

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RADLAX GATEWAY HOTEL, LLC, ET AL.,:

4 Petitioners : No. 11-166

5 v. :

6 AMALGAMATED BANK :

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8 Washington, D.C.

9 Monday, April 23, 2012

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:02 a.m.

14 APPEARANCES:

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16 Petitioners.

17 DEANNE E. MAYNARD, ESQ., Washington, D.C.; on behalf of
18 Respondent.

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20 General, Department of Justice, Washington, D.C.; for
21 United States, as amicus curiae, supporting
22 Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 11-166, RadLAX Gateway
5 Hotel v. Amalgamated Bank.

6 Mr. Neff.

7 ORAL ARGUMENT OF DAVID M. NEFF

8 ON BEHALF OF THE PETITIONERS

9 MR. NEFF: Mr. Chief Justice, and may it
10 please the Court:

11 The question presented in this case is
12 whether a secured creditor must be allowed to credit bid
13 when its collateral is being sold under a Chapter 11
14 plan. The relevant section of the Bankruptcy Code
15 plainly says no.

16 Section 1129(b)(2)(A) provides that a
17 Chapter 11 plan must be fair and equitable to a secured
18 creditor that objects to it.

19 It then provides three alternatives that the
20 debtor can pursue to satisfy that test. Any one of
21 these three alternatives can be used when assets are
22 being sold, but only one of them requires the right to
23 credit bid.

24 Under subsection (i), the plan must allow
25 the creditor to retain its lien and receive payments

1 over time, with the present value equal to the value of
2 its collateral.

3 Under subsection (ii), the plan must allow
4 the creditor to credit bid when its asset is being sold
5 free of its lien.

6 But under subsection (iii), the plan must
7 provide the creditor with the indubitable equivalent of
8 its secured claim.

9 The debtors have chosen to pursue a plan --
10 a plan sale without credit bidding under subsection
11 (iii).

12 The plain language of the statute permits
13 that result.

14 JUSTICE GINSBURG: But how does one
15 determine what is the indubitable equivalent of the
16 creditor's claim?

17 MR. NEFF: The indubitable equivalent will
18 be determined at the time of plan confirmation, in our
19 case, after the sale has been conducted, although not
20 yet approved by the court. So the court will have --

21 JUSTICE GINSBURG: The -- the sale --
22 something -- the sale can't go on without the court's
23 approval. I mean, the -- the auction has to have the
24 court's approval, right?

25 MR. NEFF: Well, here's what happens

1 typically: The debtor files a motion, as we did in this
2 case, to approve bid procedures. The court then
3 determines whether those bid procedures are appropriate
4 for the sale.

5 The sale is then conducted. Then the debtor
6 goes to plan confirmation; and, at the plan confirmation
7 hearing, aside from establishing the 16 requirements of
8 Section 1129 for a plan to be confirmed, the debtor also
9 seeks to confirm the results of the sale.

10 JUSTICE GINSBURG: And so what qualifies as
11 indubitably equivalent?

12 MR. NEFF: The indubitable equivalent must
13 be an amount that is at least equal to the amount of the
14 secured claim. In essence, it's going to be determined
15 by what the assets sold for, provided that the sale has
16 generated the best possible price for the asset.

17 JUSTICE GINSBURG: Suppose the -- suppose
18 the creditor thinks that the -- the sale was --
19 undervalued the assets, that it -- it wasn't the
20 equivalent?

21 MR. NEFF: The creditor has an opportunity,
22 at the plan confirmation hearing, to raise any issue
23 with regard to the sale process, with regard to the
24 auction that occurred -- has the opportunity to raise any
25 other issue that may bear on the price that is received

1 at the sale that occurs.

2 For instance, it could say, well, they
3 conducted this auction, but I have an appraisal here
4 that says the property is worth much more. So this
5 can't possibly be -- my --

6 JUSTICE ALITO: Well, isn't the -- isn't the
7 issue who is going to decide whether something is really
8 the indubitable equivalent? Is it going to be the
9 judge, which is what you would like? Or is it going to
10 be determined through a particular bidding procedure --

11 MR. NEFF: Well, it's --

12 JUSTICE ALITO: -- namely, where there can
13 be credit bidding, which is what the -- which is what
14 the Respondent would like.

15 MR. NEFF: It's going to be the judge, after
16 reviewing what happens at the sale. The problem with
17 allowing a creditor the right to credit bid under all
18 circumstances is, in a case like ours, we don't believe
19 we will ever get to an auction because no one else will
20 show up.

21 JUSTICE ALITO: Well, if the Respondent
22 thought that what the judge would determine would
23 indubitably provide the indubitable equivalent, then
24 there wouldn't be an issue here, right?

25 The reason why there's an issue is because

1 they don't think that what the judge will decide will
2 indubitably provide the indubitable equivalent.

3 MR. NEFF: In this particular instance, I
4 would suggest that the -- the creditor simply does not
5 want the asset sold. It would rather take the asset
6 back and hold it for some time period. So it's not --

7 CHIEF JUSTICE ROBERTS: Well, isn't that --
8 isn't that pretty much what he bargained for when he
9 insisted upon security before giving the loan?

10 MR. NEFF: Well, what they bargained for was
11 that the asset be liquidated and all of the proceeds
12 applied to their loan. And that's exactly what we
13 propose to do under our sale procedure.

14 CHIEF JUSTICE ROBERTS: Well, you're
15 depriving the secured creditor of the opportunity to
16 hold on to the asset because he thinks it is, for
17 perhaps a short period, unreasonably devalued. Right?

18 MR. NEFF: Well, he -- he is denied that
19 right under subsection (i), which is our traditional
20 reorganization -- internal reorganization provision of
21 Section 1129(b)(2)(A).

22 CHIEF JUSTICE ROBERTS: Did -- did I cut off
23 your answer to Justice Alito?

24 MR. NEFF: Well, with regard to the
25 indubitable equivalence, clearly, the judge is going to

1 make that determination. But that's no different than
2 the judge making a determination under subsection (i) as
3 to what the fair market value of the collateral is for
4 purposes of determining the note that the creditor is
5 going to receive and be paid off over time.

6 JUSTICE SCALIA: Could the -- could the
7 judge say, when the proposal is made to him, the only
8 way I can be sure that it is the indubitable equivalent
9 is to have the sale open to credit bidding, which is
10 what we always do? Can the judge say that?

11 MR. NEFF: If there is testimony provided to
12 the judge that that is the way that will maximize the
13 sale proceeds and that, in fact, you can't get
14 indubitable equivalence unless you allow credit bidding,
15 it would seem to me, under that circumstance, the judge
16 would have that discretion.

17 JUSTICE SCALIA: Now, you're, you're --

18 JUSTICE SOTOMAYOR: It makes no sense to me
19 what you are saying because, under all circumstances,
20 the credit bid, unless the property is valued higher
21 than the credit bid amount, but then another bidder
22 could do -- could make -- could enter that bid.

23 MR. NEFF: Well, the problem is when --

24 JUSTICE SOTOMAYOR: The maximum value always
25 has to be the value of the credit.

1 MR. NEFF: Well, I --

2 JUSTICE SOTOMAYOR: If the -- if the -- if
3 the creditor is willing to put it at risk that way.

4 MR. NEFF: Your Honor, I would disagree. I
5 think, in a situation like ours, no one else is going to
6 come to bid because creditors who are -- or potential
7 purchasers who are looking to buy a hotel have multiple
8 opportunities to buy other hotels.

9 So if they know that they are going to show
10 up at a sale, where a creditor is owed substantially in
11 excess of what the property is likely to sell for, they
12 are not going to spend their time and effort doing the
13 due diligence that is required to acquire or make a bid
14 on an asset like a hotel.

15 JUSTICE BREYER: And so what's wrong with that?
16 I mean, a creditor loaned you a million dollars. For the
17 million dollars, he got an interest -- a secured
18 interest in a piece of property. And that property is
19 worth whatever it was -- whatever it's worth -- less
20 than a million, and he says that's the deal.

21 I -- I have a secured interest in this; I
22 want the property. Now, you are better off because you
23 can stretch out the payments over time, and maybe you
24 don't have to give it to him immediately, but I don't
25 see anything unfair about saying, give him the property

1 if he wants it.

2 MR. NEFF: That, in essence, would be
3 denying Chapter 11 relief to a host of debtors where
4 their collateral is worth --

5 JUSTICE BREYER: Well, in accordance with
6 (i), (ii) and (iii). I mean, I'm not saying skip those.

7 MR. NEFF: What -- the problem is you are
8 cutting off the bankruptcy process, really, before it
9 has --

10 JUSTICE BREYER: I don't understand that. I
11 mean, as I read it, to put it out on the table, I read
12 this makes perfect sense. What they are trying to do is
13 help the debtor a little, without mucking up the secured
14 creditor's collateral. Choice (i), give the secured
15 creditor his collateral, and there is still a lien on
16 it. He has what he had before, and the debtor is better
17 off because he can stretch the payments out over time,
18 and that's one and two.

19 Choice (ii), we give the creditor some new
20 collateral. Hmm, that's a little risky, but to be sure
21 it's fair, we are absolutely certain, with a few
22 exceptions not relevant, that the creditor can credit
23 bid. So he has it within his control.

24 Choice (iii), something else which comes up
25 in different situations, for example, a creditor who is

1 over-secured, see, and -- and they want to sell the
2 piece of property. And he says, sure, I will let you
3 sell it, but I want something that's the equivalent,
4 give me this other property over here that you own, that
5 has no liens at all. And the judge can look at that and
6 say that's fair. That's what (iii) is basically about,
7 as far as I could understand it.

8 So it all makes sense to me. And I don't
9 understand why you would want to have a rule saying that
10 (iii) trumps (i) and (ii) and stops credit bidding.

11 MR. NEFF: Your Honor --

12 JUSTICE BREYER: So that's the whole thing,
13 as I am seeing it at this moment. So I'll give you a
14 chance to reply.

15 MR. NEFF: Thank you. Your Honor, I don't
16 see subsection (iii) as having the limiting language
17 that it should have if, in fact, it was meant to be
18 something other than what is in subsection (i) or
19 subsection (ii). There is no language that says, except
20 as provided for in subsection (i) or (ii), relief other
21 than --

22 JUSTICE BREYER: No, it doesn't have the
23 language, which is why we have a case. But, I mean,
24 trying to interpret it in a way that makes sense, what
25 is wrong with what I said as a way that makes sense? I

1 mean, why, since we are trying to give the -- the
2 creditor the indubitable value, at the very least -- the
3 best way to do that would be let the creditor credit
4 bid.

5 MR. NEFF: Well --

6 JUSTICE BREYER: So why not? And you can
7 read it. You don't have to read it the way that -- that
8 you want. You could read it the opposite way, too.

9 MR. NEFF: If you are looking at it from the
10 perspective of the creditor saying well, this -- -

11 JUSTICE BREYER: No, I'm looking at it from
12 the perspective of a bankruptcy system --

13 MR. NEFF: Okay.

14 JUSTICE BREYER: -- that is trying to get
15 secured creditors what they have their security in,
16 while giving the debtor the advantage here of being able
17 to stretch out his payments.

18 MR. NEFF: I agree. And there are other
19 parties and interests in -- in a bankruptcy case,
20 including, obviously, unsecured creditors, that get
21 nothing, if the result is all the creditor gets is the
22 relief from the automatic stay to foreclose on the
23 collateral, when you have this great discrepancy between
24 what it's owed --

25 JUSTICE KAGAN: Well, how would they get

1 anything, anyway? I mean, your brief suggests that,
2 somehow, there are these unsecured creditors in the mix
3 who are going to receive some benefit if your
4 understanding of this statute goes forward.

5 But, you know, in a circumstance like this,
6 doesn't the secured creditor either get the property or
7 get the money from the property, and the unsecured
8 creditors are out of the mix regardless?

9 MR. NEFF: Well, in our particular instance,
10 obviously, there are some senior liens that would be
11 paid, including things like mechanic's liens and real
12 estate taxes. There are other costs that --

13 JUSTICE KAGAN: But those are -- those
14 continue forward. So even if the secured creditor got
15 the property, there would be mechanic's liens on the
16 property, isn't that right?

17 MR. NEFF: That's true, although resolving
18 them pursuant to a plan is usually a better resolution
19 for them, by providing more certainty and -- with regard
20 to the result, and a more quicker resolution, usually,
21 as opposed to being relegated only to State court to
22 fight them. In our --

23 JUSTICE SCALIA: Mr. -- Mr. Neff, can -- are
24 you done? I'm sorry. I didn't want to stop your
25 answer.

1 MR. NEFF: I was only going to say that, in
2 our particular instance, the stalking horse had agreed
3 over a future time, after it obtains the property, to
4 provide for recovery to general unsecured creditors.

5 JUSTICE SCALIA: Can I -- let's look at the
6 text. Little (ii) provides for exactly what you want to
7 do here. What you want to do under (iii) is precisely
8 what (ii) says, except you want to eliminate, subject to
9 Section 363(k) of this title, right?

10 Does it -- does it make much sense for a
11 provision to say you can do it three ways: number (i);
12 number (ii), you can have this sale subject to credit
13 bidding; and number (iii), after -- after saying that,
14 specifically, oh, you can have this sale, not subject to
15 credit bidding?

16 That's -- that's not a very sensible
17 statute. Why -- why go through that -- that problem
18 of -- of saying number (ii), if you could have left it
19 to number (iii) anyway?

20 MR. NEFF: Subsection (ii) provides that, if
21 you allow credit bidding, regardless of the price that's
22 achieved, that that is deemed to be fair and equitable
23 treatment of the secured creditor's claim.

24 JUSTICE SOTOMAYOR: But that's just not true
25 from what you just said, meaning what you just said is

1 that the buyer, obviously, is paying other things off,
2 and by definition, he's deducting that from the purchase
3 price. No one gives a purchase price for a piece of
4 property and agrees to pay something else and gives the
5 highest price for the property once they've done that.

6 So what you're asking for is permission for
7 the debtor to use this property to pay other debts, and
8 that's what I thought a secured interest prevented.

9 MR. NEFF: With regard to Justice Scalia's
10 question, all I was trying to point out is that, in
11 subsection (ii), regardless of the -- the price that is
12 achieved as long, as you allow the secured creditor the
13 right to credit bid --

14 JUSTICE SOTOMAYOR: So why doesn't he get --

15 MR. NEFF: -- that's the fair and
16 equitable --

17 JUSTICE SOTOMAYOR: Why doesn't he get
18 everything that the buyer is promising to everyone else?
19 For that, indubitably, is part of the price because he
20 is giving out money to others. That's part of the value
21 of this property. So why isn't the creditor -- the
22 secured creditor, entitled to all of the proceeds from
23 the property?

24 MR. NEFF: The secured creditor will get all
25 the proceeds from the property.

1 JUSTICE SOTOMAYOR: No -- with -- with
2 sales price, but not from all the payments.

3 MR. NEFF: With -- right. With regard to
4 the pavements that are in the future, those are after
5 the -- the sale would be consummated to the stalking
6 horse bidder.

7 JUSTICE SOTOMAYOR: You still haven't
8 answered my --

9 MR. NEFF: There are other benefits that the
10 secured creditor -- that will get, that will increase
11 the -- the price that is received by having sold the
12 property in bankruptcy. For instance, when you sell
13 through a plan, you avoid the payment of transfer taxes.

14 JUSTICE SCALIA: Yes.

15 MR. NEFF: So, clearly, to the extent that
16 the transfer taxes being saved are in an amount that
17 exceeds what ultimately goes to the unsecured creditors,
18 these --

19 JUSTICE SOTOMAYOR: You still haven't
20 answered my question. If the buyer had money that he's
21 willing to give up to others, why isn't he putting it in
22 the purchase price? Why isn't that part of the price?

23 MR. NEFF: It would be our obligation to
24 show at confirmation that the creditor is paying the top
25 dollar for the asset. If the creditor desires to pay a

1 bonus or a premium on top of that, we would have to show
2 that, nonetheless, that the secured creditor is
3 receiving the indubitable equivalent and either have to
4 show by argument that -- a savings on the transfer tax
5 or some other way that this is not causing the secured
6 creditor to not receive the indubitable equivalent.

7 JUSTICE SOTOMAYOR: Could -- could you
8 explain what the reasoning is for requiring a credit
9 bid, if property is sold during the plan, but not
10 permitting it when it's sold at plan time?

11 MR. NEFF: Sure.

12 JUSTICE SOTOMAYOR: Doesn't that delay the
13 bankruptcy in every situation? I can't actually
14 understand what benefit, other than delay of the
15 bankruptcy process, that would occasion.

16 MR. NEFF: Is your question why we always
17 have it under Section 363, but not under the plan?

18 JUSTICE SOTOMAYOR: Uh-hmm.

19 MR. NEFF: Section 363 allows the sale of
20 property outside the ordinary course of business during
21 a bankruptcy case. It can be done as quickly as on
22 21 days' notice. So it can be done on a very truncated
23 basis, or even more quickly if the debtor can show that
24 there is cause, some reason to have an even faster sale.
25 There is no requirement that you show that any of the

1 plan requirements in Section 1129 must be met.

2 So there are good reasons to have this
3 protection for the secured creditor when you are selling
4 under Section 363 outside of a plan context that don't
5 necessarily exist when you are selling in the course of
6 a plan because a plan takes a much longer time period,
7 usually at least 2 months' notice, if not much longer --

8 JUSTICE SCALIA: Mr. Neff, don't you feel
9 sorry for the United States? The United States is often
10 in the creditor situation, and the United States cannot
11 come up with cash.

12 Are they going to run to Congress and get an
13 appropriation for each -- each security case it has?
14 What -- what do you propose we do with the United
15 States? The United States just can't take any security
16 interests anymore or what?

17 MR. NEFF: Well, no, I don't think that that
18 is the case. And I did see that in their brief, and I
19 don't know the extent that, in practice, that actually
20 occurs because, for instance, they pointed out the SBA
21 loans. Those are typically guaranteed loans. So there
22 would be a motivation, at least by the principals of the
23 debtor, to maximize the return to the SBA.

24 But as far as them not being allowed to
25 credit bid, there are -- they have the opportunity to

1 have a greater voice in the sale process. They can
2 seek --

3 JUSTICE SCALIA: I -- I don't understand.

4 MR. NEFF: Well, they can seek from the
5 Bankruptcy Court a greater role when the asset is being
6 marketed for sale to ensure that they are receiving top
7 dollar on their claim.

8 JUSTICE SOTOMAYOR: They don't have that
9 right now? They don't have that right now?

10 MR. NEFF: Well, when we sell assets, the
11 debtor typically has the control over how it's going to
12 be marketed and sold. They may give some input rights
13 to the secured creditor, but they're usually not going
14 to give the secured creditor the veto power over how to
15 conduct the sale.

16 But I -- I would suggest that, when you have
17 a situation with a creditor that truly cannot bid cash,
18 that -- that there would be an opportunity to impress
19 upon the judge that they need to have a greater role
20 when you are actually marketing and selling the
21 property.

22 JUSTICE KAGAN: Mr. Neff, can I understand
23 how your system would actually work in practice?
24 Suppose you have an -- an auction, and there is -- the
25 top value was \$500. And then you have the secured

1 creditor, let's say, is in the position of the United
2 States and comes in and says, we couldn't credit bid,
3 but we -- excuse me -- we couldn't pay cash, but we
4 think it's \$750.

5 MR. NEFF: Right.

6 JUSTICE KAGAN: And, now, the court has to
7 decide whether it's \$500 or \$750, after the auction has
8 gone forward. What happens?

9 MR. NEFF: The court is going to review the
10 process to actually sell the asset -- you know, who
11 was -- where was it marketed, who knew about it, who
12 showed up at the auction, how many bids were made --

13 JUSTICE KAGAN: Well, now, let's say the
14 court says, You know, I think that the government is
15 right; it's really \$750. But you've already had a sale.

16 MR. NEFF: Right.

17 JUSTICE KAGAN: And -- and you've sold it
18 for \$500.

19 MR. NEFF: There has been no closing. The
20 closing doesn't occur until the plan confirmation
21 actually occurs. And, in fact, that's how you would do
22 it after this Court's ruling in 2008.

23 JUSTICE SCALIA: But wouldn't the court
24 always say, when -- when it's confronted with this
25 situation, the government comes in, and the court says,

1 yes, well, you know, I -- I guess that that price is
2 probably so low because nobody could credit bid. I
3 mean, wouldn't that always be a -- a frailty of
4 whatever -- whatever price it sold for? Wouldn't it
5 always be?

6 MR. NEFF: No, because you are going to have
7 situations where creditors -- secured creditors will
8 credit bid amounts that have no relationship to the fair
9 market value, what we call, for instance, loan-to-own
10 lenders, where their only interest is actually getting
11 the title to the property. So you are going to have
12 situations that -- where the credit bid does not equate
13 to market --

14 JUSTICE SCALIA: Well, that might be, but --
15 you know, it doesn't -- it doesn't take a genius to
16 figure out that if you allow people to bid for cash or
17 for credit, you are going to get more bids and higher
18 bids than -- than if you allow them to bid for cash
19 only.

20 MR. NEFF: The problem is, when you are
21 dealing with larger assets, like what we are dealing
22 with, you are not going to get a sophisticated buyer to
23 come in to bid against a lender that can credit bid,
24 particularly in a situation like our case, where the
25 lender has said, I simply want the property back.

1 JUSTICE SCALIA: That just means that you
2 can't find a buyer who is willing to pay that much.

3 MR. NEFF: Well, we believe that -- that
4 subsection (iii) allows us to show that the -- the
5 secured creditors receiving the --

6 JUSTICE BREYER: You said -- look, in subsection
7 (iii), if it applies here -- I assume there's -- suppose it
8 doesn't apply here. There is a safeguard against having
9 no bidder.

10 Bidders who would bid more than what the
11 creditor thinks it's worth, the creditor will want them
12 in this. And if they -- he doesn't want it in, it's
13 because he thinks it's worth more in his own hands. So
14 what's the problem?

15 But there is a problem the other way. The
16 problem the other way -- and I'm not saying it's this
17 case, but there are -- is that the insiders say to the
18 stalking horse, we would like you to put this up at a
19 low price and give us a job. And if they keep the
20 creditor out, well, that's a big incentive.

21 And they are the ones who know what a hotel
22 is worth, the judge doesn't know, and there is always
23 leeway. And so that -- that was worrying me about this
24 fact pattern. You want -- you want to get rid of my
25 worry?

1 MR. NEFF: Yes, I do.

2 JUSTICE BREYER: Good.

3 MR. NEFF: The bankruptcy judge sees this in
4 a variety of cases, just the natural tension that you
5 have in a bankruptcy, individuals who may be
6 self-interested, yet they are supposed to be fiduciaries
7 for the estate. It's part of our roles as lawyers to be
8 the fiduciaries as well.

9 Our particular instance, it's not a concern
10 because the property is being marketed to a wide array
11 of people. There's no requirement that they keep the
12 management company, and there's every opportunity for
13 any other hotel company to come in -- or any other
14 strategic buyer --

15 JUSTICE BREYER: You know, but the concern was -- I
16 gather there is no other bidder, you have said. You've
17 just found the stalking horse. You agree to pay the
18 stalking horse a million and a half dollars, in case he
19 doesn't get it. And then the people from the inside are
20 being hired by the stalking horse, if he wins.

21 MR. NEFF: Right.

22 JUSTICE BREYER: Now, I'm not -- I'm sure
23 they are acting very honestly. But you would have to
24 say, in such a situation, that there is an incentive to
25 try to value everything on the low side by the debtor to

1 make sure that stalking horse gets the property. And
2 that incentive is destroyed -- or at least doesn't work,
3 if you allow the creditor bid.

4 MR. NEFF: Interestingly, the process
5 actually works a little different than that.

6 You -- Debtors will go out -- and their
7 financial advisers will actually go out and try to
8 market the ability to be the stalking horse, to actually
9 try to get the best stalking horse bid.

10 In this particular instance, what we got was
11 the -- ultimately, the \$55 million. We are confident
12 the property, ultimately, will sell for more.

13 JUSTICE ALITO: When this procedure is
14 followed, how often does a buyer, other than the
15 stalking horse, obtain the property?

16 MR. NEFF: I don't know from a statistical
17 basis -- and, you know, a stalking horse, if they have
18 the -- the -- a break-up fee, they have that built-in
19 cushion. And in our case, I would point out the judge
20 had not yet approved the break-up fee, but it was a
21 standard 3 percent of the -- of the bid price. So I
22 don't know what -- what percentage it is, and -- you
23 know, from my own experience --

24 JUSTICE SCALIA: I didn't realize the judge
25 had to approve --

1 MR. NEFF: The stalking horse?

2 JUSTICE SCALIA: Yes.

3 MR. NEFF: Yes.

4 JUSTICE SCALIA: The judge has to approve
5 the stalking horse?

6 MR. NEFF: That's part of the bid
7 procedures.

8 And buyers -- more sophisticated buyers --
9 and when you deal with bigger assets, they're used to
10 the process being this way, that there is going to be a
11 stalking horse and that there is going to be some sort
12 of protection.

13 JUSTICE SOTOMAYOR: The vast majority of
14 bankruptcy courts have permitted credit bidding in these
15 situations. So if the vast majority of bankruptcies
16 have stalking horses, then the norm is working, without
17 us having to rule in your favor.

18 MR. NEFF: I would say the vast majority of
19 cases occur under Section 363, where there is no
20 question, because of 363(k), that there is the right --

21 JUSTICE SOTOMAYOR: And stalking horses
22 still come in. So it's not as if the 363(k) procedure
23 is failing in maximizing prices.

24 MR. NEFF: The -- the major -- that is true.
25 The major difference is that a sale, under Section

1 363(k), almost invariably, the secured creditor
2 supports, so there is no question, but that there is
3 going to be a transaction occurring, whereas --

4 JUSTICE SCALIA: I -- say it again? I
5 didn't -- I didn't understand that.

6 MR. NEFF: When you are selling under
7 Section 363, because of 363(k), there must be a right to
8 credit bid; and, in most situations, the secured
9 creditor wants the assets sold when you are doing a
10 Section 363 sale. So there is no question, in the minds
11 of a buyer, but that there is going to be a transaction.
12 And there is a reason to spend your time and effort
13 learning more and doing due diligence about the asset.

14 CHIEF JUSTICE ROBERTS: Well -- Well, this
15 is a case, though, where you would not want the asset
16 sold. In other words, looking at it, he thinks, for
17 particular, unusual situations, this is vastly
18 undervalued; I am holding an asset that is going to
19 appreciate if I hold onto it. So he doesn't want the
20 asset sold.

21 MR. NEFF: That's correct. And -- and it's
22 our belief that the Bankruptcy Code provides the
23 ability, in subsection (iii), to conduct the sale and
24 pay the secured creditor the indubitable equivalence of
25 its claim.

1 CHIEF JUSTICE ROBERTS: And what -- what is
2 the doubtless equivalent of his claim? Measured by the
3 current market conditions? Or does that include some
4 premium, based on the assumption that it's going to
5 increase in value over some period?

6 MR. NEFF: It's going to be measured by the
7 current market conditions, but to the extent that the
8 secured creditor brings in an appraisal, that will
9 invariably be based on what the projections are going to
10 be and -- and take that into account.

11 So if I could reserve the remainder of my
12 time?

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Ms. Maynard?

15 ORAL ARGUMENT OF DEANNE E. MAYNARD

16 ON BEHALF OF THE RESPONDENT

17 MS. MAYNARD: Mr. Chief Justice, and may it
18 please the Court:

19 Secured creditors bargain for the right to
20 be repaid in full or, if not, to foreclose and take the
21 collateral that secures their loan.

22 When a Chapter 11 bankruptcy plan is going
23 to cram down a plan over the objection of a secured
24 creditor, Section 1129(b)(2)(A) gives the secured
25 creditor the ability to protect those rights, regardless

1 of the proposed treatment of its collateral.

2 Specifically, when the plan proposes, as
3 here, to sell the collateral, free and clear of the
4 secured creditor's liens, and give the secured creditor
5 nothing but the proceeds from that sale, clause (ii)
6 entitles the secured creditor to bid what it is owed in
7 the absence of cause to preclude it.

8 CHIEF JUSTICE ROBERTS: Or -- or he is
9 entitled to realize the indubitable equivalent of his
10 claims. You really do just kind of elide the fact that
11 the statute says, "or."

12 MS. MAYNARD: No, Your Honor. We give full
13 meaning to the "or." We don't dispute that these are
14 three alternative ways to cram down a plan. The
15 question here is or what? And the question is the scope
16 of the alternatives and in which circumstances they
17 apply.

18 And, here, Congress turned its attention to
19 precisely the situation at hand and determined what the
20 requirements were, but not just the requirements for a
21 sale free and clear. It's not like clause (ii) says, if
22 you sell it free and clear and you allow credit bidding,
23 then that's one way to go. It's not just the
24 requirement of credit bidding. It also sets forth the
25 only exception to credit bidding. And Petitioners'

1 reading would read clause (iii) to be a much bigger
2 exception.

3 Now, Petitioners here tried and failed in
4 the Bankruptcy Court to prove cause, and they don't
5 appeal that. So they are trying to create a much bigger
6 exception to the exception Congress allowed --

7 JUSTICE SCALIA: They tried and failed to
8 prove what?

9 JUSTICE ALITO: Cause.

10 MS. MAYNARD: Your Honor, cause.

11 JUSTICE SCALIA: Cause.

12 MS. MAYNARD: So under -- we reprint -- the
13 1129 clause (ii) is on 20a in the red brief at the back.
14 And it -- it provides: "For the sale, subject to
15 Section 363(k) of this title, of any property that is
16 subject to liens securing such claims free and clear of
17 such liens." And that refers you to 363(k), which is
18 also at the back of our brief.

19 And 363(k) provides that, "Unless the court
20 for cause orders otherwise, the holder of such claim may
21 bid at such sale; and if the holder of such claim
22 purchases such property, such holder may offset such
23 claim against the purchase price of such property."

24 So my point is clause (ii) is not just, if
25 you let them credit bid, then that's one way to go to

1 fair and equitable. It's you must let them credit bid,
2 unless cause is shown. And they tried in the Bankruptcy
3 Court, Justice Scalia, to prove cause. And the district
4 court found against them on that point, and they don't
5 appeal it. I --

6 CHIEF JUSTICE ROBERTS: Your -- your friend
7 on the other side suggests that (ii) and (iii) address
8 different ways of protecting the secured creditor. (ii)
9 is procedural, right? You can go through these
10 procedures, and you can cram down, so long as you are
11 going through these procedures, which include credit
12 bidding.

13 Or you can cram down if you ensure that he
14 receives the indubitable equivalent, a substantive
15 protection. What is wrong with that reading?

16 MS. MAYNARD: I don't think that's a fair
17 characterization of the three clauses, Mr. Chief
18 Justice, because all three of the clauses have both
19 procedural and substantive components. And essentially,
20 what Petitioners seek to do here is exchange their
21 preferred procedure, which is a sale without allowing us
22 to credit bid, followed by a judicial determination of
23 whether whatever number that sale produces is high
24 enough to be our secured claim.

25 But the whole point is, if the secured

1 creditor is willing to bid one more dollar of what it's
2 owed at the sale, that is the value of our secured
3 claim. And --

4 JUSTICE ALITO: Is it correct that, really,
5 the heart of your argument is that the real value of
6 this property is greater than the value that you think
7 the Bankruptcy Court would assign to it, if this were
8 done under subsection (iii)?

9 MS. MAYNARD: That is definitely the fear,
10 Justice Alito.

11 JUSTICE ALITO: Why? Why do you have that
12 fear?

13 MS. MAYNARD: Because valuations are
14 inherently uncertain, and Congress knew that. And in
15 this Bankruptcy Code, Congress tried to move away from
16 judicial valuations for precisely that reason.

17 JUSTICE KAGAN: But doesn't clause (i)
18 depend upon a judicial valuation? In clause (i), the
19 Court has to say, what is the present value of your
20 property, so that it knows what the right income stream
21 is.

22 MS. MAYNARD: That's true, Justice Kagan.
23 But, if you proceed through clause (i), the code
24 provides a secured creditor with a different protection
25 against undervaluation. So the whole code structure is

1 set up to protect the secured creditor against the risk
2 of undervaluation of its claim. And that's the Section
3 1111(b) election. So Section 1111(b) election allows
4 the secured creditor who is undersecured and is afraid
5 that their -- their value of their property will be
6 misvalued in a clause (i), to elect to have their entire
7 face value of their claim treated as secured.

8 So here, the lenders are owed more than
9 \$130 million. If they were to proceed under clause (i),
10 the lenders would have the option to have that whole
11 \$130 million treated as secured. And that would be the
12 value of the secured claim.

13 And, under clause (i), yes, we would then be
14 subject to the judicial determination of the present
15 value of whatever a note paying out \$130 million would
16 be, but two protections we would have. They wouldn't be
17 determining the principal. The principal -- the face
18 value of the note would have to be \$130 million; and the
19 lien that we would retain would be \$130 million.

20 JUSTICE KAGAN: How about in subsection
21 (iii), where it talks about substitute collateral?
22 That's completely a judicial valuation, isn't it?

23 MS. MAYNARD: That would be true, but I
24 think, in that situation, we would also have the option
25 to make the 1111(b) election. And, therefore, they

1 would have to substitute collateral that would be up to
2 the \$130 million mark. So it's true -- and it's true
3 that Congress did leave this other, but it is an other.

4 And I think -- I think another way to --
5 another point to make that clear is the fact that clause
6 (ii) expressly has a role for clause (iii), and it
7 doesn't come into play until after the sale at which the
8 secured creditor gets to credit bid. And --

9 JUSTICE ALITO: Well, what is it about the
10 auction -- what is it about the auction process that you
11 think is likely to produce or creates an -- an
12 unacceptable risk of producing a valuation that is --
13 that is too low? Is it because of this -- the use of
14 the stalking horse or -- or what is it about the
15 process?

16 MS. MAYNARD: If the secured creditors
17 aren't able to come in and bid their credit and if the
18 secured creditors can't, as is a real risk, raise enough
19 cash to bid the amount of their credit in cash -- and,
20 in some instances, as with the government, they're -- they
21 can't -- they actually can't.

22 But, in a lot of these complicated loans,
23 there are multiple lenders, and it would be very
24 difficult to come up with the money to put in. And they
25 are, therefore -- you are taking out of the marketplace

1 one of the most knowledgeable bidders about this
2 property. And there is no good reason to do that.
3 These -- it's not like they are bidding funny money.
4 They -- they have already put in \$142 million.

5 CHIEF JUSTICE ROBERTS: Well, but there is,
6 of course, a good reason, which is consistent with the
7 policy of the Bankruptcy Code, which is you do want to
8 look out for the other creditors as well. And if the
9 secured creditor is getting, indubitably, the value of
10 this security, why don't you weigh in the balance at
11 least the interests of -- of the other creditors?

12 MS. MAYNARD: There will be no cash for
13 anyone junior to these creditors, unless these creditors
14 are paid in full, regardless of whether everyone bids in
15 cash or we bid in credit. This property is well under
16 water. There -- there is no equity in it. The secured
17 lenders have lent them 142 million --

18 CHIEF JUSTICE ROBERTS: Well, maybe in this
19 particular case, but that's not going to be true in
20 every case, and we are asked to issue a ruling that is
21 going to apply in every case.

22 MS. MAYNARD: In every case where the
23 property is under water, there will be -- in every case
24 in which the secured creditor has a lien on the
25 property, the secured creditor takes first. So until

1 the -- so underwater or not, until the secured creditor
2 is paid --

3 CHIEF JUSTICE ROBERTS: Well, I know, but
4 the whole premise of why this problem arises is that the
5 security is worth a lot less than -- than it was,
6 obviously, when it was -- was purchased. Or a lot less
7 than -- a lot less than the claim that it was meant to
8 secure.

9 MS. MAYNARD: Everyone agrees that the
10 property is under water, but it's important to note that
11 the valuations in this case that have been filed in the
12 district court, in conjunction with the relief from the
13 stay, the appraisals are different by tens of millions
14 of dollars, what the property is worth.

15 And if you allow that to go to a judge, to
16 decide whether it's enough, that's an inherently
17 uncertain process. And -- you know, judicial valuation,
18 the -- the court -- tens of millions of dollars, the
19 judge could decide, and it might not be a fact that we
20 could overturn, if that goes to a fairly erroneous finding.

21 JUSTICE BREYER: What is -- I was just
22 guessing before, but, I mean, if you're right, what is
23 the (iii) -- the indubitable equivalent, what kind of
24 situation does that come up?

25 I mean, I was guessing it would come up,

1 maybe an over secured creditor, they want to -- they
2 want to sell the property, and he still wants his
3 security, and they have to put in equivalent property
4 that wasn't mortgaged, but I was just guessing.

5 MS. MAYNARD: Well --

6 JUSTICE BREYER: So -- so what is it
7 really -- what is it really used for, in your opinion?

8 MS. MAYNARD: The legislative history,
9 Justice Breyer, suggests two meanings for it.

10 JUSTICE BREYER: What?

11 MS. MAYNARD: Two examples. And that's what
12 you see in the case. There aren't very many clause
13 (iii) cases. There will be many more, if this Court
14 holds that this is permissible.

15 JUSTICE BREYER: Yes, I'm sure.

16 MS. MAYNARD: But that -- there aren't very
17 many clause (iii) cases. And they abandon --
18 abandonment of the collateral. So, in other words, they
19 could decide just to turn all of the collateral over,
20 and that would be the indubitable -- that would be res
21 ipsa, our secured claim. I mean, that -- the -- we have
22 collateral in everything they own, the hotel, the
23 garage, all of the proceeds.

24 Or, as Justice Kagan was suggesting, some of
25 the cases involve providing a substitute lien. But the

1 courts are --

2 JUSTICE BREYER: That's what I was thinking.

3 MS. MAYNARD: -- courts are very hesitant to
4 do that. And it would have to be really -- because it
5 is -- you know, you are stripping our lien. You're
6 supposedly giving us an equal lien. So -- you know,
7 maybe if you can imagine -- maybe if these creditors
8 owned the airport at the Dulles -- you know, a hotel at
9 the Dulles Airport and a parking garage, and one could
10 say it's exactly the same risk factor and everything,
11 and we're going to swap that in for this. But --

12 JUSTICE SOTOMAYOR: Could you tell me what
13 the -- what's the purpose -- if you permit credit
14 bidding, why do you go through the sale at all, if it's
15 always -- if the credit is always going to be higher
16 than the value? Why don't you just turn over the
17 property under (iii)? What -- why do you -- why do you
18 go through the sham of a sale?

19 MS. MAYNARD: It's not a sham,
20 Justice Sotomayor, because the creditor -- secured
21 creditors don't often want to run a hotel and parking
22 garage. They may not want the property. So what they
23 are interested in doing is maximizing the value, getting
24 back as much as they can of the money that they --

25 JUSTICE SOTOMAYOR: So it is the stalking

1 horse dance? At what point do they credit bid until
2 they get the highest price from someone else and then
3 let that other person have it, is that it?

4 MS. MAYNARD: That's definitely one of the
5 strategies. And if they -- so they -- so what clause
6 (ii) allows a secured creditor -- it allows the secured
7 creditor to choose whether it takes its property, which
8 was the right it had prebankruptcy, or whether it's
9 enough. But if you leave it to their system -- and
10 he's -- I'm sorry --

11 JUSTICE SOTOMAYOR: When do you think, under
12 363(k), what's good -- what would constitute or has
13 constituted in the case law good cause not to permit
14 credit bidding? What situations have arisen under
15 363(k), where a court has found good cause?

16 MS. MAYNARD: The cause cases include
17 malfeasance of the creditor in some way --

18 JUSTICE SOTOMAYOR: I'm sorry. What --

19 MS. MAYNARD: Malfeasance of the creditor in
20 some way. Or whether there might be --

21 JUSTICE SOTOMAYOR: How does a creditor
22 commit malfeasance?

23 MS. MAYNARD: I'm sorry. I can't remember
24 any specific examples.

25 But another instance -- and it's actually

1 one that -- that goes to something Justice Kagan asked
2 earlier, which is -- is -- when there's some dispute
3 about priority or whether there might be senior liens.

4 So, in this case, the -- the bankruptcy
5 judge provided at 44(a) and 45(a) -- because there --
6 there are some real estate taxes that would be senior to
7 our liens, and there's a debate about whether the
8 mechanic's liens are senior or not.

9 And so the bankruptcy judge provided that --
10 that -- that, here, it would be appropriate for us to
11 either put up cash, in that amount, the amount of the
12 potentially senior liens, or to offer -- you know, some
13 security to cover those, in the event that they turn up.
14 And that is an example of cause. And that is --
15 clearly answers the concern that there may be others.

16 No one junior to these creditors is going to
17 take anything. And all making us cash bid would do,
18 assuming the secured creditors are able to come up with
19 the cash to bid in this amount, would be to endless --
20 just to pointlessly cycle money into the estate, and
21 then, if we're the winning bid, through the estate and
22 back to us, at the risk of their siphoning off the money
23 that really shouldn't go to anyone else because we
24 have -- the cash collateral is these secured
25 creditors' -- the hotel and the parking garage are all

1 these secured creditors' collateral.

2 Now, the Petitioners say this is going to --
3 if you let the secured creditors bid, this is going to
4 chill credit bidding. Well, they tried to prove that in
5 the bankruptcy court, and the bankruptcy court, at pages
6 43(a) and 44(a), rejected that as a matter of fact.

7 But, anyway, as a matter of theory, their
8 proposal -- who would bid in their proposal? Their
9 proposal is you do the due diligence, you have to prove
10 you have the money, you put up the bid, and then at the
11 back end, you know that the secured creditor is going to
12 be able to come in and tell the bankruptcy judge, I
13 would have bid more with my secured credit. So anyone
14 who bids knows that there's the potential that it's all
15 going to be a waste of time.

16 And then how do you do it over at that
17 point? