No. 11-166

In the Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC, ET AL.,
PETITIONERS

v.

AMALGAMATED BANK

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Section 1129(b)(2)(A) of the Bankruptcy Code permits a bankruptcy court to confirm a proposed Chapter 11 plan that impairs the rights of an objecting secured creditor if the plan, *inter alia*, is "fair and equitable." In order to satisfy that requirement, a plan must either: (i) allow secured creditors to retain their liens on collateral and receive cash payments of a specified value; (ii) provide for the sale of collateral free and clear of secured creditors' liens under conditions that allow the creditors to credit bid at the sale and retain liens on the sale proceeds; or (iii) give secured creditors the "indubitable equivalent" of their claims. The question presented is as follows:

Whether a Chapter 11 plan can be approved pursuant to Section 1129(b)(2)(A)(iii), on the ground that it affords an objecting secured creditor the "indubitable equivalent" of its claim, if it provides for the sale of collateral free and clear of the creditor's lien on the property, but does not permit the creditor to credit bid at the sale.

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INTEREST OF THE UNITED STATES

The question presented in this case concerns the right of secured creditors to "credit bid" at an auction sale of encumbered property held pursuant to a Chapter 11 bankruptcy plan. United States Trustees—who are Department of Justice officials appointed by the Attorney General—supervise the administration of Chapter 11 cases and trustees, monitor Chapter 11 plans, and file comments with bankruptcy courts regarding such plans in connection with confirmation hearings pursuant to 11 U.S.C. 1125, 1128. See 28 U.S.C. 586(a)(3)(B); H.R. Rep. No. 595, 95th Cong., 1st Sess. 88 (1977). "The United States trustee may raise and may appear and be heard on any issue in any [bankruptcy] case or proceed-

ing." 11 U.S.C. 307. In addition, the United States is frequently a secured creditor in bankruptcy. Because federal agencies often do not have sufficient appropriated funds to participate in a cash-only auction sale of an encumbered asset, the government's ability to credit bid the allowed amount of its claim at any collateral sale is critical to its ability to enforce its security interests in bankruptcy. For these reasons, the United States has a substantial interest in the Court's resolution of the question presented in this case.

STATEMENT

1. a. Chapter 11 of the Bankruptcy Code provides for the reorganization of financial obligations of a business enterprise or individual. 11 U.S.C. 1101 *et seq.* When a bankruptcy petition is filed, any creditor may submit a proof of claim or interest with the bankruptcy court. 11 U.S.C. 501. The court then determines which claims are "allowed" and to what extent. 11 U.S.C. 502.

This case involves a claim that is secured by property of the debtor. Where, as here, a creditor's claim is undersecured (*i.e.*, the current value of the collateral securing a debt is less than the amount of the claim), the claim may be bifurcated into a secured claim for the current value of the collateral and an unsecured claim for the balance (the deficiency). 11 U.S.C. 506. Alternatively, if the creditor (or class of creditors) so elects, an undersecured claim may be treated as fully secured (*i.e.*, as secured for the full amount of the claim rather than for the current value of the collateral). 11 U.S.C. 1111(b)(2). That election is not available, however, if the claim is of inconsequential value or the property is sold pursuant to Section 363 or through the plan. 11 U.S.C. 1111(b)(1)(B).

Chapter 11 bankruptcies are implemented according to a "plan" (usually, but not always, filed by the debtor, 11 U.S.C. 1121) that assigns to "classes" the various allowed claims against it and specifies the treatment each class of claims shall receive under the plan. 11 U.S.C. 1122, 1123. Each secured creditor typically is designated as a class unto itself. See 7 *Collier on Bankruptcy* ¶ 1122.03[3][c] at 1122-15 (Alan N. Resnik & Henry J. Sommer eds., 16th ed. 2011) (*Collier*). A proposed plan must provide "adequate means for the plan's implementation," including by providing for the "sale of all or any part of the property of the estate, either subject to or free of any lien." 11 U.S.C. 1123(a)(5)(D).

A court generally may confirm a proposed Chapter 11 plan only if each class of creditors "has accepted the plan" or "is not impaired under the plan." 11 U.S.C. 1129(a)(8)(A) and (B); see 11 U.S.C. 1124. Section 1129(b) establishes an exception to that general rule, however, by authorizing a bankruptcy court, under specified circumstances, to confirm a proposed plan that impairs the claim or interest of a non-consenting creditor. Such a plan (commonly known as a "cramdown" plan) must satisfy all of Section 1129(a)'s conditions for confirmability other than the requirement that impaired classes of creditors consent. 11 U.S.C. 1129(b)(1). In addition, a cramdown plan must "not discriminate unfairly," and it must be "fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." *Ibid.*

Section 1129(b)(2) establishes the criteria for determining whether a cramdown plan is "fair and equitable with respect to a class." 11 U.S.C. 1129(b)(2). With respect to secured claims—the only type of claim at issue in this case—a cramdown plan must "provide[]":

> (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.

