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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 IN SUPPORT OF RESPONDENT FOR *AMICI CURIAE* PROFESSORS RICHARD AARON, LAURA BETH BARTELL, JAGDEEP S. BHANDARI, SUSAN BLOCK-LIEB, ROBERT D'AGOSTINO, JESSICA DAWN GABEL, KENNETH N. KLEE, GEORGE W. KUNEY, C. SCOTT PRYOR, NANCY B. RAPOPORT, MARIE T. REILLY, LYNNE F. RILEY, KEITH SHARFMAN, AND MICHAEL SOUSA

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INTEREST OF *AMICI*[1]

The Amici Curiae are law professors who have devoted their careers to the teaching and study of bankruptcy law.[2] They are keenly interested in this appeal because its outcome will have an impact on bankruptcy auction sales of property made free and clear of mortgages and other liens conducted pursuant to chapter 11 plans over the objection of a secured creditor, and on such creditor's ability to receive payment of the full debt owed to it or, failing that, to realize the true value of its collateral by means of credit bidding for the property.

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[1] Pursuant to Rule 37 of this Court, the *Amici* file this brief with the written consent of both parties, which is on file with the Clerk. No counsel for a party authored this brief in whole or in part. No person or entity including the *Amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] The *Amici* professors are Professor Richard Aaron, University of Utah-S. J. Quinney College of Law; Professor Laura Beth Bartell, Wayne State University Law School; Professor Jagdeep S. Bhandari, Florida Coastal College of Law; Professor Susan Block-Lieb, Fordham University School of Law; Professor Robert D'Agostino, John Marshall School of Law; Professor Jessica Dawn Gabel, Georgia State University College of Law; Professor Kenneth N. Klee, UCLA School of Law; Professor George W. Kuney, University of Tennessee College of Law; Professor C. Scott Pryor, Regent University School of Law; Professor Nancy B. Rapoport, William S. Boyd School of Law, University of Nevada, Las Vegas; Professor Marie T. Reilly, Penn State University-Dickinson School of Law; Professor Lynne F. Riley, Boston College Law School; Professor Keith Sharfman, St. John's University School of Law; and Professor Michael D. Sousa, University of Denver-Sturm College of Law.

By this *pro bono amicus* brief in support of Respondent, the *Amici* urge that, properly interpreted, 11 U.S.C. § 1129(b)(1) and § 1129(b)(2)(A)[3] require that if a secured creditor objects to confirmation of such chapter 11 plan, the secured creditor must be allowed to credit bid the debt for the plan to be confirmed.

The *Amici* represent no institution, group or association. Their sole purpose is to offer what assistance they can to this Court as it considers and decides this important bankruptcy law issue. They believe that their unique analysis of these provisions demonstrates that the most plausible interpretation of these provisions is that at a sale of an objecting secured creditor's collateral free and clear of its lien pursuant to a chapter 11 plan, the secured creditor must be allowed to credit bid.

SUMMARY OF ARGUMENT

The *Amici* seek affirmance of the order of the Court of Appeals for the Seventh Circuit. They urge that the Circuit Court correctly held that for a chapter 11 plan providing for the sale of a secured creditor's collateral free and clear of its mortgage to be confirmed over its objection as "fair and equitable" under § 1129(b)(1) of the Bankruptcy Code, the secured creditor must be allowed to credit bid and to set off the unpaid debt against the amount it bid to purchase the property. In the *Amici's* view, to confirm a chapter 11 plan providing for such a sale, it is required that

[3] References herein to numbered sections are to provisions of the Bankruptcy Code of 1978 codified by Title 11 of the United States Code.

the plan comply with § 1129(b)(2)(A)(ii), which, by incorporating § 363(k), accords a secured creditor the right to credit bid for its collateral. The *Amici* note that they urge affirmance based on a somewhat different statutory analysis of these provisions than that provided by the compelling analysis in Respondent's Brief filed with this Court and in the Seventh Circuit's opinion below.

It is well established under this Court's jurisprudence that a secured creditor's right to bid at a bankruptcy sale of its collateral constitutes a significant property right. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 594 (1935). It is implausible to conclude that Congress intended to deprive a secured party of its property right to credit bid without any hint of an intention to do so, while specifically providing in § 363(k) for credit bidding at pre-confirmation sales of a secured creditor's collateral and at sales of collateral under chapter 11 plans pursuant to § 1129(b)(2)(A)(ii).

The *Amici* also argue that § 1129(b)(2)(A) should be interpreted to require that credit bidding be allowed in light of the practice established for two centuries to permit a secured creditor to credit bid in order to enable it to realize the true value of its collateral, instead of the amount of a lower cash bid for the property made by another person at an auction sale. Nowhere in the Bankruptcy Code of 1978 or its legislative history is there any indication that Congress intended to abolish this established practice. In that regard, under this Court's approach to statutory interpretation, it is not plausible to interpret a provision of the Bankruptcy Code as making a fundamental

change in prior practice in the absence of any mention by Congress of an intended change either in the relevant statute or its legislative history. Congress has not given the slightest hint of any intent to terminate the practice of allowing credit bidding.

