable equivalent of the secured claim) that ensures the creditor will realize the present value of its collateral. Subsection (ii) therefore need not and does not limit the application of subsection (iii).

Similarly, permitting a sale of property free of liens under subsection (iii) does not render subsection (ii) superfluous. In some circumstances, a debtor may be unable to provide its secured creditor with cash or property at least equal to the secured claim immediately upon confirmation and thus may prefer to sell the collateral with credit bidding. Likewise, when the creditor's total claim is close to the estimated value of its collateral, the debtor may prefer an auction sale with credit bidding because it may generate a surplus for the bankruptcy estate. Finally, when a debtor wants to dispose of unnecessary property in bankruptcy, it may wish to conduct an auction with credit bidding rather than meet the indubitable equivalent standard under subsection (iii) at confirmation.

The Seventh Circuit turned away from the plain language of § 1129(b)(2)(A) in its decision. It found the statute ambiguous based on the purported absence of any indication in the statutory text whether subsection (iii) can apply to any type of chapter 11 plan or whether it is limited only to plans not covered under subsections (i) and (ii). In reaching this conclusion, the court dismissed in a footnote Congress' use of the word "or" to connect the three subsections. It interpreted § 1129(b)(2)(A) to limit subsection (iii) to situations in which subsections (i) and (ii) could not apply. That holding offends the plain language of the statute and this Court's well-established precedents on statutory construction by judicially crafting a limitation in subsection (iii) that does not appear in the statutory text.

The Seventh Circuit's ruling also conflicts with two better-reasoned court of appeals decisions that interpreted § 1129(b)(2)(A) to permit a sale of property free of liens without credit bidding. The Third Circuit's decision in *Philadelphia Newspapers* and the Fifth Circuit's decision in *Pacific Lumber* demonstrate how a faithful application of the plain language of § 1129(b)(2)(A) produces an optimal outcome in bankruptcy—confirmation of a chapter 11 plan for the benefit of *all* creditors instead of liquidation for the benefit of only the secured creditor.

ARGUMENT

The purpose of chapter 11 of the Bankruptcy Code is to permit the successful rehabilitation of debtors. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984). To that end, the Code provides a wide range of procedures for restructuring a distressed enterprise or disposing of its assets in an orderly fashion. This flexibility reflects "Congress' appreciation that various approaches are necessary to address effectively the disparate situations of debtors seeking protection under the Code." *Toibb v. Radloff*, 501 U.S. 157, 164 (1991). One such approach is the orderly sale of property free of pre-bankruptcy liens. 11 U.S.C. § 1123(a)(5)(D).

The Debtors in this case proposed an auction sale of substantially all their assets free of liens to fund a chapter 11 plan for the benefit of all their creditors. In connection with the auction, the Debtors sought approval of bid procedures that would prohibit secured creditors from bidding their debt instead of cash at the auction. The bankruptcy court and the Seventh Circuit refused to approve those bid procedures, holding that the Code mandates credit bidding in all sales of collateral free of liens under a chapter 11 plan. Pet. App. 1a, 38a. That ruling disregards the plain language of § 1129(b)(2)(A)(iii), which unambiguously permits such a sale as long as the secured creditor will realize the indubitable equivalent of its claim.

A. The Plain Language of the Code Does Not Require Credit Bidding

Interpretation of the Bankruptcy Code, like all statutes, begins with the plain language of the statute

itself. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Courts presume that Congress said in the statutory text precisely what it intended. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("[W]e begin with the understanding that Congress, 'says in a statute what it means and means in a statute what it says there.'"). Thus, where the language and structure of a statute are clear, the Court looks no further and applies the statute according to its plain meaning. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[W]hen the words of a statute are unambiguous * * * 'judicial inquiry is complete.'"); *Ron Pair*, 489 U.S. at 241 ("[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'"). Because Congress took particular care in drafting the Code over the span of 10 years, it is only in the rarest case that its text is truly ambiguous. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461–62 (1999) (Thomas, J., concurring). This is not such a case.

1. Section 1129(b)(2)(A) Unambiguously Provides Three Distinct Options for Confirming a Chapter 11 Plan Over the Objection of a Secured Creditor

The primary statute upon which the Debtors rely in support of their proposed auction is 11 U.S.C. § 1129(b)(2)(A), which sets forth three alternative ways that a debtor may satisfy the "fair and equitable" requirement for confirmation of a chapter 11 plan over the dissent of a secured creditor. *See* 11 U.S.C. § 1129(b)(1) (permitting confirmation of a chapter 11 plan despite rejection by an impaired secured creditor if, among other things, the plan is "fair and equitable"

to the dissenting secured creditor). Section 1129(b)(2)(A) provides, in relevant part:

> (b)(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class *includes* the following requirements:
>
> (A) With respect to a class of secured claims, *the plan provides—*
>
> (i) (I) that the holders of such claims retain the liens securing such claims * * * to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive * * * deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for 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, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; *or*
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. § 1129(b)(2)(A) (emphasis added). Several features of this text compel the conclusion that a debtor may choose any one of the three alternatives

under subsections (i), (ii), or (iii) to satisfy the "fair and equitable" requirement of § 1129(b)(1).

First, the three subsections are connected by the disjunctive "or," indicating that any one of the alternatives alone can satisfy the fair and equitable requirement. This reading comports with the Code's rules of construction, which instruct that "'or' is not exclusive." 11 U.S.C. § 102(5); *see also* 11 U.S.C.A. § 102 (West 2011) (Revision Notes and Legislative Reports) (statutory note further explaining that "[p]aragraph (5) specifies that 'or' is not exclusive. Thus, if a party 'may do (a) or (b)', then the party may do either or both. The party is not limited to a mutually exclusive choice between the two alternatives."). Likewise, *Black's Law Dictionary* defined "or" as "[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things * * *."). BLACK'S LAW DICTIONARY 1095 (6th ed. 1990).

Second, the phrase "the plan provides" at the beginning of § 1129(b)(2)(A) demonstrates that it is the plan proponent—in this case, the Debtors—that selects which of the three alternatives to pursue. Thus, as long as the plan is designed to meet any one of the three alternatives set forth in § 1129(b)(2)(A), it will be deemed fair and equitable with respect to an objecting secured creditor.

Third, Congress' use of the term "includes" in the opening clause of § 1129(b)(2) demonstrates that the plan proponent is not limited in its selection from the three alternatives. *See* 11 U.S.C. § 102(3) ("'includes' and 'including' are not limiting."); *see also Am. Sur. Co. of N.Y. v. Marotta*, 287 U.S. 513, 517 (1933) ("In

definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration.").

Accordingly, the plain language and structure of § 1129(b)(2)(A) unambiguously afford a debtor flexibility in meeting the "fair and equitable" standard through any of the three enumerated alternatives. Numerous courts have adopted this straightforward interpretation of § 1129(b)(2)(A)'s three alternatives. *See Philadelphia Newspapers*, 599 F.3d at 305; *Pacific Lumber*, 584 F.3d at 245–46; *Wade v. Bradford*, 39 F.3d 1126, 1130 (10th Cir. 1994); *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd. II)*, 994 F.2d 1160, 1168 (5th Cir. 1993); *In re CRIIMI MAE, Inc.*, 251 B.R. 796, 806 (Bankr. D. Md. 2000).

2. Congress Did Not Mandate Credit Bidding in All Sales of Property Free of Liens

In this case, the Debtors propose to confirm their chapter 11 plan through § 1129(b)(2)(A)(iii) by providing the Lender the "indubitable equivalent" of its claim. Nothing in the plain language of § 1129(b)(2)(A)(iii) restricts how the Debtors can meet this standard. Rather it directs that the court "shall confirm the plan" if, "with respect to a class of secured claims, the plan provides for * * * the realization by such holders of the indubitable equivalent of such claims." 11 U.S.C. §§ 1129(b)(1), 1129(b)(2)(A)(iii).

Congress knew how to limit the scope of the "indubitable equivalent" standard when it wanted to

do so. For instance, § 361(3)—the only other section of the Code that employs the phrase—provides that:

> When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—
>
> * * *
>
> (3) granting such other relief, *other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense*, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11 U.S.C. § 361(3) (emphasis added). Section 361(3) thus expressly limits how a debtor can provide adequate protection under the indubitable equivalent standard to something *other than* an administrative expense. In contrast, Congress did not limit how a debtor may satisfy the indubitable equivalent requirement in § 1129(b)(2)(A)(iii).[1]

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[1] Congress appears to have adopted the term "indubitable equivalent" from Judge Learned Hand's opinion in *Metropolitan Life Ins. Co. v. Murel Holding Corp. (In re Murel Holding Corp.)*, 75 F.2d 941, 942 (2d Cir. 1935). Nothing in that case suggests an inherent limitation on "indubitable equivalence." The court simply declined to read § 77B of the Bankruptcy Act to deprive a senior creditor of its money or property to benefit junior creditors unless the plan provided "a substitute of the most indubitable equivalence." *Id.* at 942.

Had Congress wanted to constrain subsection (iii) in the way the Seventh Circuit proposed, Congress could have and would have written in words of limitation, such as "*except as provided in subsections (i) and (ii) of this section*, for the realization by such holders of the indubitable equivalent of such claims." Indeed, Congress used this precise language when restricting the application of numerous other provisions of the Code. *See, e.g.*, 11 U.S.C. §§ 348(a), 362(a), 362(c), 365(f)(1), 365(g), 366(a), 502(b), 509(a), 523(c)(1), 524(e), 541(a)(1), 542(a), 547(b), 547(e)(2)(A), 549(a), 552(a), 766(h), 945(b), 1112(e), 1122(a), 1301(a), 1307(c). The lack of any restrictions in subsection (iii) is strong evidence that Congress did not intend to limit its scope or application.

Indeed, if Congress had truly intended to provide an absolute right to credit bid at all sales through chapter 11 plans, the most logical place to include that right would have been in § 1123(a)(5)(D), which authorizes the sale of estate property free of liens to implement a chapter 11 plan. That section provides:

> (a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—
>
> * * *
>
> (5) provide adequate means for the plan's implementation, such as—
>
> * * *
>
> (D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any

> part of the property of the estate among those having an interest in such property of the estate.

11 U.S.C. § 1123(a)(5)(D). Although Congress expressly permitted the sale of property "free of any lien," it did not mandate that the secured creditor must be allowed to credit bid at such a sale.

This omission is in stark contrast to § 363(k) of the Code, which entitles a secured creditor to credit bid at a sale of its collateral outside a chapter 11 plan unless the bankruptcy court denies that right for cause:

> At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such 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). Although it easily could have done so, Congress did not extend the credit bidding privileges in § 363(k) to *all* sales inside a chapter 11 plan. This omission was purposeful, as shown by the very next subsection, § 363(l), which authorizes sales of property pursuant to a chapter 11 plan:

> Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, *or a plan*

> *under chapter 11*, 12, or 13 of this title may provide for the use, sale, or lease of property * * *.

11 U.S.C. § 363(l) (emphasis added).

Congress' inclusion of a presumptive credit bidding requirement in § 363(k) for all asset sales *outside* a chapter 11 plan and its omission of the same requirement in § 1123(a)(5)(D) for such sales *inside* a chapter 11 plan is compelling evidence that Congress did not intend to provide secured creditors with a right to credit bid in *all* chapter 11 cases. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Indeed, earlier this Term, the Court refused to impose an extra-textual limit on a similarly constructed statute. In *Pacific Operators Offshore, LLP v. Valladolid*, No. 10–507, 132 S. Ct. ____ (Jan. 11, 2012), the Court considered § 1333(b) of the Outer Continental Shelf Lands Act, which extends workers compensation coverage to injuries "occurring as the result of operations conducted on the outer Continental Shelf." 43 U.S.C. § 1333(b). Because the plain text of the statute did not require the injury itself to occur on the outer continental shelf, the Court held that such benefits could extend to injuries that occurred on land, as long as they resulted from operations on the shelf. *Valladolid*, slip op. 8. The Court rejected the petitioner's argument that geographic limitations contained in other subsections

of § 1333 implied that Congress meant to impose a similar limitation in that subsection, reasoning that "Congress' decision to specify, in scrupulous detail, exactly where the other subsections of § 1333 apply, but to include no similar restriction on injuries in § 1333(b), convinces us that Congress did not intend § 1333(b) to apply only to injuries suffered on the OCS." *Id*.

The same analysis applies here. Congress' decision to specify a credit bidding requirement in § 363(k) for all property sales free of liens outside a chapter 11 plan, but to include no similar requirement in § 1123(a)(5)(D) for property sales free of liens through a chapter 11 plan is convincing evidence that Congress did not intend to impose an absolute right to credit bid in chapter 11.

B. Applying the Plain Language of § 1129(b)(2)(A) Ensures Consistency in Protections for Secured Creditors

This Court has long recognized that statutory interpretation is a "holistic endeavor" and that a specific provision may be clarified by its relationship to the rest of the statutory regime. *See, e.g., United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("*Timbers*"). A review of the Code's broader scheme of secured creditor protections confirms that the plain language of § 1129(b)(2)(A) permits a sale of assets free of liens without credit bidding as long as the secured creditor will realize the indubitable equivalent of its secured claim under subsection (iii).

1. The Code Protects the Present Value of the Secured Creditor's Collateral in Bankruptcy

At the outset of a bankruptcy case, § 506(a) bifurcates an undersecured creditor's claim into two separate claims: (1) a secured claim equal to the present value of the underlying collateral; and (2) an unsecured deficiency claim equal to the remaining balance of the claim. *See* 11 U.S.C. § 506(a)(1). For example, a secured creditor owed $100,000 secured by property valued at $70,000 as of the bankruptcy filing would have a secured claim of $70,000 and an unsecured deficiency claim of $30,000.

The Code protects the secured claim by preserving the creditor's interest in the value of its collateral during the bankruptcy case. If that value declines, the secured creditor is entitled to "adequate protection" of its interest or relief from the automatic stay to foreclose on its collateral under § 362(d)(1). Thus, if the value of the property declines from $70,000 to $50,000 during the course of the case, the creditor is entitled to adequate protection of its declining interest ($20,000) or relief from the stay. *See* 11 U.S.C. § 362(d)(1). To satisfy that adequate protection requirement, the debtor may provide cash payments, replacement collateral, or anything else (other than an administrative expense claim) that constitutes the indubitable equivalent of the creditor's declining interest. 11 U.S.C. § 361. In this way, the Code preserves the secured creditor's right to the present value of its collateral during the course of the bankruptcy case.

At plan confirmation, § 1129(b)(2)(A) ensures that the secured creditor will *realize* the present value of its collateral. Section 506(a) once again sets the amount of the secured claim equal to the present value of the collateral as of the effective date of the plan. 11 U.S.C. § 506(a)(1) ("Such value shall be determined in light of the purpose of the valuation * * * and in conjunction with any hearing * * * on a plan affecting such creditor's interest."). That secured claim is entitled to "fair and equitable" treatment under § 1129(b)(1). Section 1129(b)(2)(A) sets forth the three alternative ways to satisfy the fair and equitable requirement, each of which ensures that the secured creditor will realize at least the present value of its collateral when the plan is confirmed.

Under subsection (i), a debtor may retain or transfer the collateral subject to the liens and provide the secured creditor deferred cash payments that total the allowed amount of its secured claim and have a present value at least equal to the current value of its collateral. 11 U.S.C. § 1129(b)(2)(A)(i). Subsection (i) thus guarantees the secured creditor a stream of payments over the life of the plan with a present value equal to the value of the collateral as of the effective date of the plan.

Under subsection (ii), the secured creditor has the presumptive right to credit bid at the sale of its collateral free of liens. This allows the secured creditor to purchase its collateral through a winning credit bid at the sale. Thus, subsection (ii) also ensures that the creditor has the ability to realize the current value of its collateral.

Under subsection (iii), a debtor must provide its secured creditor with the indubitable equivalent of the creditor's secured claim; that is, property at least equal to the present value of the collateral. Subsection (iii) thus provides the secured creditor with the same benefit required under subsections (i) and (ii): the right to realize the present value of its collateral at plan confirmation. Permitting a sale of collateral free of liens under subsection (iii) is entirely consistent with this scheme of secured creditor protections because the secured creditor will receive property at least equal to the present value of its collateral.

For example, assume again that a creditor has a $100,000 claim secured by property valued at $70,000. Under subsection (i), the secured creditor is entitled to deferred cash payments with a present value equal to the property's current value, $70,000. If the property is sold free of liens under subsection (ii), the secured creditor is entitled to bid up to the full amount of its $100,000 claim to obtain the property, worth $70,000. Finally, if the property is sold free of liens under subsection (iii), the secured creditor is entitled to the indubitable equivalent of its secured claim, which again is $70,000. Under each scenario, the Code ensures that the secured creditor will realize the present value of its collateral ($70,000) at plan confirmation. *See Timbers*, 484 U.S. at 377 (recognizing that "under § 1129(b) a secured claimant has a right to receive under a plan the present value of his collateral").

Thus, while § 361 and § 362(d)(1) preserve the present value of the secured creditor's interest in its collateral during the bankruptcy case, § 1129(b)(2)(A) ensures the realization of that interest at plan

confirmation. These sections work together to protect a secured creditor's interest in the present value of its collateral at all times. Applying the plain language of § 1129(b)(2)(A) to permit the sale of collateral free of liens under subsection (iii) serves this overarching objective.

2. The Code Separately Protects the Secured Creditor's Deficiency Claim

Although § 506(a) limits an undersecured creditor's secured claim to the present value of its collateral in bankruptcy, it provides the creditor with a separate unsecured deficiency claim equal to the remaining amount, regardless of whether the creditor contractually bargained for such rights. *See* 11 U.S.C. § 1111(b)(1). This gives a secured creditor significant additional protections. For example, the secured creditor may separately vote its deficiency claim at plan confirmation. 11 U.S.C. § 1126(a). It is also protected from unfair discrimination against its deficiency claim. 11 U.S.C. § 1129(b)(1). Furthermore, the secured creditor's deficiency claim is generally classified with all other general unsecured claims. 11 U.S.C. §§ 1122(a), 1129(a)(10); *see also John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 159–61 (3d Cir. 1993) (Alito, J.). This right often enables the secured creditor to control the vote of the general unsecured creditor class, which frequently allows it to block confirmation of the plan. 11 U.S.C. §§ 1126(c) (requiring the vote of at least two-thirds in amount and more than one-half in number of claims in a class voting on the plan to accept it), 1129(a)(10) (requiring at least one accepting impaired class to confirm a plan). The secured creditor is also guaranteed to receive at least as much as it would

have received in a chapter 7 liquidation. 11 U.S.C. § 1129(a)(7)(A)(ii) (the "best interests" test). Finally, the Code ensures that the secured creditor's deficiency claim will be paid in full before any subordinate claims or interests receive or retain property. 11 U.S.C. § 1129(b)(2)(B)(ii) (the "absolute priority" rule).

The Code therefore provides a broad range of secured creditor protections in chapter 11 designed to protect both the secured creditor's interest in the value of its collateral as well as its unsecured deficiency claim. Yet in this case, the Lender claims that these protections are not enough, and that secured creditors must have the additional right to realize the upside potential of their collateral through credit bidding at any sale of that collateral. To try to convince the Court to reach this result, the Lender must stray outside the plain language of § 1129(b)(2)(A).

C. Other Statutory Interpretation Tools Cannot and Do Not Override the Plain Language of § 1129(b)(2)(A)

Courts often look to canons of construction to assist with the interpretation of statutes when the language is unclear. But the Court has cautioned that "canons of construction are no more than rules of thumb that help courts determining the meaning of legislation," and courts should always turn first to the "cardinal canon" of applying the plain language of the statute. *Germain*, 503 U.S. at 253–54; *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004) ("We should prefer the plain meaning since that approach respects the words of Congress."). As demonstrated above, the plain language of § 1129(b)(2)(A)(iii) does not prohibit an auction sale of assets free of liens without credit

bidding. In any event, alternative canons of statutory construction would not change that conclusion.

1. Subsection (ii) Is Not a "Specific" Provision Superseding a "General" Subsection (iii)

One canon of construction instructs that "[w]here there is inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail." NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:5 (7th ed. 2007). Some have argued against applying the plain language of § 1129(b)(2)(A) by interpreting subsection (iii) as a general, catch-all provision that must be limited by the purportedly more specific subsection (ii). That argument, however, mischaracterizes the nature of these subsections.

Subsection (ii) provides secured creditors with a *procedural* protection—the right to credit bid at an auction of their collateral free of liens—without regard to the substantive outcome of the sale. If the secured creditor is afforded that procedural right (whether or not it exercises such right), it does not matter how the sale is conducted (e.g., by private sale, public auction, etc.) or what price is ultimately paid for the asset. This provision reflects Congress' determination that the procedural right to credit bid by itself protects a creditor's interest in the present value of its collateral and causes any treatment it receives under the plan to be fair and equitable.

Subsection (iii), on the other hand, provides the secured creditor with a *substantive* protection—receipt of the indubitable equivalent of its secured claim—regardless of the procedure the debtor employs to achieve that result. As long as the secured creditor receives property equal to at least the present value of its collateral, it does not matter how the debtor implements its chapter 11 plan (e.g., by retention, substitution, abandonment or sale of the collateral). In that respect, subsection (iii) is *more* exacting than subsection (ii) because it requires a debtor to actually provide the secured creditor what subsection (ii) only protects procedurally.

Indeed, receipt of cash equal to the present value of the collateral upon confirmation has many advantages. For example, the creditor can redeploy that cash to a better use. *See Till v. SCS Credit Corp.*, 541 U.S. 465, 487 (2004) (Thomas, J., concurring) (recognizing that the receipt of cash today is more valuable because it "can be invested to start earning interest immediately"). Furthermore, the secured creditor avoids the risks involved when a debtor retains its collateral over the life of a plan. *See Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 962 (1997).

Because subsection (ii) mandates a certain process while subsection (iii) mandates a certain outcome, neither subsection is more specific or more general than the other. Instead, they provide secured creditors with similar protections in two different ways. As such, the canon of construction that a specific provision should limit a more general provision in the same statute does not apply.

This conclusion comports with the Court's recent decision in *Bloate v. United States*, 130 S. Ct. 1345 (2010), which applied the "specific governs the general" canon of construction to the Speedy Trial Act. The issue in *Bloate* was whether delays resulting from preparation of a pretrial motion are automatically excluded from the 70-day period to begin a trial under 18 U.S.C. § 3161(h)(1), or instead may be excluded only upon a specific finding by the district court under 18 U.S.C. § 3161(h)(7). In resolving that issue, the Court held that the general language in § 3161(h)(1) for "[a]ny period of delay resulting from other proceedings concerning the defendant" was limited by the specific example of one such proceeding in subparagraph D, involving a "delay resulting from any pretrial motion," for which only the time "from the filing of the motion through the conclusion of the hearing" is automatically excluded. *Id*. at 1354. In that case, the "specific governs the general" canon applied because the limiting subparagraph (D) was a subset of the more general § 3161(h)(1). *Id*.

By contrast, in this case, subsection (ii) is not a limiting subset of subsection (iii). Rather, both are subsets of § 1129(b)(2)(A), which enumerates three equal and independent ways to satisfy the general "fair and equitable" requirement of § 1129(b)(1). Consequently, subsection (iii) need not yield to subsections (i) or (ii).

2. The Natural Reading of § 1129(b)(2)(A) Does Not Render Subsection (ii) Superfluous

Other critics have argued that applying the plain language of § 1129(b)(2)(A) would render subsection

(ii) superfluous. *See Philadelphia Newspapers*, 599 F.3d at 330 (Ambro, J., dissenting). In fact, permitting a sale of collateral free of liens without credit bidding under subsection (iii) does *not* nullify subsection (ii).

As explained above, subsection (iii) requires a debtor to provide the secured creditor with property at plan confirmation at least equal to the present value of its collateral. That requirement is immediate and substantial, and not all chapter 11 plans can satisfy it. For example, the sale may not generate proceeds equal to the asset's fair market value. Unless the debtor has access to additional property or new funds, it will be unable to satisfy the "indubitable equivalent" requirement of subsection (iii). In that case, a debtor may opt to pursue confirmation under subsection (ii) and simply permit the secured creditor to credit bid at the sale.

Additionally, where a debtor owns multiple properties, only some of which are necessary or desirable for an effective reorganization, the debtor may wish to sell the unneeded property and allow credit bidding to avoid having to provide the indubitable equivalent of the creditor's secured claim at confirmation under subsection (iii). Likewise, where the present value of the collateral is close to the total amount of the secured creditor's claim, a debtor may prefer to allow credit bidding under subsection (ii) because it may generate a surplus for the estate and avoid any need to satisfy the indubitable equivalent requirement at confirmation. Finally, in some cases secured creditors may negotiate credit bid rights in debtor-in-possession financing agreements and cash collateral orders in bankruptcy that would preclude a

sale of collateral without credit bidding under subsection (iii).

In sum, that § 1129(b)(2)(A) permits a sale without credit bidding under subsection (iii) does not mean that *all* such sales will proceed under subsection (iii) rather than subsection (ii).

3. Secured Creditors Are Not Entitled to the Potential Future Appreciation of Their Collateral

Critics have also argued that applying the plain language of § 1129(b)(2)(A) would deprive the secured creditor of the potential future appreciation of its collateral. Advocates of this position point to the interplay between § 363(k) and § 1111(b) of the Code as ensuring such a right for secured creditors. *See Philadelphia Newspapers*, 599 F.3d at 332–34 (Ambro, J., dissenting).

Section 1111(b)(2) permits an undersecured creditor, in certain circumstances, to elect to have its entire claim treated as fully secured regardless of the value of its underlying collateral (the § 1111(b) election). *See Dewsnup v. Timm*, 502 U.S. 410, 430 n.3 (1992) (Scalia, J., dissenting) (describing the effect of the § 1111(b) election). For example, a creditor owed $100,000 secured by property currently valued at $70,000 may elect to have its entire $100,000 claim treated as fully secured under § 1111(b)(2), even though the property is only worth $70,000. In a reorganization plan in which a debtor retains the collateral, this election provides the secured creditor with a lien equal to the full amount of its claim ($100,000) regardless of the value of its collateral

($70,000). Thus, although the undersecured creditor waives a deficiency claim and its attendant rights, it retains a lien on its collateral equal to the full amount of its claim. This supposedly protects against a debtor cramming down the creditor's secured claim at a low point in valuation under § 1129(b)(2)(A)(i) and then later selling the collateral at a higher price, paying off the lien, and keeping the surplus for itself.

A secured creditor may not make the § 1111(b) election if its collateral is sold under § 363 or through a chapter 11 plan. *See* 11 U.S.C. § 1111(b)(1)(B)(ii). This has caused some to argue that a secured creditor must always have the right to credit bid when its collateral is sold. Like the § 1111(b) election, credit bidding supposedly protects the secured creditor against a third party buying its collateral free of liens when prices are depressed. Accordingly, these critics argue that the Code guarantees secured creditors one of these two supposedly fundamental rights—either the § 1111(b) election when the debtor keeps the collateral or credit bidding when the debtor sells the collateral. This syllogism is undermined, however, by numerous situations where the Code provides *neither* protection.

First, if a debtor transfers collateral subject to a lien to a third party under § 1129(b)(2)(A)(i), the secured creditor is not entitled to make the § 1111(b) election because the collateral is sold. 11 U.S.C. § 1111(b)(1)(B)(ii). But the secured creditor is also not entitled to credit bid because subsection (i), like subsection (iii), does not incorporate the right to credit bid.

Second, § 363(k) itself expressly permits the bankruptcy court, for cause, to deny the right to credit bid in the sale of collateral. 11 U.S.C. § 363(k) ("unless the court for cause orders otherwise the holder of such claim may bid at such sale"). The cause exception in § 363(k), however, is generally reserved for creditor malfeasance or priority disputes among lien holders. *See*, *e.g.*, Daniel P. Winikka & Debra K. Simpson, *Will Bankruptcy Courts Limit the Right to Credit Bid?*, 17 J. BANKR. L. & PRAC. 6 art. 6 (Sept. 2008) (recognizing that "courts thus far have found cause to alter or eliminate a creditor's right to credit bid [under § 363(k)] only in situations involving collusion or a failure to provide for, or satisfy, a senior or pari passu lien."). Consequently, the Debtors were unable to demonstrate cause in this case.

Third, a creditor may not make the § 1111(b) election if its interest in the collateral is of inconsequential or no value (e.g., in the case of an out-of-the-money second lien creditor). 11 U.S.C. § 1111(b)(1)(B)(i). As a result, if the bankruptcy is filed at a time of depressed asset values, rendering the formerly well-secured creditor totally unsecured, that creditor has no right to share in the upside of its collateral.

Finally, even where the creditor makes the § 1111(b) election, it still is not guaranteed to participate in the future appreciation of its collateral. The Code expressly allows a debtor to modify a lien to implement its chapter 11 plan. *See* 11 U.S.C. § 1123(a)(5)(E). Such modifications can include eliminating a due-on-sale clause. *See*, *e.g.*, *Airadigm Commc'ns, Inc. v. FCC (In re Airadigm Commc'ns, Inc.)*, 519 F.3d 640, 654–55 (7th Cir. 2008). Doing so

would allow a debtor to cram down the secured creditor under § 1129(b)(2)(A)(i) and later sell the collateral subject to the lien and retain the benefit of the collateral's future appreciation for itself. The secured creditor, meanwhile, would be entitled only to retain its lien and continue to receive payments under the plan from the new buyer.

These examples demonstrate that the Code does *not* in all circumstances protect a secured creditor's right to participate in any potential future appreciation of its collateral. *See Dewsnup*, 502 U.S. at 430 (Scalia, J., dissenting) (recognizing that chapter 11 does not provide secured creditors the right to "demand the benefit of postvaluation increases in the value of property given as security"). Instead, it protects the *present value* of the collateral, as reflected in the plain language of § 1129(b)(2)(A).

4. The Legislative History Is Unclear and Cannot Override the Plain Language of § 1129(b)(2)(A)

Because the text of § 1129(b)(2)(A) is unambiguous, the Court should not rely on extrinsic sources, such as legislative history, to reach a different interpretation. *See Ron Pair*, 489 U.S. at 240–41 ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."). Indeed, the Court frequently notes the unreliability of legislative history in construing the meaning of a statute. *See Exxon Mobil Corp. v. Allapattah Serv., Inc.*, 545 U.S. 546, 568 (2005) ("[L]egislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and

contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.'"); *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("If one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.") (emphasis in original). "The risks of relying on such practice in interpreting the Bankruptcy Code, which seeks to bring an entire area of law under a single, coherent statutory umbrella, are especially weighty." *203 North LaSalle*, 526 U.S. at 461 (Thomas, J., concurring).

The legislative history of § 1129(b)(2)(A) is particularly unenlightening. For example, certain comments made by Representative Edwards, one of the principal drafters of the Code, support the disjunctive nature of § 1129(b)(2)(A): "[t]he court must confirm the plan notwithstanding the dissent of such a class of secured claims if *any* of three alternative requirements is met," and "[c]lause (iii) *requires* the court to confirm the plan notwithstanding the dissent of the electing secured class if the plan provides for the realization by the secured class of the indubitable equivalents of the secured claims." 124 CONG. REC. 32,407 (1978) (emphasis added). On the other hand, referring to § 1111(b), Representative Edwards commented, seemingly inconsistently, that "[s]ale of property under section 363 or under the plan is excluded from treatment under section 1111(b) because of the secured party's right to bid in the full amount of his allowed claim at any sale of the

collateral under section 363(k)." *Id*.[2] With respect to § 1129(b)(2)(A)(ii), Representative Edwards only commented that "[c]lause (ii) is self-explanatory." *Id*.

At most, these conflicting snippets of legislative history from different sections of the Code simply highlight just how "murky, ambiguous and contradictory" legislative history can be. *Exxon Mobil*, 545 U.S. at 568. Such "evidence" should not be used to override the plain language of § 1129(b)(2)(A). *See Lamie*, 540 U.S. at 539–42 (rejecting "competing interpretations of legislative history" to override the text of § 330(a) because it "creates more confusion than clarity about the congressional intent").

The Court should refrain from engaging in the wide-ranging string of inferences and suppositions required to interpret § 1129(b)(2)(A) contrary to its plain text. Once again, had Congress intended to limit all plan sales to subsection (ii), it could have written the statute that way. *See Lamie*, 540 U.S. at 538 ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding.").

D. The Seventh Circuit Misconstrued the Language and Structure of § 1129(b)(2)(A)

In its decision below, the Seventh Circuit rejected the plain meaning of § 1129(b)(2)(A), instead holding that any chapter 11 plan proposing a sale of property free of liens may only be confirmed over the dissent of

[2] The more practical reason a creditor may not make the § 1111(b) election when its collateral is sold is that there is no longer any collateral remaining to secure the creditor's claim.

a secured creditor under § 1129(b)(2)(A)(ii), which requires credit bidding. Pet. App. 25a. The court arrived at its conclusion based on a flawed understanding of the chapter 11 process.

1. The Seventh Circuit Conflated Approval of Bid Procedures With Plan Confirmation

In framing the issue on appeal, the Seventh Circuit stated:

> The Debtors contend[ ] that the bankruptcy court misinterpreted Section 1129(b)(2)(A) of the Code when it held that their plans could not be confirmed because they did not "comply with the specific requirements of Section 1129(b)(2)(A)(ii)." They argue that their plans should have been confirmed because they satisfied the conditions set forth in Section 1129(b)(2)(A)(iii).

Pet. App. 10a. That framing reflects a subtle but important error. The order at issue is the bankruptcy court's order denying the Debtors' motion to establish *bid procedures* for their proposed auction, not an order denying *plan confirmation*. *See* Pet. App. 38a–45a. Indeed, the Debtors have not yet sought confirmation of their chapter 11 plan. The Debtors must first obtain approval of bid procedures for the auction. Only *after* those procedures are approved can the Debtors conduct the auction, determine the distribution of its proceeds, and then seek confirmation of their plan. *See* 11 U.S.C. §§ 1125, 1128.

Approval of auction bid procedures and confirmation of a plan are two separate and distinct parts of the chapter 11 process. The only question currently before the Court is whether the Debtors may proceed with the auction using bid procedures that preclude credit bidding. Because the plain language and structure of § 1129(b)(2)(A) do not foreclose that possibility as a matter of law, the answer is yes. Whether the Debtors ultimately can fulfill the confirmation requirements set forth in § 1129, including provision of the indubitable equivalent of the Lender's claim under § 1129(b)(2)(A)(iii), must be determined at plan confirmation by the bankruptcy judge, who has broad discretion to ensure those requirements (and others) are met. *See Philadelphia Newspapers*, 599 F.3d at 308 n.8 ("The question of whether a particular asset sale is 'fair and equitable' is a question for plan confirmation and cannot be answered at this stage by manufacturing extra-textual statutory constraints.").

Indeed, the Debtors may not be required to resort to § 1129(b)(2)(A) at all. Depending on the results of the auction and resulting distributions under the plan, the Lender may ultimately be satisfied with its treatment and vote in favor of the Debtors' chapter 11 plan, which would eliminate the need to pursue confirmation under § 1129(b)(2)(A) altogether. *See* 11 U.S.C. § 1129(b)(1) (requiring fair and equitable treatment only for a class of creditors that "is impaired under, and has not accepted, the plan").

The Seventh Circuit also mistook the Debtors as arguing that the proceeds from an auction sale of collateral free of liens without credit bidding will *always* constitute the indubitable equivalent of a

secured creditor's claim. Pet. App. 16a. Whether the "indubitable equivalent" requirement is satisfied will depend on the proceeds generated from the auction and the value of the secured creditor's claim. But it is impossible to make that determination now, when neither the amount of proceeds nor the fair market value of the collateral is known. In any event, the Code does not require the Debtors to show definitively, at this stage of the chapter 11 process, that their auction will satisfy the "indubitable equivalent" standard under § 1129(b)(2)(A)(iii). Instead, the Code requires the Debtors to satisfy that test at the plan confirmation hearing. Likewise, the Lender maintains its right to object at plan confirmation for lack of indubitable equivalence or failure to meet the "fair and equitable" requirement. In this way, the Code allows the chapter 11 process to play out, fostering further negotiation among the parties to confirm a viable chapter 11 plan. Precluding the Debtors from proceeding with the auction at this stage would have the untenable consequence of stopping the chapter 11 plan process before it starts, effectively barring bankruptcy relief for the Debtors and others whose property is worth substantially less than their secured debt.

2. The Seventh Circuit's Decision Is At Odds With the Plain Language and Structure of § 1129(b)(2)(A)

In analyzing the text of § 1129(b)(2)(A), the Seventh Circuit rejected the possibility that the statute had a plain meaning on the basis that:

> [n]othing in the text of Section 1129(b)(2)(A) directly indicates whether Subsection (iii) can

> be used to confirm any type of plan or if it 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).

Pet. App. 17a. In so holding, the court was not persuaded that the statute's use of the disjunctive "or" to separate its three subparts plainly indicated Congress' intention that subsection (iii) may be used to confirm any type of plan, so long as its specific requirement—indubitable equivalence—is satisfied.

Departing from the decisions of the Third and Fifth Circuits, the Seventh Circuit dismissed in a footnote Congress' use of the word "or," reasoning that while the Code's own rules of construction require a non-exclusive application of the word, "several exceptions to this rule have been recognized." Pet. App. 17a n.5. In support of this proposition, the court cited to the dissent in *Philadelphia Newspapers*, which listed examples in the Code where the use of the word "or" was supposedly meant to be exclusive. *Id.* (citing *Philadelphia Newspapers*, 599 F.3d at 324 (Ambro, J., dissenting)).

The Seventh Circuit's scant analysis of the word "or" misconstrued its use in § 1129(b)(2)(A) and mischaracterized its use in other sections of the Code. The examples cited by the Seventh Circuit are merely instances where alternatives are mutually exclusive as a practical matter, *see* 11 U.S.C. §§ 1112(b)(1), 1325(a)(5)(B)–(C), or the alternatives themselves contain a clause limiting their application, *see* 11 U.S.C. §§ 365(g)(2)(B)(i)–(ii), 506(d)(1)–(2), 1325(b)(3)(A)–(C), 1325(b)(4)(A)(i)–(ii). Neither

condition applies here; § 1129(b)(2)(A)(iii) contains no limiting language. If a secured creditor realizes the indubitable equivalent of its secured claim, then the bankruptcy court "shall confirm the plan" despite the secured creditor's objection. 11 U.S.C. §§ 1129(b)(1), 1129(b)(2)(A)(iii). Congress deemed that sufficient protection for a secured creditor under any type of chapter 11 plan. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent." *Lamie*, 540 U.S. at 542.

Unshackled by the plain language of the statute, the Seventh Circuit concluded that the more plausible interpretation of § 1129(b)(2)(A)(iii) "is one that limits it only to circumstances not otherwise covered by subsections (i) and (ii)." Pet. App. 23a–24a. This interpretation, however, imposes restrictions on subsection (iii) that do not exist in the statutory text. Congress knew how to limit the application of subsections in the Code. As discussed above, § 361 lists three ways in which a debtor may provide adequate protection, including (1) cash payments, (2) additional or replacement liens, or "(3) granting *such other relief* * * * as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property." 11 U.S.C. § 361 (emphasis added). By including the restrictive clause "such other relief" at the beginning of § 361(3), Congress clearly limited its application to something *other* than that provided by the prior two subsections, (1) and (2). But no such textual limitation appears in § 1129(b)(2)(A)(iii)—powerful evidence that Congress intended subsection (iii) to apply to *any* type of chapter 11 plan.

The Seventh Circuit further premised its ruling on the supposed ambiguity of the phrase "indubitable equivalent." Pet. App. 13a. The court observed that "[i]f a creditor's claim is undersecured, then the indubitable equivalent of the creditor's secured claim equals the current market value of the asset." Pet. App. 18a (also stating that "a reorganization plan will give the creditor the indubitable equivalent of its claim if the plan gives the creditor something worth the asset's current market value"). Nevertheless, the court was concerned that certain factors unique to bankruptcy auctions create "a substantial risk" that the asset will be sold below fair market value and the secured creditor might not receive the indubitable equivalent of its claim, justifying its need to credit bid. Pet. App. 20a. In making this quasi-legislative determination, the court rejected the possibility that *any* plan involving the sale of assets could be confirmed under § 1129(b)(2)(a)(iii). Pet. App. 21a ("Nothing in the text of Section 1129(b)(2)(A) indicates that plans that *might* provide secured lenders with the indubitable equivalent of their claims can be confirmed under Subsection (iii).") (emphasis in original). This too was error.

As explained above, whether the Debtors can ultimately satisfy the "indubitable equivalent" standard for cramdown under § 1129(b)(2)(A)(iii) cannot be determined now, but rather must be evaluated by the bankruptcy judge at plan confirmation. Any perceived risk that the bankruptcy auction *might* not generate proceeds equal to the fair market value of the collateral sold is an insufficient reason to rule out the possibility that a debtor may nonetheless satisfy the "indubitable equivalent" standard of § 1129(b)(2)(A)(iii) at that time.

For instance, the auction might generate proceeds that appraisals and other indications of value confirm equal or exceed the fair market value of the collateral sold. Indeed, it is not unusual for a buyer at a bankruptcy auction to pay a price higher than expected for strategic or emotional reasons. Bankruptcy auctions are widely advertised and dynamic, often generating significantly greater value than a foreclosure sale. *See In re Canonigo*, 276 B.R. 257, 262 (Bankr. N.D. Cal. 2002) ("generally speaking, a voluntary sale by the estate will bring a higher price than a foreclosure sale by a senior lienholder"); *In re Kirchner*, 216 B.R. 417, 422 n.12 (Bankr. W.D. Wis. 1997) ("There may be reason to believe that a sale in bankruptcy is likely to yield a higher price than a foreclosure sale"); *In re R.L. Kelly & Sons, Millers*, 125 B.R. 945, 957 (Bankr. D. Md. 1991) ("[I]t is likely the trustee may be able to realize a higher sale price from a market sale than a creditor would receive at a foreclosure sale."). Moreover, the debtor could supplement the sale proceeds with additional property to satisfy the indubitable equivalent standard. For example, in *Philadelphia Newspapers* the debtors proposed giving the secured creditors the proceeds from the auction and a parcel of real property in satisfaction of their secured claim under § 1129(b)(2)(A)(iii). *Philadelphia Newspapers*, 599 F.3d at 312 ("[Indubitable equivalence] can include not only the cash value generated by the public auction, but other forms of compensation or security such as substituted collateral or, as here, real property.").

In sum, the Seventh Circuit incorrectly interpreted § 1129(b)(2)(A) to foreclose the possibility that a debtor may sell property free of liens without credit bidding and nonetheless provide its secured creditor with the

indubitable equivalent of its claim under subsection (iii) at plan confirmation.

E. The Third and Fifth Circuits Correctly Applied the Plain Language of § 1129(b)(2)(A)

An analysis of the contrary decisions by the Third and Fifth Circuits confirms that the plain language of § 1129(b)(2)(A) reflects Congress' careful balance between protecting secured creditor interests and fostering the reorganization and rehabilitation of distressed debtors.

1. The Majority Opinion in *Philadelphia Newspapers* Reflects the Proper Analysis of § 1129(b)(2)(A)

In *Philadelphia Newspapers*, the Third Circuit affirmed the approval of bid procedures for an auction sale of collateral free of liens nearly identical to the bid procedures at issue in this case. In a thorough and well-reasoned opinion, the majority recognized that the plain language and structure of § 1129(b)(2)(A) provide a debtor with three alternative paths to plan confirmation. *See Philadelphia Newspapers*, 599 F.3d at 305 ("The use of the word 'or' in this provision operates to provide alternatives—a debtor may proceed under subsection (i), (ii) *or* (iii), and need not satisfy more than one subsection.") (emphasis in original). The majority rejected the secured creditor's argument that the supposedly general indubitable equivalent standard in subsection (iii) must yield to the supposedly specific credit-bidding requirement of subsection (ii). Citing extensively to the Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996),

the majority noted that this canon of statutory construction applies only where the more specific provision expressly limits the general provision, and that § 1129(b)(2)(A) contains no such limitation. *Philadelphia Newspapers*, 599 F.3d at 308 ("Although subsection (ii) specifically refers to a 'sale' and incorporates a credit bid right under § 363(k), we have no statutory basis to conclude that it is the only provision under which a debtor may propose to sell its assets free and clear of liens.").

The majority observed that the secured creditor's interpretation of the statute would produce the strange result of rejecting a chapter 11 plan that fully compensated the creditor for its secured claim by providing the indubitable equivalent under subsection (iii) simply because it failed to provide the right to credit bid at the auction under subsection (ii). *Id*. at 308–09. Taking this point one step further underscores the absurdity of this result. Assume a creditor is owed $100,000 secured by a lien on property that is appraised for a current value of $70,000 and is sold free of liens at an auction in bankruptcy for $90,000, with all of the cash proceeds to be remitted directly to the creditor in full satisfaction of its secured claim. Under the Lender's restrictive interpretation of § 1129(b)(2)(A), that plan could still not be confirmed even though the creditor would receive *more* than its secured interest simply because the creditor was not allowed to credit bid. "Reading the statute in this manner significantly curtails the ways in which a debtor can fund its reorganization—an outcome at odds with the fundamental function of the asset sale, to permit debtors to 'provide adequate means for the plan's implementation.'" *Id*. at 309 (citing 11 U.S.C. § 1123(a)(5)(D)).

The majority likewise rejected the argument that § 363(k) and § 1111(b) together entitle secured creditors to realize something more than their secured claim, reasoning that "such preferential treatment is plainly contrary to other provisions of the Code." *Id*. at 316 (explaining well-recognized limitations to § 363(k) and § 1111(b)). Finally, the majority concluded that the legislative history failed to provide the "extraordinary showing of contrary intentions" by Congress required to override the plain language of § 1129(b)(2)(A). *Id*. at 317.

The dissenting judge in *Philadelphia Newspapers* acknowledged that the majority's application of the plain language of § 1129(b)(2)(A) is plausible, but nonetheless disagreed with the holding because he was "convinced this is not what Congress intended when it drafted the Bankruptcy Code." *Id*. at 319 (Ambro, J., dissenting). The dissent then engaged in a wide-ranging analysis of alternative canons of statutory construction, secured creditor protections found in other sections of the Code and under non-bankruptcy law, and bits of legislative history to arrive at an alternative interpretation. The dissent's analysis, however, is unpersuasive in light of the plain language and structure of the statute. Indeed, the concurring opinion aptly noted the "near-gymnastics" used by the dissent to justify a conclusion at odds with the statutory text. *Id*. at 318–19 (Smith, J., concurring).

In closing, the dissent warned that applying the plain language of § 1129(b)(2)(A) would "upset[] three decades of secured creditors' expectations, thus increasing the cost of credit." *Id.* at 338 (Ambro, J., dissenting). Those concerns proved unfounded. The auction in *Philadelphia Newspapers* went forward and

produced spirited cash bidding with the secured lenders submitting the winning bid totaling approximately $105 million in cash, nearly triple the amount of the initial cash bid ($37 million) offered in connection with the asset purchase agreement. *See* Yitzhak Greenberg, *Credit Bidding After* Philadelphia Newspapers: *The Fat Lady Has Not Sung*, 2011 NO. 7 NORTON BANKR. L. ADVISER 2 (July 2011). The majority's application of the plain language of § 1129(b)(2)(A) produced an optimal result, maximizing the value of the bankruptcy estate and permitting the debtors to confirm a chapter 11 plan for the benefit of all their stakeholders, not just the secured creditors. Furthermore, the secured creditors were still able to protect their interest in the collateral by submitting the winning cash bid, which was largely returned to them through the plan. Thus, *Philadelphia Newspapers* highlights how the faithful application of the plain language of § 1129(b)(2)(A) enacted by Congress maintains the careful balance of competing interests established by the Bankruptcy Code.

2. *Pacific Lumber* Illustrates How § 1129(b)(2)(A) Provides Flexibility to Achieve an Equitable Result Consistent With the Underlying Policies of the Bankruptcy Code

Shortly before *Philadelphia Newspapers*, the Fifth Circuit affirmed the confirmation of a chapter 11 plan under similar circumstances. The debtors in that case owned a sawmill, power plant, and town as well as a vast stretch of prime redwood timberland in northern California. *Pacific Lumber*, 584 F.3d at 236. Upon the termination of the debtors' exclusive period to file a plan under § 1121, two different chapter 11 plans were

proposed: one by the debtors' secured noteholders seeking to liquidate only the timberland assets; the other from a group seeking to purchase and reorganize all of the debtors' assets. *Id*. The bankruptcy court confirmed the latter plan over the noteholders' objection, ruling that a cash payment equal to the judicially determined value of the noteholders' collateral satisfied the indubitable equivalent standard of § 1129(b)(2)(A)(iii). The noteholders appealed the decision to the Fifth Circuit, claiming that they were improperly denied the right to credit bid at the sale of their collateral.

Writing through noted bankruptcy expert Chief Judge Edith Jones, the Fifth Circuit affirmed, reasoning that while § 1129(b)(2)(A)(ii), which requires credit bidding, *could* have applied, it was not the *exclusive* means to confirm a plan involving the sale of property free of liens in chapter 11. *Id*. at 245–46. The court rejected the noteholders' argument that allowing sales free of liens under subsection (iii) would render subsection (ii) superfluous, reasoning that "Congress did not adopt indubitable equivalent as a capacious but empty semantic vessel" and that indubitable equivalent is "no less demanding a standard than its companions." *Id*. at 246. The court likewise rejected the notion that the Code ensures a secured creditor's right to the potential future appreciation of its collateral, correctly noting that the Code "does not protect a secured creditor's upside potential; it protects the 'allowed secured claim.'" *Id*. at 247.

Applying the plain meaning of § 1129(b)(2)(A) allowed the court in that case to confirm a chapter 11 plan that benefited all stakeholders. Had the Fifth Circuit adopted the noteholders' constrained

interpretation, the secured creditor would have simply liquidated its interest in the timberland assets, leaving the rest of the debtor's stakeholders—including the employees of the sawmill, power plant, and town—with nothing.

F. Following the Plain Language of § 1129(b)(2)(A) Is Consistent With the Flexible and Rehabilitative Purposes of Bankruptcy

In line with its underlying policies of flexibility and equity, the Bankruptcy Code offers numerous different ways in which a debtor may seek to reorganize. *See Bildisco*, 465 U.S. at 525. The three alternatives provided under § 1129(b)(2)(A) embody this flexible approach, permitting a debtor to design and confirm a chapter 11 plan over the dissent of an undersecured creditor in various ways. The Lender's restrictive reading of this section not only offends the plain language and structure of the statute, but also undermines the fundamental purpose of chapter 11 "to permit successful rehabilitation of debtors." *Id*. at 527. Indeed, such an interpretation would severely limit the ability of a broad group of distressed entities with severely depressed asset values to reorganize under the protections of the Code at a time when such protections are needed most—an outcome antithetical to the flexible and rehabilitative goals of the Code. *See id*. at 524–25 (rejecting a "very strict" interpretation of Section 365(a) as "fundamentally at odds with the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code").

As this case illustrates, a debtor is often unable to attract new equity to fund a reorganization under

subsection (i) where the outstanding secured debt far exceeds the current value of the enterprise because it is not feasible to satisfy the secured creditor's total claim when the § 1111(b) election is made. *See* 11 U.S.C. § 1129(a)(11) (requiring plan feasibility for confirmation). Likewise, a debtor often cannot effectively sell its assets free of liens under subsection (ii) because the secured creditor can credit bid the full amount of its claim (which far exceeds the current value of the collateral) and take back its collateral, leaving no cash available to fund a chapter 11 plan for creditors. Under either of these circumstances, the bankruptcy court likely will grant the secured creditor relief from the automatic stay to foreclose on its collateral. *See* 11 U.S.C. §§ 362(d)(1), 362(d)(2). Thus, a debtor's only option to confirm a plan to benefit all creditors may be to sell assets free of liens without credit bidding under subsection (iii). This economic reality was not lost on the bankruptcy judge below. *See* Pet. App. 37a ("Notwithstanding the debtors' reference to alternative resolutions, the huge difference between the value of the real estate and the amounts owed the lenders, the proposed sale precluding credit bidding appears to this bankruptcy judge to be the only realistic hope the debtors have to confirm a plan in chapter 11." (footnote omitted)).

This reality illustrates how, under circumstances such as these, credit bidding does not benefit the bankruptcy estate. Unlike bidding with cash, a credit bid may only be used by the secured creditor at a sale of its collateral. As such, the creditor has little reservation in bidding the full amount of its claim regardless of the actual value of the collateral. Because its total claim far exceeds any reasonable estimate of the current value of the collateral, a right to credit bid

at all plan sales would ensure that the creditor can trump any other third-party cash bids and take back its collateral—defeating the purpose of the auction and depriving the debtor of any effective way to implement a chapter 11 plan. *Cf.* 11 U.S.C. § 1123(a)(5)(D) (expressly allowing a debtor to sell property free of liens to implement a chapter 11 plan). Consequently, requiring credit bidding for all plan sales under subsection (ii) effectively provides the secured creditor with an unconditional veto over the chapter 11 process when the secured creditor's total claim far exceeds the present value of its collateral. The Code does not give secured creditors this extraordinary power.

By contrast, applying the plain language of § 1129(b)(2)(A) gives a debtor flexibility to fulfill its fiduciary obligation to confirm a chapter 11 plan for the benefit of all its creditors, not just the secured creditor. *See 203 N. LaSalle*, 526 U.S. at 453 (recognizing the two underlying policies of Chapter 11 "of preserving going concerns and maximizing property available to satisfy creditors"). It also reinforces the rehabilitative goals of the Code even in especially challenging economic times, which, in turn, fosters entrepreneurial risk-taking that is central to our free-market economy.

G. This Case Is Not Moot

The Lender has repeatedly attempted to avoid review of its victory below by arguing mootness. This argument incorrectly shifts the focus from the bid procedures on appeal to the underlying asset purchase agreement and chapter 11 plan, neither of which was considered by the bankruptcy court below. Both the bankruptcy court and the Seventh Circuit have

correctly rejected the Lender's mootness claim. *See* Pet. App. 7a–9a.

A case is moot only if the issue presented is no longer live or the parties lack a cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The Court has described a legally cognizable interest as "'definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937)).

In this case, a live controversy plainly exists. The Debtors are still pursuing their proposed auction and the parties continue to vigorously contest whether the Code gives the Lender the absolute right to credit bid at the auction. Likewise, the parties have a legally cognizable interest in the outcome of this appeal. If the Court agrees with the Debtors' reading of § 1129(b)(2)(A) and reverses the decision below, the Debtors will implement their bid procedures precluding the Lender from credit bidding at the auction. This controversy thus "touch[es] the legal relations of parties having adverse legal interests," and a decision from the Court will provide "specific relief through a decree of a conclusive character" in this bankruptcy case. *Rice*, 404 U.S. at 246. The bankruptcy court acknowledged this point in certifying a direct appeal to the Seventh Circuit. *See* Pet. App. 37a ("[A]n immediate appeal will materially advance the progress of this case by settling whether the

debtors may proceed with their proposed chapter 11 plan.").

The crux of the Lender's mootness argument is that the Debtors have abandoned their asset purchase agreement and chapter 11 plan. The question presented in this case, however, relates only to the Debtors' proposed *bid procedures*. In any event, the Debtors have filed an amended asset purchase agreement and amended chapter 11 plan, both of which are nearly identical to their predecessors except that (1) the purchase price has increased to account for the recent appreciation of the Debtors' assets, and (2) certain deadlines for the sale have been extended, reflecting the buyer's continued interest in participating in the proposed auction. J.A. 174, 255. Recognizing the Debtors' and the buyer's continued intent to pursue the sale through a plan, the bankruptcy court has twice denied the Lender's request to modify the automatic stay to foreclose.

Even if this appeal were technically moot (which it is not), it would nonetheless fit squarely within the well-established exception to mootness allowing cases to proceed if they raise issues that are capable of repetition, yet evade review. This exception applies where (1) the challenged action is too short in duration to be fully litigated before cessation or expiration, and (2) there is a reasonable expectation that the same party will be subject to the same action again. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007).

This case readily satisfies both prongs of the test. *See* Pet. App. 9a. First, asset sales in bankruptcy typically require short deadlines to protect the parties from market fluctuations, dissipation of value, and

other unforeseen events. Second, if the appeal were dismissed as moot, the Debtors would simply renew their motion in the bankruptcy court to approve the same bid procedures with a new asset purchase agreement, which would be subject to the same adverse ruling. The Debtors would be forced into a position where they could never seek appellate review of their proposed bid procedures because the inherently short deadlines required for such a sale would inevitably expire before the litigation has run its course. This is precisely the dilemma that the "capable of repetition, yet evading review" exception is designed to avoid. Indeed, if this case were deemed moot, it is difficult to imagine how any chapter 11 plan confirmation issue could survive long enough to be reviewed by the Court.

CONCLUSION

The decision of the Seventh Circuit should be reversed and the case remanded to the bankruptcy court for consideration of the Debtors' bid procedures motion under the correct statutory interpretation.

Respectfully submitted,

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January 26, 2012

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APPENDIX

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 102

§ 102. Rules of construction

In this title—

(1) "after notice and a hearing", or a similar phrase—

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

(B) authorizes an act without an actual hearing if such notice is given properly and if—

(i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;

(2) "claim against the debtor" includes claim against property of the debtor;

(3) "includes" and "including" are not limiting;

(4) "may not" is prohibitive, and not permissive;

(5) "or" is not exclusive;

(6) "order for relief" means entry of an order for relief;

(7) the singular includes the plural;

(8) a definition, contained in a section of this title that refers to another section of this title, does not, for the purpose of such reference, affect the meaning of a term used in such other section; and

(9) "United States trustee" includes a designee of the United States trustee.

11 U.S.C. § 363(k)

§ 363. Use, sale, or lease of property

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such 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. § 1111(b)

§ 1111. Claims and interests

(b)(1)(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless—

(i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or

(ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.

(B) A class of claims may not elect application of paragraph (2) of this subsection if—

(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or

(ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.

(2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

11 U.S.C. § 1123(a)(5)

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(5) provide adequate means for the plan's implementation, such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

11 U.S.C. § 1129(b)(1)

§ 1129. Confirmation of plan

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

CERTIFICATE OF COMPLIANCE

No. 11-166

RADLAX GATEWAY HOTEL, LLC
and RADLAX GATEWAY DECK, LLC,

Petitioners,

v.

AMALGAMATED BANK,

Respondent.

As required by Supreme Court Rule 33.1(h), I certify that the Brief for Petitioners contains 14,466 words, excluding the parts of the Brief that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 26, 2012.

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Sworn to and subscribed before me by said Affiant on the date designated below.

Date: _____

_____
Notary Public

[seal]

CERTIFICATE OF SERVICE

I, Sarah R. Miller, hereby certify that 40 copies of the foregoing Petitioners' Brief on the Merits and Joint Appendix in 11-166, *RadLAX Gateway Hotel, LLC and RadLAX Gateway Deck, LLC v. Amalgamated Bank*, were sent via Next Day Service to The U.S. Supreme Court, and 3 copies were sent Next Day Service to the following parties listed below, this 26th day of January, 2012:

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All parties required to be served have been served.

I further declare under penalty of perjury that the foregoing is true and correct. This Certificate is executed on January 26, 2012.

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Date: _____

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Notary Public

[seal]