11 U.S.C. 1129(b)(2)(A).

Under clause (i), a plan may be confirmed over a secured creditor's objection if the creditor retains its lien and the plan provides for deferred cash payments that total at least the allowed amount of the claim and have a present value (as of the date of plan confirmation) no less than the current value of the collateral. 11 U.S.C. 1129(b)(2)(A)(i). Under clause (ii), a plan that provides for the sale of collateral free and clear of the secured creditor's lien may be confirmed if the sale is conducted pursuant to 11 U.S.C. 363(k), the creditor retains a lien on the proceeds of the sale, and such lien receives treat-

ment as provided under either clause (i) or clause (iii). 11 U.S.C. 1129(b)(2)(A)(ii). Section 363(k) provides that, when "property that is subject to a lien that secures an allowed claim" is sold at auction, "the holder of such claim may bid at such sale * * * [and] may offset such claim against the purchase price of such property," "unless the court for cause orders otherwise." 11 U.S.C. 363(k). That auction practice, through which a secured creditor may bid on encumbered property without providing cash, is commonly known as "credit bidding." Finally, under clause (iii), a plan may be confirmed if it provides for the "realization" by the objecting secured creditor "of the indubitable equivalent" of its claim. 11 U.S.C. 1129(b)(2)(A)(iii).

2. a. In 2007, petitioners purchased the property known as the Radisson Hotel at Los Angeles International Airport, with the intent of renovating the hotel and building a parking structure on a related parcel. Pet. App. 3a-4a. In order to finance the purchase of the hotel and the planned renovation and construction, petitioners secured loans totaling approximately $142 million from the Longview Ultra Construction Loan Investment Fund, which loans were to be administered by respondent Amalgamated Bank. *Id.* at 4a. Petitioners ran out of funds during the construction of the parking structure and were unable to negotiate the loan of additional money from respondent. *Ibid.* Petitioners subsequently filed a voluntary Chapter 11 bankruptcy petition. *Id.* at 4a-5a.

When the petition was filed, petitioners owed at least $120 million on the loans, which were accruing more than $1 million in interest every month. Pet. App. 5a. In addition, more than $15 million in mechanics' liens have been asserted against petitioners' properties.

Ibid. Petitioners continue to operate their businesses as debtors in possession pursuant to 11 U.S.C. 1107 and 1108. Pet App. 5a.

b. In June 2010, petitioners submitted a proposed reorganization plan to the bankruptcy court. Pet. App. 5a; J.A. 14-96. The plan proposed to dissolve petitioners and to sell "substantially all of [petitioners'] assets" at auction in accordance with procedures set out in a contemporaneously filed "Sale and Bid Procedures Motion." J.A. 65-66. The plan further proposed that the proceeds of the sale would be transferred to respondent in full satisfaction of its claim. *Id.* at 66.

The bid procedures motion explained that petitioners had arranged for a "stalking horse" bidder (LAX Century & Sepulveda Hotel, LLC) that had agreed to bid $47.5 million at auction for "substantially all of [petitioners'] assets," *i.e.*, the hotel and parking structure. J.A. 105-106. One of petitioners' principals was expected to own an equity stake in the stalking horse. J.A. 105. The motion explained that the stalking horse had agreed to leave current management of the hotel and garage in place after the auction, and to contribute 20% of the profits earned after the sale to petitioners' liquidating trust (less a 12% return on the purchaser's investment), with 75% of that amount (*i.e.*, 15% of profits) to be distributed to petitioners' unsecured creditors and the remaining 25% to respondent. J.A. 39, 105, 108. Petitioners proposed that interested buyers bid in cash, deposit 5% of any bid into an escrow account, and identify both the proposed management company for the property and the future brand name of the hotel. J.A. 110-114. Petitioners also proposed that the stalking horse receive approximately $1.5 million if it was not the successful bidder, and that any competing bidder be required to

outbid the stalking horse by at least that amount in order to win at the auction. J.A. 117-118.

Petitioners' proposed bid procedures specifically barred any holder of a lien on petitioners' assets from "credit bid[ding] pursuant to section 363(k) of the Bankruptcy Code." J.A. 118. Respondent objected to that aspect of the proposed bid procedures. See Pet. App. 6a, 38a-39a, 41a-42a. Petitioners argued that preclusion of credit bidding was permissible under the Bankruptcy Code because secured creditors do not have a right to credit bid when a cramdown plan offers them the "indubitable equivalent" of their secured claims pursuant to Section 1129(b)(2)(A)(iii). J.A. 126-129. Petitioners further contended, in the alternative, that there was "cause" under Section 363(k) to suspend any right to credit bid. J.A. 129-132.

The bankruptcy court denied petitioners' motion to approve their proposed auction procedures. Pet. App. 38a-39a. The court concluded that the procedures did not comply with Section 1129(b)(2)(A)'s requirements for confirmation of a cramdown plan, *id.* at 42a, and that petitioners had not established "cause" for precluding credit bidding, *id.* at 43a-45a. At petitioners' request, the bankruptcy court certified for direct review in the court of appeals the question presented in this case. *Id.* at 30a-37a. The court of appeals authorized the appeal. J.A. 163-164.

c. The court of appeals affirmed. Pet. App. 1a-26a. The court sustained the bankruptcy court's determination that Section 1129(b)(2)(A) does not permit a debtor to sell an encumbered asset free and clear of liens without permitting the lienholders to credit bid. *Id.* at 10a-26a. The court explained that the Bankruptcy Code recognizes two basic methods of determining the market

value of assets to be sold in a corporate bankruptcy: "judicial valuation of an asset's value, 11 U.S.C. § 506(a)(1), and free market valuation of an asset's value as established in an open auction, 11 U.S.C. §§ 363(k), 1129(b)(2)(A)." *Id.* at 19a. The court further explained that, by affording secured creditors the right to credit bid at auctions conducted under Sections 363(k) and 1129(b)(2)(A)(ii), "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." *Ibid.*

The court of appeals concluded that petitioners' reading of Section 1129(b)(2)(A)(iii) was "unacceptable" because petitioners' approach "would render the other subsections of the statute superfluous." Pet. App. 23a. The court explained that "[a]llowing plans to use Subsection (iii) to accomplish a sale free of liens without according lenders the procedural protections prescribed by clause (ii) 'places the two clauses in conflict' and would allow the general to subsume the specific." *Id.* at 23a n.7 (quoting *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 329 (3d Cir. 2010) (Ambro, J., dissenting)). The court also observed that, although the Bankruptcy Code affords secured creditors various means to protect their interests in different factual circumstances, *id.* at 24a-25a, "the Code does not appear to contain any provisions that recognize an auction sale where credit bidding is unavailable as a legitimate way to dispose of encumbered assets," *id.* at 25a.

SUMMARY OF ARGUMENT

A. When a Chapter 11 debtor proposes a plan that would impair the rights of a secured creditor, the debtor must either obtain the creditor's consent or comply with

the requirements of Section 1129(b), which governs "cramdown" plans. Section 1129(b) requires that a cramdown plan be "fair and equitable" with respect to every creditor class whose claim is impaired, and Section 1129(b)(2)(A) specifies three means by which that requirement may be satisfied when a secured creditor objects to plan confirmation. Clause (i) of Section 1129(b)(2)(A) allows a plan to be confirmed over a secured creditor's objection if the creditor retains its lien and is promised deferred cash payments satisfying specified criteria. Clause (ii), which applies when the plan would sell collateral free and clear of a lien, requires, *inter alia*, that the lienholder be permitted to credit bid at the auction. Finally, clause (iii) authorizes confirmation of a plan that provides an objecting secured creditor "the indubitable equivalent" of its claim.

As the court of appeals recognized, the clause (iii) catch-all should not be applied in a way that undermines or renders superfluous the more specific provisions of clauses (i) and (ii). A deferred stream of cash payments that does not satisfy clause (i), for example, could not properly be considered a "fair and equitable" treatment of an objecting creditor's claim under the "indubitable equivalent" standard of clause (iii). Clause (iii) likewise does not authorize the confirmation of a plan that proposes to sell plan assets free and clear of existing liens unless secured creditors are allowed to exercise the right to credit bid that is conferred by clause (ii).

B. The Bankruptcy Code's general treatment of secured creditors confirms that petitioners may not extinguish respondent's lien on collateral by selling the property through an auction at which respondent is not permitted to credit bid. Taken together, Sections 363(k), 1111(b), and 1129(b)(2)(A) establish that a secured credi-

tor is entitled *either* to have the full amount of its claim treated as secured (rather than just the amount corresponding to the current value of the collateral) *or* to bid the allowed amount of its claim at any sale of the collateral that would extinguish the creditor's lien. That system prevents debtors from cashing out secured creditors when the actual or perceived value of collateral is depressed.

If the debtor retains the encumbered property, a creditor may elect under Section 1111(b) to have the full allowed amount of its claim treated as secured. Such an election is not available when the property is sold under the plan; but in those cases a creditor may guard against undervaluation by bidding the full allowed amount of its claim at any auction that would sell the property free of liens. The creditor is thereby guaranteed either to take the property (if it wins at auction) or to be paid at least the value that it places on the property (if it is outbid at auction) in the form of the proceeds of the sale.

C. Petitioners' interpretation of Section 1129(b)(2)(A) also takes insufficient account of the legal background against which that provision was enacted. The longstanding rule outside of bankruptcy was that a mortgage holder could not be compelled to relinquish its lien on collateral unless it had been paid in full or was permitted to bid at a foreclosure sale. The traditional practice within bankruptcy was similar—a plan could not reduce the amount of a secured creditor's lien over the creditor's objection except by paying the debt. Under petitioners' expansive view of Section 1129(b)(2)(A)(iii), however, an objecting secured creditor could be divested of its lien while receiving less than its own valuation of the property. The general language of Section 1129(b)(2)(A)(iii) should not be construed to ef-

fect so severe an impairment of the rights of secured creditors.

D. A creditor's opportunity to bid cash at an asset sale is not an adequate substitute for the right to bid credit. Cash bids include transaction costs not associated with bidding credit. And some secured creditors—such as the United States and federal agencies—are significantly constrained in their ability to bid cash.

ARGUMENT

IN THE ABSENCE OF GOOD CAUSE, A CHAPTER 11 BANKRUPTCY PLAN MAY NOT SELL ENCUMBERED PROPERTY FREE AND CLEAR OF THE LIEN OF A NON-CONSENTING SECURED CREDITOR WITHOUT PERMITTING THE CREDITOR TO CREDIT BID AT THE SALE OF THE PROPERTY

Under Section 1129(b)(2)(A), a proposed reorganization plan may be confirmed over a secured creditor's objection only if one of three conditions is satisfied. Under clause (ii) of that provision, plan confirmation may be premised on an auction sale of the collateral, free and clear of the secured creditor's lien, so long as the secured creditor is allowed to credit bid and obtains a lien on the sale proceeds. The question presented in this case is whether plan confirmation under clause (iii) may be premised on an otherwise comparable auction sale at which credit bidding is *not* permitted. The text, structure, and history of Section 1129(b)(2)(A), and of the Bankruptcy Code more broadly, make clear that clause (iii) may not be utilized in that manner.

A. The Text And Structure Of Section 1129 Demonstrate That, In The Absence Of Good Cause, Any Cramdown Chapter 11 Plan That Proposes To Sell An Encumbered Asset Free And Clear Of Liens Must Permit A Lienholder To Credit Bid At The Sale

1. Each of Section 1129(b)(2)(A)'s three clauses establishes a different means of ensuring that a cramdown plan is "fair and equitable" to an objecting secured creditor. Clause (i) authorizes confirmation when the secured creditor retains its lien on the property and the plan entitles the creditor to a stream of deferred cash payments satisfying specified prerequisites. 11 U.S.C. 1129(b)(2)(A)(i). Clause (ii) applies when the encumbered property is sold free and clear of liens and the plan allows the creditor to credit bid the allowed amount of its claim. 11 U.S.C. 1129(b)(2)(A)(ii); see 11 U.S.C. 363(k). Clause (iii) is a catch-all that applies when the plan provides secured creditors "the indubitable equivalent of [their] claims." 11 U.S.C. 1129(b)(2)(A)(iii). The phrase "indubitable equivalent," which Congress apparently borrowed from Judge Learned Hand's opinion for the Second Circuit in *In re Murel Holding Corp.*, 75 F.2d 941, 942 (1935), has been understood to encompass situations in which the secured creditor receives either the collateral itself or a lien on substitute collateral. See Kenneth N. Klee, *All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code*, 53 Am. Bankr. L.J. 133, 156 (1979) (Klee).[1]

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[1] Professor Klee "served as associate counsel to the Committee on the Judiciary, U.S. House of Representatives," and was "one of the principal drafters of the Bankruptcy Code." *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 331 n.16 (3d Cir. 2010) (Ambro, J., dissenting).

Clause (iii) of Section 1129(b)(2)(A) would serve no useful purpose unless it covered at least some plan provisions that fall outside clauses (i) and (ii). To that extent, petitioners are correct in arguing (Br. 15-18) that a plan may be "fair and equitable" under clause (iii) even though neither clause (i) nor clause (ii) applies. It does not follow, however, that a court may effectively override Congress's detailed determination of what constitutes "fair and equitable" treatment of a secured creditor's claim in situations covered by clauses (i) and (ii) by invoking the "indubitable equivalent" standard of clause (iii). Rather, clause (iii) should be construed so as not to undermine or render superfluous those more specific provisions.

2. Clause (i) establishes one set of criteria that, if satisfied, will render the plan fair and equitable with respect to a particular objecting secured creditor. First, the objecting creditor must retain its lien on the property in the allowed amount of its claim, even if the property is transferred to another entity. 11 U.S.C. 1129(b)(2)(A)(i)(I). Second, the plan must provide for deferred cash payments "totaling at least the allowed amount of such claim," and the present value of the payment stream must be at least as great as the creditor's interest in the property. 11 U.S.C. 1129(b)(2)(A)(i)(II).[2]

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[2] The allowed amount of a secured creditor's claim (and thus the amounts of the liens and deferred cash payments required to satisfy clause (i)) will depend on whether the creditor has made the election authorized by Section 1111(b)(2). For example, if an objecting creditor has a lien of $100,000 secured by property worth $50,000, and the debtor seeks plan confirmation under clause (i), the surviving lien must be in the amount of $100,000 for electing creditors or $50,000 for non-electing creditors. In addition, the plan must ensure that the creditor will receive deferred cash payments with a present value of $50,000

The careful balancing of interests reflected in clause (i) would be significantly undermined if some subset of those protections—such as retention of the creditor's lien and deferred cash payments totaling 90% of the allowed amount of the creditor's claim, or a stream of deferred payments *without* retention of the creditor's lien—could be considered "fair and equitable" treatment of an objecting creditor's claim under the "indubitable equivalent" standard of clause (iii).

The requirements of clause (ii) are similarly detailed. That provision specifies that a sale of property free of liens must be conducted pursuant to Section 363(k), which in turn requires that a lienholder be permitted to credit bid up to the full allowed amount of its claim. 11 U.S.C. 363(k), 1129(b)(2)(A)(ii); see *In re SubMicron Sys. Corp.*, 432 F.3d 448, 459 (3d Cir. 2006). Clause (ii) also requires both that the creditor take a lien on any proceeds of the sale and that the plan treat such lien in a matter that complies with either clause (i) or clause (iii). Congress thereby provided an objecting creditor with a procedural protection—the right to credit bid—designed to guard against undervaluation of collateral through either an insider sale or a judicial valuation. Clause (ii) is properly understood to reflect Congress's focused judgment concerning the circumstances under which a sale of encumbered property free and clear of existing liens may be deemed by a bankruptcy court to be "fair and equitable" to an objecting secured creditor.

(regardless of whether the creditor has elected to treat the entire amount as secured under Section 1111(b)(2)), and that the total amount of such payments is at least as great as the allowed amount of the claim ($100,000 for an electing creditor or $50,000 for a non-electing creditor).

In this case, petitioners proposed to sell the Radisson Hotel at Los Angeles International Airport free and clear of respondent's existing lien, and to compensate respondent exclusively from the sale proceeds. Petitioners' proposed bid procedures, however, specifically *precluded* respondent from exercising the right to credit bid that clause (ii) (through its cross-reference to Section 363(k)) guarantees. Treating the proposed auction as a "fair and equitable" treatment of respondent's claim under clause (iii)'s "indubitable equivalent" standard would subvert the balance drawn in clause (ii) by allowing petitioners to deprive respondent of the valuation protection afforded by credit bidding.

3. As this Court recently reaffirmed, "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Bloate* v. *United States*, 130 S. Ct. 1345, 1354 (2010) (quoting *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932) (applying this principle to the Bankruptcy Act of 1898)). Contrary to petitioners' contention (Br. 31), that principle is not rendered inapplicable simply because clause (ii) "is not a limiting subset of [clause] (iii)." Indeed, this Court has repeatedly found that a specific statutory provision trumps a more general one even when the two provisions are included in entirely different statutes. See, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 170 (2007); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992); *Simpson* v. *United States*, 435 U.S. 6, 15 (1978).

Petitioners also argue (Br. 29-30) that neither clause (ii) nor clause (iii) "is more specific or more general than the other." Clause (ii), petitioners contend, provides a creditor with the "*procedural* protection" of entitlement

to credit bid, while clause (iii) provides it with the "*substantive* protection" of receiving the indubitable equivalent of its secured claim. *Ibid.* That is incorrect.

Unlike clause (iii), clause (ii) specifically addresses situations in which encumbered property is sold free and clear of existing liens. Clause (ii) provides that the proceeds of such sales will constitute adequate compensation to objecting secured creditors only if the sales are conducted in accordance with Section 363(k), which guarantees the right to credit bid. Petitioners seek to undo that congressional judgment by proposing a Chapter 11 plan that is a clause (ii) plan in every respect but one: petitioners propose to sell the collateral, extinguish the liens, and give the sale proceeds to the secured creditor in full satisfaction of its claim, but refuse to respect respondent's presumptive right to credit bid. As Judge Ambro noted in his dissenting opinion in *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 329 (3d Cir. 2010), it "seems Pickwickian to believe that Congress would expend the ink and energy detailing procedures in clause (ii) that specifically deal with plan sales of property free of liens, only to leave general language in clause (iii) that could sidestep entirely those very procedures."

The opportunity to credit bid protects secured creditors against the risk that the high bid at auction will be less than the property's true worth. See Pet. App. 19a (explaining that, by affording secured creditors the right to credit bid, Sections 363(k) and 1129(a)(2)(B)(ii) "provide[] lenders with means to protect themselves from the risk that the winning auction bid will not capture the asset's actual value"); pp. 18-22, *infra*. Petitioners, by contrast, propose a *different* procedural mechanism—a comparison by the bankruptcy court between the auc-

tion price and the asset's actual value, see Pet. Br. 44-45—to protect secured creditors against that same risk, and thus to ensure "fair and equitable" treatment of secured creditors' claims. Treating a judicially-approved sale price as the "indubitable equivalent" of respondent's claim would subvert the congressional balancing of interests reflected in clause (ii).

To be sure, as petitioners observe (Br. 18-19), clause (iii) does not *expressly* negate the possibility that the proceeds of a no-credit-bidding asset sale could constitute the "indubitable equivalent" of a secured creditor's claim. But the whole point of the canon that specific statutory language controls over general is to address situations in which the general provision at least arguably covers the situation before the court. See *Bloate*, 130 S. Ct. at 1354 ("[G]eneral language of a statutory provision, *although broad enough to include it*, will not be held to apply to a matter specifically dealt with in another part of the same enactment.") (citation omitted) (emphasis added). The canon would serve no useful purpose if it were rendered inapplicable by Congress's failure to enact an explicit exception to the general provision.

It would be particularly inappropriate to interpret clause (iii) in the manner petitioners advocate because clause (ii) directs that, when an encumbered asset is sold free and clear of a secured creditor's lien, the lien attaches to the proceeds of the asset sale, and the plan must provide for the transferred lien to be treated according to the requirements of either clause (i) or clause (iii). The statute thereby specifies the role that clause (iii) plays in determining whether a sale of assets free and clear of liens is "fair and equitable" to an objecting secured creditor. A debtor may extinguish a creditor's

lien on the proceeds of an asset sale by offering the creditor the indubitable equivalent of that lien. But the value of the lien (*i.e.*, the value of the sale proceeds) must be determined by a sale that is conducted according to the requirements of Section 363(k).

Petitioners may not prevent respondent from invoking the valuation protection of credit bidding by substituting an after-the-fact judicial approval of a sale price. The point of giving a creditor the presumptive right to credit bid is to give the creditor a means of protecting against the undervaluation of property securing its claim. If a creditor believes collateral is worth more than what would otherwise be the winning bid amount, the creditor may bid more than that amount (in credit) and either take the collateral or drive up the amount of the winning bid and take those proceeds. Under petitioners' view, the only protection against undervaluation of collateral would be judicial review of a completed sale at which the price was set without the creditor's ability to credit bid. Because such a scheme would deprive the creditor of the right either to take collateral or to take what it views as the collateral's value, it would not, in Congress's determination, constitute "fair and equitable" treatment of the secured creditor's claim.

B. The Bankruptcy Code's Other Protections For Secured Creditors Confirm That A Secured Creditor Has The Presumptive Right To Credit Bid When A Cramdown Plan Proposes To Sell Its Collateral Free And Clear Of Liens

Related provisions of the Bankruptcy Code confirm that, when encumbered property is sold free and clear of existing liens, at a sale at which credit bidding is not allowed, giving an objecting creditor a lien on the sale

proceeds cannot constitute "fair and equitable" treatment of the creditor's claim under Section 1129(b)(2)(A)(iii)'s "indubitable equivalent" standard. See *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute."); *Ali* v. *BOP*, 552 U.S. 214, 222 (2008) (noting that judicial construction of a statutory term "must, to the extent possible, ensure that the statutory scheme is coherent and consistent"); *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (same). In particular, it is apparent from Section 1129(b)(2)(A)'s interaction with Sections 363(k) and 1111(b) that Congress intended to protect the rights that secured creditors bargained for by preventing debtors from "cashing out" creditors when the (actual or perceived) value of collateral is at a low point. See Klee 161.

1. Section 363(k) governs the sale of "property that is subject to a lien that secures an allowed claim." 11 U.S.C. 363(k). That provision states that, in the absence of "cause," a lienholder "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." *Ibid.* As petitioners note (Br. 26), a creditor's right to credit bid under Section 363(k) includes the right to bid up to the full value of its allowed claim. See *In re SubMicron Sys. Corp.*, 432 F.3d at 459 ("It is well settled among district and bankruptcy courts that creditors can bid the full face value of their secured claims under § 363(k).").

The right to credit bid ensures that, when an encumbered asset of the bankruptcy estate is sold free and clear of existing liens, a secured creditor will receive at

least the value that it places on the collateral, either in the form of the collateral itself (if it submits the winning bid), or in the form of sale proceeds equal to or greater than the amount the creditor is willing to bid for the property (if a competing bidder submits a higher bid). By exercising its right to credit bid the full allowed amount of its claim, a secured creditor can ensure that it either will be paid in full (if another bid is higher) or will acquire ownership of the property. That right protects the creditor against the risk that the auction price (and thus the compensation the creditor receives for its allowed claim) will be lower than the asset's true value. As the court of appeals explained, "[i]f 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." Pet. App. 19a.

Section 1111(b), which was added to the Code at the same time as Section 1129(b), similarly ensures that a secured creditor will not be forced to relinquish its lien on collateral in exchange for a monetary payment less than the allowed amount of its claim. As explained above (see p. 2, *supra*), an undersecured creditor may elect under Section 1111(b) to have the entire allowed amount of its claim treated as a secured claim rather than having the claim bifurcated into a secured claim for the value of the collateral and an unsecured deficiency claim for the balance. 11 U.S.C. 1111(b); see 11 U.S.C. 506(a)(1). Although such an election will deprive the creditor of the right to vote its deficiency claim along with other unsecured creditors in proceedings to approve or object to a proposed plan, the option of making

the Section 1111(b)(2) election allows the creditor to retain its lien on the collateral if it believes the property is being undervalued in the bankruptcy process. See *Collier* ¶ 1111.03[2][a] at 1111-22, ¶ 1111.03[3][c] at 1111-26. As the leading treatise explains, this election can be used "to prevent an attempted cash out," whereby a debtor pays an understated assessed value of an asset to a secured creditor (because such creditor's allowed secured claim is set by Section 506 at the value of the collateral), extinguishes the lien, exits bankruptcy, and then retains the asset's appreciation for itself. *Id*. ¶ 1111.03[3][c] at 1111-26; see *id.* ¶ 1111.03 at 1111-14 ("[S]ection 1111(b) protects the legitimate expectation of secured lenders that the bankruptcy laws will be used only as a shield to protect debtors and not as a sword to enrich debtors at the expense of secured creditors.").

The Section 1111(b) election is not available if the asset in question "is sold under section 363 of this title or is to be sold under the plan." 11 U.S.C. 1111(b)(1)(B)(ii). Sections 363(k) and 1111(b) therefore function as alternative means of protecting an undersecured creditor from being cashed out at a depressed value. If encumbered property is to be sold, the creditor has the presumptive right to credit bid, thereby ensuring that it receives either the property or a monetary amount that reflects the creditor's own valuation of the asset. If encumbered property is not sold, the creditor may elect to have its claim treated as fully secured, thereby ensuring that it may share in any increase in the property's value, up to the amount of its claim, and that it may foreclose in the event of future default. See *Collier* ¶ 1111.03[2][b] at 1111-23, ¶ 1111.03[3][b] at 1111-25 to 1111-26; see also *In re Kent Terminal Corp.*, 166 B.R.

555, 562-567 (Bankr. S.D.N.Y. 1994) (explaining that a secured creditor must either be able to take advantage of Section 1111 or be able to credit bid at a collateral sale); *In re 222 Liberty Assocs.*, 108 B.R. 971, 977-980 (Bankr. E.D. Pa. 1990) (same). Taken together, these provisions afford secured creditors substantial protection against judicial undervaluation of encumbered assets. See *In re Woodridge N. Apts., Ltd.*, 71 B.R. 189, 191-192 (Bankr. N.D. Cal. 1987); cf. *Bank of Am. Nat'l Trust & Savs. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 457 (1999) (explaining that "the best way to determine value is exposure to a market," and that"one of the Code's innovations [was] to narrow the occasions for courts to make valuation judgments"). *Ibid.*

To construe Section 1129(b)(2)(A)(iii) as petitioners urge would subvert that carefully constructed framework by allowing an objecting undersecured creditor to be deprived of both the right to make a Section 1111(b) election *and* the right to credit bid. But the reason a creditor is not permitted to make an election under Section 1111(b) when a plan proposes to sell the property securing its claim is that the creditor has the right to credit bid the full amount of its claim at any sale of collateral. See 124 Cong. Rec. 32,407 (1978) (Rep. Edwards) ("Sale 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 collateral under section 363(k)."); *Chapter 11 Reorganizations* § 14:19, at 954 (Hon. W. Homer Drake, Jr. & Christopher S. Strickland, eds., 2d ed. 2011-2012) (noting that any cramdown "sale free and clear of liens must comport with Bankruptcy Code section 363(k), thereby ensuring the secured creditor's right to challenge objection-

able sale terms"); Klee 155 & n.143 (same). Section 1129(b)(2)(A)(ii) makes that right express by incorporating Section 363(k)'s guarantee of the right to credit bid.

Petitioners contend (Br. 24-28) that the Bankruptcy Code protects a secured creditor's claim only to the extent of the value of the collateral at the time of the bankruptcy. That assertion is inconsistent with the default rule of bifurcated claims (which gives the secured creditor an unsecured claim over and above the present value of the asset)[3]; with the availability of the Section 1111(b) election (which gives the creditor a secured claim for more than the present value of the asset if the asset is not sold); and with the fact that Section 363(k) permits a secured creditor to bid the entire allowed amount of its claim (rather than simply the current value of the asset). In any event, Congress gave secured creditors the right to credit bid at the sale of collateral precisely to ensure that the proceeds of the sale reflect the true value of the collateral at the time of the bankruptcy.

2. As petitioners point out (Br. 35), the right to credit bid conferred by Section 363(k) is not absolute, since the right exists "unless the court for cause orders otherwise." 11 U.S.C. 363(k). Petitioners acknowledge (Br. 35), however, that the for-cause exception in Section 363(k) is generally invoked only in cases of creditor malfeasance or when a creditor's lien is in dispute. See, *e.g.*, *In re Daufuskie Island Props., LLC*, 441 B.R. 60, 64

[3] Petitioners suggest (Br. 27) that Section 1111(b)(1) adequately protects the undersecured portion of a secured creditor's claim when the creditor does not have recourse against the debtor for the deficiency claim by treating such deficiency claim as an allowed unsecured claim even when the collateral is sold through the plan. By its terms, however, Section 1111(b)(1) does not apply when the collateral "is to be sold under the plan." 11 U.S.C. 1111(b)(1)(A)(ii).

(Bankr. D.S.C. 2010) (creditor not entitled to credit bid when mortgage was in dispute); *In re Theroux*, 169 B.R. 498 (Bankr. D.R.I. 1994) (barring credit bid where there was evidence of a collusive scheme to deprive state authorities of taxes). Petitioners sought to invoke the exception here, but they were "unable to demonstrate cause." Pet. Br. 35. By requiring that an asset sale under clause (ii) be conducted "subject to section 363(k)," 11 U.S.C. 1129(b)(2)(A)(ii), Congress signaled its intent that credit bidding be permitted under a cramdown plan unless the narrow for-cause exception applies. Confirmation of a cramdown plan that disallows credit bidding even in the absence of good cause would subvert that congressional choice.

Petitioners' reliance (Br. 21-22) on Sections 363(*l*) and 1123(a)(5)(D) is likewise misplaced. Those provisions authorize sales of estate property pursuant to Chapter 11 plans, and they do not refer to credit bidding. Petitioners describe those provisions as "compelling evidence that Congress did not intend to provide secured creditors with a right to credit bid in *all* chapter 11 cases." Br. 22. The question in this case, however, is not whether a no-credit-bidding asset sale can *ever* be held in a Chapter 11 case, but whether it can be held *over a secured creditor's objection*. Unlike Sections 363(*l*) and 1123(a)(5)(D), Section 1129(b)(2)(A)(ii) deals specifically with asset sales under cramdown plans, and it incorporates by reference the requirements of Section 363(k).

3. Petitioners also contend (Br. 39-41) that the court of appeals should not even have considered the requirements of Section 1129(b)(2)(A) when reviewing the bankruptcy court's rejection of petitioners' proposed auction procedures. Petitioners suggest that the courts below

should instead have allowed the proposed auction to take place, while deferring until a later date the decision whether to confirm petitioners' Chapter 11 plan. That argument is not fairly encompassed by the question on which this Court granted certiorari (which involves the proper construction of Code provisions that govern plan confirmation), and it lacks merit in any event.

Petitioners filed their Chapter 11 plan and their motion to establish bid procedures together, and each proposal was plainly made in contemplation of the other. Petitioners' plan specifically requests that "[t]he Confirmation Order shall grant the relief requested in the Sale and Bid Procedures Motion and authorize a sale of certain or substantially all of [petitioners'] assets * * * under the terms and conditions of the Asset Purchase Agreement," which agreement forms the basis of the proposed bid procedures. J.A. 65-66; see J.A. 105-109. The chapter 11 plan also specifies that respondent shall receive the proceeds of the proposed sale "in full satisfaction" of respondent's claim, J.A. 52-53, and it incorporates the profit-distribution scheme suggested in the bid proposal, J.A. 58-59. There is consequently no basis for petitioners' contention that their proposed bid procedures should have been evaluated without reference to Section 1129's requirements for plan confirmation.

C. Petitioners' Approach Takes Insufficient Account Of The Historical Context Against Which Congress Enacted The Bankruptcy Code

"When Congress amends the bankruptcy laws, it does not write on a clean slate." *Dewsnup* v. *Timm*, 502 U.S. 410, 419 (1992) (quoting *Emil* v. *Hanley*, 318 U.S. 515, 521 (1943)). Courts are therefore "reluctant to accept arguments that would interpret the Code * * * to

effect a major change in pre-Code practice" based on "vague" or "ambigu[ous]" language. *Id.* at 419-420. The text of Section 1129(b)(2)(A) gives no indication that Congress intended the substantial change from traditional bankruptcy practice that petitioners' approach would entail.

The longstanding rule outside of bankruptcy is that the holder of a mortgage may not be compelled to relinquish the collateral to the debtor free and clear of the lien unless either "the debt was paid in full" or the creditor "was allowed to bid at the judicial sale on foreclosure" in order "[t]o protect his right to full payment or the mortgaged property." *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 579-580 (1935). Within bankruptcy, the historical practice was not to permit "involuntary reduction of the amount of a creditor's lien for any reason other than payment on the debt." *Dewsnup*, 502 U.S. at 419; see *Farrey* v. *Sanderfoot*, 500 U.S. 291, 297 (1991) ("Ordinarily, liens and other secured interests survive bankruptcy"). Although the Bankruptcy Code does permit a court, through plan confirmation, to modify some rights of a secured creditor—by, for example, changing the length or schedule of payment terms under Section 1129(b)(2)(A)(i)—the Code largely preserves a secured creditor's essential right to insist upon either retaining its lien, being paid the full allowed amount of its claim, or taking the property.

The terms "fair and equitable" and "indubitable equivalent" should be construed in keeping with that statutory intent and structure. In proposing to sell encumbered property without permitting respondent to credit bid, and then to treat the sale proceeds as full satisfaction of their existing debt, petitioners are not

offering respondent the indubitable equivalent of its claim. They are instead offering respondent the cash equivalent of some third party's valuation of the collateral. Such a proposal is not "fair and equitable" to an objecting secured creditor because it abrogates the creditor's bargained-for rights in a manner not contemplated or permitted by the Bankruptcy Code. See Pet. App. 25a (court of appeals observes that "the Code does not appear to contain any provisions that recognize an auction sale where credit bidding is unavailable as a legitimate way to dispose of encumbered assets").

Petitioners suggest (Br. 44-45) that the "indubitable equivalent" standard may be satisfied by a judicial finding that the auction price reflects the fair market value of the encumbered property. See pp. 16-17, *supra*. The word "indubitable" clearly indicates, however, that clause (iii) applies only when equivalence is not subject to reasonable dispute. If a particular secured creditor prefers to accept a cash sum less than the full allowed amount of its claim, rather than to acquire ownership of the collateral, it can forgo its statutory right to credit bid (or can submit a bid less than the full allowed amount). The rights of a secured creditor, however, have traditionally included the right to insist on taking the collateral rather than accepting partial payment of the outstanding indebtedness. An approach that divests secured creditors of that right neither treats creditors' claims fairly and equitably nor provides them with the "indubitable equivalent" of their claims.[4]

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[4] There is particular reason to doubt whether an all-cash auction conducted on the terms proposed by petitioners could ever pay lenders the indubitable equivalent of their claims. The cost of financing a bid (five percent deposit and extensive due diligence, see J.A. 111-116), com-

D. The Right To Credit Bid Is An Essential Protection For Secured Creditors, Particularly For Lenders Such As The United States And Federal Agencies, Who Are Often Unable To Bid Cash

The right to bid cash at an asset sale is not a satisfactory substitute for a secured creditor's statutory right to credit bid. The transaction costs associated with bidding cash act as a disincentive to the submission of cash bids, and they reduce the likelihood that a secured creditor will regard an effort to acquire the property as economically preferable to acceptance of the auction proceeds. Petitioners' submission of proposed bid procedures that specifically precluded credit bidding, and their subsequent efforts to vindicate that approach in the court of appeals and in this Court, presumably reflect petitioners' understanding that their stalking horse bidder would be less likely to prevail at auction if respondent could credit bid the full amount of its claim. Requiring secured creditors to cash bid in these circumstances would also create the anomalous result that

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bined with the fact that the sale could not be consummated unless and until the plan is confirmed, would artificially depress bid amounts. See Vincent S.J. Buccola & Ashley C. Keller, *Credit Bidding and the Design of Bankruptcy Auctions*, 18 Geo. Mason L. Rev. 99, 121 (2010). Other features of the auction's structure similarly are not conducive to maximizing the proceeds of the sale. The plan would require a winning bidder to pay the stalking horse approximately $1.5 million, and to identify in its bid the management company it intends to put in place and the brand name under which it intends to operate the hotel. J.A. 111-118. The auction procedures appear to have been designed not to maximize the recovery for creditors, but to ensure that the stalking horse—a company that is expected to be owned in part by a current member of the management team and has promised to keep that management team in place—obtains possession of petitioners' assets.

rules of offset are intended to prevent, namely "the absurdity of making A pay B when B owes A." *Citizens Bank* v. *Strumpf*, 516 U.S. 16, 18 (1995) (quoting *Studley* v. *Boylston Nat'l Bank*, 229 U.S. 523, 528 (1913)). Section 363(k) avoids that result by providing that, if a secured creditor purchases at auction property subject to a lien that secures the creditor's allowed claim, the creditor "may offset such claim against the purchase price of such property." 11 U.S.C. 363(k).

In addition, specific classes of secured lenders—including the United States, which has loan guarantee portfolios in the billions of dollars—are particularly dependent on credit bidding because they face legal obstacles to cash bidding. The Anti-Deficiency Act, 31 U.S.C. 1341, forbids any officer or employee of the United States either to involve the "government in a contract or obligation for the payment of money before an appropriation is made" or to "authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. 1341(a)(1)(A) and (B). The ability of a federal agency to bid cash is therefore strictly circumscribed by the scope of its congressional appropriation. But because federal law also requires the United States to take a lien on collateral when it extends certain kinds of loans, the United States is often a secured creditor in bankruptcy proceedings. *E.g.*, 15 U.S.C. 636(a)(6) (requiring that loans by the Small Business Association "shall be of such sound value or so secured as reasonably to assure repayment"); 10 C.F.R. 609.10 (requiring the Department of Energy to take a security interest in collateral that is senior to other debt in exchange for providing loan guarantees to certain projects that employ innovative technologies). If the United States and federal agencies are

unable to bid cash at the sale of their collateral due to a lack of appropriated funds, and are prevented from exercising their statutory right to credit bid, the auction price of such assets would be depressed, and the United States would ultimately receive less value for its security interests.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2012