It is further urged by the *Amici* that the Court should interpret § 1129(b)(2)(A) in accordance with Judge Learned Hand's approach in *In re Murel Holding Corp.*, 75 F.2d 941 (2d Cir. 1935). In *Murel*, Judge Hand set forth his understanding of the phrase "indubitable equivalence," which he coined. The legislative history of § 1129(b)(2)(A) makes clear that Congress intended the "indubitable equivalent" language of its clause (iii) to follow Judge Hand's "strict approach," but the opinion of one of the Circuit Courts that interpreted § 1129(b)(2)(A) did not cite *Murel*, and Judge Hand's concept of what would be an "indubitable equivalent" was not explored in the opinions of the other two Circuit Courts that have addressed the issue. In *Murel*, he explained, that for a plan to be confirmed over the objection of a secured creditor, it must fairly and equitably provide for the secured creditor "to get his money or at least the property," unless the creditor is given "a substitute of *the most* indubitable equivalence." *Id*. at 942 (emphasis added). In this regard, the *Amici* urge that this standard, requiring that a secured creditor be assured of receiving "the most" protection of its rights, cannot be satisfied without allowing credit bidding, because there is no equivalent that can be substituted for credit bidding. As explained by this Court, the purpose of credit bidding is to assure that the mortgaged property is devoted primarily to satisfaction of the debt

through the creditor's receipt of the proceeds of the sale or by taking the property itself. *Radford*, 295 U.S. at 594-595. Clause (iii) is thus unavailable for plan confirmation without allowing credit bidding, and it must be allowed at such sales in accordance with clause (ii).

In sum, it is not plausible to interpret § 1129(b)(1) and § 1129(b)(2)(A) as authorizing confirmation of a plan that provides for the sale of an objecting secured creditor's collateral without authorizing it to credit bid.

ARGUMENT

POINT I

WHERE A SECURED CREDITOR'S COLLATERAL IS TO BE SOLD UNDER A PLAN, THE MOST PLAUSIBLE INTERPRETATION OF § 1129(b)(2)(A) REQUIRES ALLOWING AN OBJECTING SECURED CREDITOR TO CREDIT BID THE DEBT OWED TO IT.

It is implausible, for two principal reasons, to interpret § 1129(b)(2)(A) as not requiring that an objecting secured creditor be allowed to credit bid where its collateral is to be sold under a plan free and clear of its lien. First, the right to credit bid is a property right of the secured creditor, which Congress gave no hint of an intention to terminate. Second, Congress does not write on a clean slate. It is implausible that when drafting § 1129(b)(2)(A), Congress would have intended to terminate the practice of credit bidding, which has

been an accepted practice by courts for nearly two centuries, without so indicating in the statute or its legislative history.

A. The most plausible interpretation of § 1129(b)(2)(A) requires that a secured creditor be allowed to credit bid because this Court has long recognized that its right to credit bid is a property right.

A secured creditor's right to credit bid at a sale of its collateral is a property right, which is among several substantive rights of a secured creditor in specific property. *Radford,* 295 U.S. at 589-590, 594-595. As early as 1821, the right of a secured creditor to bid up to the full amount of its outstanding debt and to apply it towards the auction price of its collateral, was an established component of the foreclosure sale process. *Nichols v. Ketchum,* 19 Johns 84, 92 (N.Y. Sup. Ct. 1821). In *Radford*, the Court explained the importance of credit bidding as the means "[t]o protect [the mortgagee's] right to full payment or the mortgaged property," *Radford*, 295 U.S. at 580, and that the mortgagee's right to protect its interest in the property by credit bidding is upheld "to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself." *Id.* at 594-595.

This Court, in *Radford*, held the Frazier-Lemke Act, part of the former Bankruptcy Act, to be unconstitutional under the Fifth Amendment, noting that, except for the statute at issue in that case, it could not find a statute or decision requiring the secured creditor to give up its lien and

relinquish the property to the mortgagor "unless the debt was paid in full." *Id.* at 579. In holding the statute unconstitutional because of the taking of the mortgagee's several property rights, the Court stressed that a mortgagee has a right to full payment and recognized the importance of its property right to credit bid as the means to protect its right to full payment of the debt. *Id.* at 579-580. *See also Easton v. German-American Bank*, 127 U.S. 532, 538-539 (1888) (cited in *Radford*, 295 U.S. at 580 n.8) (expressly recognizing that a secured creditor's bid of its mortgage was as good, "in fact and law," as a payment of cash).

Congress addressed this constitutional defect by amending the Frazier-Lemke Act. This time, the Court, in *Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, Va.*, 300 U.S. 440 (1937), sustained the Act as amended, rejecting a mortgagee's contention that the statute violated its right to due process under the Fifth Amendment. In sustaining the amended version, the Court pointed out that the new version adequately preserved three of the five rights of a mortgagee as enumerated by *Radford*, consisting of its right to retain its lien until payment of the debt, the right to realize on its collateral by a public sale, and the right to bid in the property at the public sale. *Wright*, 300 U.S. at 458-459 n.4. In upholding the amended Act, the Court noted that the original statute was held unconstitutional in *Radford* because of its impairment of the several property rights of a mortgagee, including the right to credit bid. However, in so holding, the Court made clear in *Wright* its understanding of the importance of the right to credit bid. The Court thus treated the

amended Act as though its terms provided for credit bidding even though the Act did not so state, and despite the fact that a provision of the bill providing for credit bidding did not make it into the statute as enacted. *Wright,* 300 U.S.at 459 and n. 4. The Court in *Wright* found that credit bidding was embedded in the statute by accepting the view, expressed in floor statements by Senators responsible for the bill in the legislative process, that secured creditors would have a right to bid in the property at a sale under the statute. *Id*. Thus, the Court interpreted the amended statute in light of Congress' intention to protect the mortgagee's right to credit bid, endorsing that intent.

Congress was surely aware of this Court's jurisprudence when writing § 1129(b). It is thus implausible to conclude that Congress intended to override the view expressed in the Court's jurisprudence that protects a mortgagee's right to credit bid.

B. The most plausible interpretation of § 1129(b)(2)(A) requires that a secured creditor be allowed to credit bid because credit bidding is a historically-accepted practice of which Congress was aware when drafting that provision.

For nearly two centuries and long before enactment of the present Bankruptcy Code, credit bidding has been recognized by the courts as an inherent ingredient of the foreclosure process. *See* Point I.A *supra.* Congress does not legislate on a clean slate when it amends the bankruptcy laws; rather, Congress is presumed to have been aware of longstanding practice, and legislates with that

in mind. As stated by this Court in *Dewsnup v. Timm*, 502 U.S. 410 (1992), provisions of the Bankruptcy Code are interpreted to continue an established prior practice, absent a clear contrary indication in the text of a statute or, at the very least, some discussion in the legislative history:

> When Congress amends the bankruptcy laws, it does not write "on a clean slate." *See Emil v. Hanley*, 318 U.S. 515, 521, 63 S.Ct. 687, 690-691, 87 L.Ed. 954 (1943). Furthermore, this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history. Of course, where the language is unambiguous, silence in the legislative history cannot be controlling. But, given the ambiguity here, to attribute to Congress the intention to grant a debtor the broad new remedy against allowed claims to the extent that they become "unsecured" for purposes of § 506(a) without the new remedy's being mentioned somewhere in the Code itself or in the annals of Congress is not plausible, in our view, and is contrary to basic bankruptcy principles.

Dewsnup, 502 U.S. at 419-420 (citations omitted). *See also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544-545 (1994)) (without a "clear and manifest" indication to the contrary, "the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law.").

Congress provided no indication of an intention to stray from the requirement that a secured creditor to be allowed to credit bid the debt. In fact, Congress was aware of the longstanding practice of allowing a secured creditor to credit bid at a foreclosure sale when it wrote § 1129(b)(2)(A). *See* 124 Cong. Rec. 31795, 32407 (Sept. 28 1978) (remarks by Rep. Edwards) ("Sale of property . . . *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 the allowed claim at any sale of its collateral under section 363(k).") (emphasis added); *see also* 124 Cong. Rec. 33130, 34007 (Oct. 6, 1978) (remarks of Sen. DeConcini) (same).[4]

Since credit bidding is a long established pre-Code practice of which Congress was well aware, the most plausible interpretation of § 1129(b)(2)(A) is that it continued the practice requiring that an objecting secured creditor be allowed to credit bid.

[4] Senator DeConcini and Representative Edwards were the floor leaders of the bill which was enacted as the 1978 Bankruptcy Code. This Court has relied on their statements in interpreting provisions of the Bankruptcy Code. *See, e.g.*, *Begier v. I.R.S.*, 496 U.S. 53, 63-66, 64 n 5 (1990) ("Because of the absence of a conference and the key roles played by Representative Edwards and his counterpart floor manager Senator DeConcini, we have treated their floor statements on the Bankruptcy Reform Act of 1978 as persuasive evidence of congressional intent."); *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 351 (1985).

C. Section 1129(b)(2)(A) should be interpreted to require a secured creditor to be allowed to credit bid in order to effectuate the will of Congress to enact legislation that does not raise a potential constitutional objection.

Congress stated that it followed *Murel's* approach in writing clause (iii). As stated in the legislative history, "[t]he indubitable equivalent language is intended to follow the strict approach taken by Judge Learned Hand in *In re Murel Holding Corp.*, 75 F.2d 941 (2d Cir. 1935)." S.Rep. 95-989 at 127 (1978). *Murel* stated that the provisions for confirming a plan in the face of a secured creditor's objection should be construed in conformity with constitutional limitations. *Murel,* 75 F.2d at 942. *See also Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (construing federal statutes to avoid constitutional problems "is a cardinal principle of statutory interpretation"); *Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."); *Public Citizen v. Dept of Justice*, 491 U.S. 440, 466 (1989) ("[T]he Court will construe the statute to avoid such [constitutional] problems unless such construction is plainly contrary to the intent of Congress.").

Because the right to credit bid is a property right, a plausible interpretation of § 1129(b)(2)(A) is that Congress provided for credit bidding in

clause (ii) so as to avoid a potential challenge to § 1129(b)(2)(A) under the Fifth Amendment.[5]

POINT II

THE "INDUBITABLE EQUIVALENT" METHOD UNDER CLAUSE (iii) OF § 1129(b)(2)(A) SHOULD NOT BE INTERPRETED AS PERMITTING A SALE OF AN OBJECTING SECURED CREDITOR'S COLLATERAL WITHOUT ALLOWING CREDIT BIDDING, BECAUSE THERE IS NO EQUIVALENT FOR THE SECURED CREDITOR'S RIGHT TO CREDIT BID.

A plan of reorganization may be confirmed over the objection of a class of secured creditors "if the plan . . . is fair and equitable" to them. § 1129(b)(1). A chapter 11 plan generally places a mortgage claim in its own class because a particular mortgage claim is usually not substantially similar to other secured claims. *See* § 1122(a). Section 1129(b)(2)(A) states that a plan is fair and equitable if it provides "(iii) for the realization by such holders of the indubitable equivalent of such claims." Under § 101(5)(A), the word "claim," when

[5] Because a Fifth Amendment question is not before this Court in the present case, the Court need not address (and the *Amici* take no position on) the extent to which secured creditors must be afforded credit bidding rights in bankruptcy proceedings as a constitutional matter. Nonetheless, given the prominence of secured creditors' credit-bidding rights in *Radford* and *Wright*, a congressional decision to codify credit-bidding rights in § 1129(b)(2)(A) would prevent potential constitutional concerns, and the *Amici* urge that this Court interpret § 1129(b)(2)(A) accordingly.

used in the 1978 Bankruptcy Code, means "right to payment." When an objecting secured creditor's collateral is being sold in a bankruptcy case free of its lien, it has been long established that the secured creditor has a right to payment of the cash proceeds of the sale, or, if less than the unpaid debt owed to it, to get the property itself pursuant to a credit bid. In that regard, when credit bidding, the secured creditor is entitled to bid the full amount of the debt even if a prior lower valuation was made in the bankruptcy court under § 506(a), and it is noted that "the bid at the sale would be determinative of value." S. Rep. 95-989 at 56 (1978). Caselaw recognizes that credit bidding is the means for a secured creditor to realize the most from the sale. Section 1129(b)(2)(A) should thus be interpreted as requiring that a plan provide that such sale be held pursuant to clause (ii) because that clause preserves a secured creditor's right to credit bid. It should also be interpreted as not allowing the auction to proceed under clause (iii) where the plan does not provide for credit bidding, because there is no equivalent for credit bidding and thus no substitute that can satisfy the "indubitable equivalent" standard.

A. *Murel*'s "strict approach" is the foundation of clause (iii)'s "indubitable equivalent" method.

Although there is no statutory definition of "indubitable equivalent," Judge Learned Hand's opinion in *Murel*, 75 F.2d at 942, was the foundation for the introduction of § 1129(b)(2)(A)(iii)'s "indubitable equivalent" method for confirming a plan over the objection of a secured creditor. As stated in the legislative history of § 1129(b)(2)(A):

"The indubitable equivalent language is intended to follow the *strict approach* taken by Judge Learned Hand in *In re Murel Holding Corp*. . . ." S. Rep. 95-989 at 127 (1978) (emphasis added). *Murel* provides meaningful insight into what Congress understood as Judge Hand's "strict approach" and his concept of an "indubitable equivalent," which it adopted for clause (iii). As discussed below, the lower courts, in addressing clause (iii), have usually cited *Murel* as the origin of the "indubitable equivalent" concept, but failed to examine and understand *Murel's* illumination of its meaning. An understanding of *Murel* is important because it leads to the conclusion that clause (iii) is not available to confirm a plan providing for a free and clear sale of an objecting secured creditor's collateral that does not allow it to credit bid.

B. *Murel's* meaning of "indubitable equivalent."

The essence of Judge Hand's "strict approach" imported by Congress into clause (iii) is that for a plan to be confirmed over the objection of a secured creditor it must fairly and equitably provide for the secured creditor "to get his money or at least the property." 75 F.2d at 942. The strictness of Judge Hand's approach is found in his crucial requirement that any impairment of the right of an objecting secured creditor to get paid in full or the property, is allowed only if by means of "a substitute of the *most* indubitable equivalence." *Id*. (emphasis added). The *Amici* urge that, properly understood, that standard is not satisfied if the secured creditor is not allowed to credit bid.

Although *Murel* introduced the "indubitable equivalent" requirement, and is found at the heart of the controversy over the rights of an objecting secured creditor whose collateral is to be sold under a chapter 11 plan, lower courts have generally not realized the significant impact of Judge Hand's thinking. This appeal presents the first opportunity for this Court to recognize the significance of Judge Hand's approach as the basis for understanding clause (iii), and why that clause cannot be used to confirm a plan that provides for a sale of collateral without allowing credit bidding. The Seventh Circuit below, in holding that clause (iii) could not be used where a chapter 11 plan provides for a free and clear sale of an objecting secured creditor's collateral without allowing credit bidding, did not cite *Murel*, and the Third Circuit's majority opinion in *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 310 (2010), in allowing the use of clause (iii) for such a sale, did no more than to observe that *Murel* is "rarely explained in case law," citing the Fifth Circuit's decision in *In re Pacific Lumber Co*., 584 F.3d 229, 246 (2009). The majority opinion in *Philadelphia Newspapers* also failed to recognize that *Pacific Lumber* did not understand the impact on the § 1129(b)(2)(A) issue of *Murel's* words and the crux of Judge Hand's understanding that "the most indubitable equivalence" requires "the most" assurance for the secured creditor "to get his money or at least the property." *See Pacific Lumber*, 584 F.3d at 246 (quoting *Murel,* 75 F.2d at 942). Instead, *Pacific Lumber* found the plan at issue to have satisfied the statute because it provided for payment of the judicially determined value of the collateral, rejecting the secured cred-

itors' protestation that by not allowing them to credit bid, they were not given an "indubitable equivalent" because they "forfeited the possibility of later increases in the collateral's value" being realized by them. *Id.* at 247. This appeal enables this Court to clear up the confusion in the lower courts over how Congress intended to protect objecting secured creditors when their collateral is to be sold under a plan.[6]

In *Murel,* the bankruptcy court below enjoined further prosecution of a secured creditor's state court mortgage foreclosure proceeding. In the bankruptcy court, the debtor filed a plan of reorganization under which the debtor would retain its ownership of the property, and which preserved the secured creditor's mortgage lien while stretching out the principal of the mortgage debt for 10 years. On appeal, the injunction staying foreclosure was reversed based on a finding that the plan would not provide the secured creditor with "adequate protection," as required by the provision of the former Bankruptcy Act for confirming a plan over the objection of a secured creditor. Judge Hand's opinion in *Murel* was based on his conclusion that the evidence introduced below failed to show that the plan would provide, as required for confirmation, an assurance that the secured creditor's claim would be paid in full at the end of its 10 year moratorium provision. Judge Hand's strict approach was to require that the

[6] This appeal does not raise the question whether, or under what circumstances, a disallowance for cause of a secured creditor's right to credit bid at a sale of its collateral, as authorized by § 363(k), may be unconstitutional under the Fifth Amendment.

plan protect the secured creditor by nothing less than "a substitute of the most indubitable equivalence." *Murel*, 75 F.2d at 942.

Testing a plan that provides for the sale of an objecting secured creditor's collateral under Judge Hand's "strict approach" plainly requires that the secured creditor be assured that it will "get his money or at least the property." *Id.* As he explained:

> In construing so vague a grant [requiring "adequate protection"], we are to remember not only the underlying purposes of the section, but the constitutional limitations to which it must conform. It is plain that "adequate protection" must be completely compensatory; and that payment ten years hence is not generally the equivalent of payment now. Interest is indeed the common measure of the difference, but a creditor who fears the safety of his principal will scarcely be content with that; *he wishes to get his money or at least the property*. We see no reason to suppose that the statute was intended to deprive him of that in the interest of junior holders, unless by *a substitute of the most indubitable equivalence.*

Id. (emphasis added).

Barely two months after *Murel* was decided, the rights of secured creditors were fully examined in this Court's May 1935 decision in *Radford*, in which this Court, like *Murel,* made it clear that a secured creditor has a paramount right "to insist upon . . . full payment or the mortgaged property,"

and in which this Court also made clear that credit bidding is the means to protect that paramount right of the mortgagee. *Radford*, 295 U.S. at 594-595.

In sum, the "strict approach" built into § 1129(b)(2)(A) requires that a plan provide an objecting secured creditor with the best chance to get full payment of the debt in cash from the auction, or, in the absence of a sufficient bid to enable full payment in cash, assures the secured creditor of the opportunity to own the property by means of credit bidding, so that its appreciation in value will inure to the secured creditor rather than the debtor or others. Allowing credit bidding is the best—indeed the only—means to implement Judge Hand's "strict approach" requiring "the most indubitable equivalent." That standard cannot be satisfied without allowing credit bidding where an objecting secured creditor's collateral is to be sold in a free and clear sale, because, as shown below, there is no equivalent that can be substituted for it.

C. Credit bidding protects a mortgagee's right to full payment or the property.

The right of a mortgagee to get paid the full amount of the mortgage debt or at least the property by means of credit bidding, has long been recognized by this Court. *Radford*, 295 U.S. at 579-580. In amplifying the critical importance of this right, this Court stated in *Radford*:

> No instance has been found, except under the [unconstitutional] Frazier-Lemke Act (11 USC § 203(s), of either a statute or decision compelling the mortgagee to

> relinquish the property to the mortgagor free of the lien unless the debt was paid in full. *This right of the mortgagee to insist upon full payment before giving up his security has been deemed the essence of a mortgage*. His position in this respect was not changed when foreclosure by public sale superseded strict foreclosure or when the Legislatures of many states created a right of redemption at the sale price. *To protect his right to full payment or the mortgaged property, the mortgagee was allowed to bid at the judicial sale on foreclosure.*

Id. (emphasis added).

In *Radford*, this Court singled out a secured creditor's right to credit bid as being designed to "assure" that the secured creditor will get either the proceeds of the auction or the property itself:

> The right [to credit bid is] to protect its interest in the property by bidding at such sale whenever held, and thus to *assure* having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.

Id. at 594-595. (emphasis added).

Notably, Petitioner's Brief does not address or even cite *Radford*. Petitioner's Brief also failed, in its interpretation of § 1129(b)(2)(A), to comprehend the significance of the words carefully chosen by Judge Hand in *Murel,* having cited it only once, in its short footnote 1.

The Seventh Circuit below correctly held that a plan under which the secured creditor's collateral is to be auctioned does not provide the "indubitable equivalent" of its claim "without allowing credit bidding." *Matter of River Road Hotel Partners, LLC*, 651 F.3d 642, 651 (7th Cir. 2011). In so ruling, the court below recognized that the unique function of credit bidding was built into both § 363(k) and clause (ii) of § 1129(b)(2)(A) to prevent the extinguishment of a secured creditor's lien for less than the true value of its collateral:

> By granting secured parties this ability [to credit bid], the Code provides lenders with means to protect themselves from the risk that the winning auction bid will not capture the asset's actual value. If a secured lender feels that the bids that have been submitted in an auction do not accurately reflect the true value of the asset and that a sale at the highest bid price would leave them undercompensated, then they may use their credit to trump the existing bids and take possession of the asset. In essence, by granting secured creditors the right to credit bid, the Code promises lenders that their liens will not be extinguished for less than face value without their consent. This protection is important since there are [a] number of factors that create a substantial risk that assets sold in bankruptcy auctions will be undervalued.

Id. at 650-651.

Indeed, Congress itself understood that for a secured creditor to gain the ownership of its col-

lateral from the auction, rather than accepting a cash bid of less than the debt, the secured creditor may credit bid up to the full amount of the debt, and may do so even if there had been a lower valuation of its collateral earlier in the bankruptcy case. *See* S. Rep. 95-989 at 56 (1978) (The secured creditor may "set off against the purchase price up to the amount of such entity's claim. No prior valuation under section 506(a) would limit this bidding right, since the bid at the sale would be determinative of value.").

In the *Amici's* view, the Third Circuit's majority got it wrong in *Philadelphia Newspapers*, 599 F.3d 298 (2010). After acknowledging that a secured creditor could credit bid at a § 363(b) auction sale up to the full amount of its loan, *id*. at 311, the majority opinion in that case erred by basing its holding on the premise that the adequacy of the plan's protection of a secured creditor should be determined before the auction in a proceeding in which the bankruptcy judge makes an "indubitable equivalent" finding by considering "other forms of compensation" for the secured creditor's collateral, rather than by the auction. *Id*. at 312. The majority opinion made its premise unmistakably clear by stating: "In other words, it is the plan of reorganization, and not the auction itself, that must generate the 'indubitable equivalent.'" *Id*. It thus held that a plan providing for the sale of collateral without allowing credit bidding, could nevertheless somehow be found to provide an indubitable equivalent, and rejected the contention that a secured creditor is denied an indubitable equivalent because it is not allowed to credit bid. The court, however, did not—indeed it

could not—offer any explanation of how, without credit bidding, the secured creditor would be assured of getting full payment of the debt or at least the property.

It is also evident that the approach of the Third Circuit's majority opinion in *Philadelphia Newspapers* is at odds with *Murel's* "strict approach" built into § 1129(b)(2)(A), which requires that the secured creditor's rights be indubitably protected. A determination by a judge at a hearing to consider whether a plan's provisions are equivalent to the secured creditor's right to get payment in full or at least the property, provides far less reliability and protection than does credit bidding, which provides the secured creditor with a market valuation and an assurance of receiving payment of the cash bid or the property itself if it believes that the highest market bid in cash is less than the true value of the property.

Significantly, the premise of the Third Circuit's majority in that case that the adequacy of a plan's protections for a secured creditor should be determined by means of a bankruptcy judge's evaluation, rather than by an auction, is undercut by this Court's clear preference for determining value by a market exposure, not by judicial valuation. In this regard, this Court stated in *Bank of America Nat. Trust and Savings Ass'n v. 203 North LaSalle Street*:

> Under a plan granting an exclusive right, making no provision for competing bids or competing plans, any determination that the price was top dollar would necessarily be made by a judge in bankruptcy court, whereas the best way to determine value

> is exposure to a market . . . . This is a point of some significance, since it was, after all, one of the [1978] Code's innovations to narrow the occasions for courts to make valuation judgments. . . .

526 U.S. 434, 457 (1999).

It is clear that a sale of a secured creditor's collateral without a right to credit bid, which cuts off its right to take the property rather than accepting an amount of cash that is less than the unpaid debt, does not satisfy the "indubitable equivalent" standard:

> It is thus illogical to believe or assume that paying the lender the court-determined value of its collateral (despite the fact that the lender may have an unsecured deficiency claim) actually provides the lender with the indubitable equivalent of its secured claim when the sale of its collateral is made without a true market test . . . . The lender's collateral—and the amount of its secured claim—is not protected from undervaluation when credit bidding is foreclosed, and a lender can therefore never receive the indubitable equivalent of its claim when a sale proceeds under clause (iii) without the right to credit bid.

Jason S. Brookner, *Pacific Lumber and Philadelphia Newspapers: The Eradication of a Carefully Constructed Statutory Regime Through Misinterpretation of Section 1129(b)(2)(A) of the Bankruptcy Code,* 85 AM. BANKR. L. J. 127, 146-147 (2011).

Under the "strict approach" imported into § 1129(b)(2)(A) from Judge Hand's opinion in *Murel*, clause (ii) is thus the only provision that may be used to confirm a plan that provides for a free and clear sale of an objecting secured creditor's collateral. This is because there is nothing equivalent to the assurance that a secured creditor has by means of credit bidding to get the cash proceeds of the sale, or if less than the debt, to get its collateral, much less an indubitable one. As aptly stated by Professor Ralph Brubaker, where a plan provides for the sale of an objecting secured creditor's collateral "there is no indubitably equivalent substitute for the secured creditor's right to credit bid at the sale." Ralph Brubaker, *Cramdown of an Undersecured Creditor Through Sale of the Creditor's Collateral*, 29 No. 12 BANKRUPTCY LAW LETTER 1, 11 (Dec. 2009).[7]

The imperative of *Murel's* "strict approach" is that, to confirm a plan providing for a free and clear sale of an objecting secured creditor's collateral, the plan must allow for credit bidding. For this reason, § 1129(b)(2)(A) should be interpreted to require that where a plan provides for the sale of an objecting secured creditor's collateral, it must be held under clause (ii), and may not be conducted under clause (iii) without allowing the secured creditor to credit bid.

[7] Professor Brubaker's December 2009 article was cited approvingly by dissenting Judge Ambro in *Philadelphia Newspapers,* 599 F.3d at 325, 327, 334, 336, 337, whose dissent was found "to be compelling" by the Seventh Circuit in its opinion below. *See River Road*, 651 F.3d at 649.

POINT III

CREDIT BIDDING IS A LONG ESTABLISHED PRACTICE BASED ON THIS COURT'S EQUITY JURISPRUDENCE. CONGRESS GAVE NO HINT OF ANY INTENTION TO TERMINATE THAT PRACTICE WHEN ENACTING § 1129(b)(2)(A), WHICH SHOULD BE INTERPRETED TO REQUIRE CREDIT BIDDING AT A SALE OF AN OBJECTING SECURED CREDITOR'S COLLATERAL.

Congress carried the longstanding practice of allowing credit bidding into § 1129(b)(2)(A) by the clear and specific words it used for its clause (ii). It is thus not plausible to attribute to Congress an intent that clause (iii) could be used as a substitute for the secured creditor's established property right to credit bid when it highlighted such right by clause (ii)'s clarity and provided no suggestion in that statute or its legislative history of an intent to jettison that practice.

A. The longstanding practice of credit bidding.

For at least two centuries, courts have recognized a mortgagee's right to credit bid. *See Nichols*, 19 Johns at 92 ("It would be unreasonable, and injurious to debtors, as well as creditors, to insist, that the creditor on the execution should advance money on his bid, when the sole object of the sale, is to put money in his pocket, by paying a debt due to him."); *Sage v. Cent. R.R. Co.*, 99 U.S. 334, 339, 344-345 (1878) (noting well known practice by bondholders to credit bid their secured

claims in railroad reorganizations); *see also* Leonard A. Jones, 2 LAW OF MORTGAGES OF REAL PROPERTY § 1614 (2d. ed. 1879). The practice of allowing credit bidding was again recognized by this Court in *Easton*, 127 at 538-539, *Radford*, 295 U.S. at 594 n.4, and *Wright*, 300 U.S. at 459, 459 n.4.

Importantly, Congress was well aware of the practice of credit bidding when it drafted § 1129(b)(2)(A). *See* 124 Cong. Rec. 33130, 34007 (Oct. 6, 1978) (remarks of Sen. DeConcini) ("Sale of property . . . *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 the allowed claim at any sale of its collateral under section 363(k).") (emphasis added); 124 Cong. Rec. 31795, 32407 (Sept. 28, 1978) (remarks of Rep. Edwards) (same).[8]

Congress broadly enacted § 363(k) and § 1129(b)(2)(A)(ii) to preserve the practice of credit bidding in all bankruptcy sales, not to limit it merely to pre-plan sales.

B. A setoff is an equitable principle, which Congress presumably intended to preserve by allowing secured creditors to credit bid at sales under a plan.

Congress must have understood that § 1129(b)(2)(A) would be interpreted in light of the notion that setoff is an equitable principle. *See*

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[8] Senator DeConcini and Representative Edwards were the floor leaders of the bill which enacted the 1978 Bankruptcy Code. This Court has relied on their statements in interpreting provisions of the Bankruptcy Code. *See* discussion in note 4 *supra*.

Pepper v. Litton, 308 U.S. 295, 304 (1939) (bankruptcy courts apply "the principles and rules of equity jurisprudence."). Allowing a secured creditor to use the debt to it as the currency for paying the purchase price it bid at the auction implements the equitable nature of setoff. Given that the secured creditor has already invested cash for the property at the inception of the loan transaction, it would be inequitable to require the secured creditor to advance still more cash to get the property where the high cash bid is less than the debt.

By allowing a setoff of the debt, the debt becomes a substitute for cash. *See Easton*, 127 U.S. at 538-539 (holding that a credit bid "[i]n fact and in law . . . was a payment of money"); *Hadley Falls Trust Co. v. United States*, 110 F.2d 887, at 891-892 (1st Cir. 1940) ("[W]hen a mortgagee buys in the property, he 'pays' for it with so much of the mortgage obligation as is applied to the bid price; in substance, there is a cancellation or offset of cross-claims between mortgagor and mortgagee.").

Setoff is "favored and encouraged by the law" as a means "to avoid circuity of action and injustice." *N. Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U.S. 596, 615-616 (1894); *Studley v. Boylston Nat. Bank*, 229 U.S. 523, 528 (1913). As this Court has recognized more recently, setoff enables parties to apply debts against each other and thereby avoid '"the absurdity of making A pay B when B owes A."' *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18-19 (1995) (quoting *Studley*, 229 U.S. at 528).

Congress gave no hint in the legislative history of § 1129(b) that it intended to allow confirmation

of a plan that did not allow credit bidding at a free and clear sale of an objecting secured creditor's collateral. Section 1129(b)(2)(A) should be plausibly interpreted to require that such a plan allow credit bidding.

C. The legislative history of § 1129(b) contains no suggestion that Congress intended to discontinue the practice of credit bidding at sales under a plan.

There is no indication in the legislative history of § 1129(b)(2)(A), or in that provision itself, that Congress thought that a sale of an objecting secured creditor's collateral under a plan could be made without allowing credit bidding. Nor is there any indication that Congress ever considered as a possibility that such a sale could be effected under clause (iii) without allowing credit bidding.

It is not plausible to construe § 1129(b)(2)(A) as permitting such a sale without allowing the secured creditor to credit bid. This is because it is presumed that Congress does not effectuate a great change from prior practice without making it clear by the text of the relevant statute or by some indication in its legislative history. *See Dewsnup*, 502 U.S. at 419-420; *see also BFP*, 511 U.S. at 544-545 (1994) (without "clear and manifest" indication to the contrary, "the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law."); *Stern v. Marshall*, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring) (a statute may be sustained on the basis of "a firmly established historical practice").

Thus, the most plausible understanding of § 1129(b)(2)(A) is that Congress enacted clause (ii)

as the method for confirmation of a plan that provides for such sale, and did not write clause (iii) to enable making such a sale without allowing credit bidding. For this reason, the *Amici* urge the Court to rule that such a sale must be held in accordance with clause (ii).

CONCLUSION

Based on the forgoing and Respondent's Brief, the order appealed from should be affirmed.

Respectfully submitted,

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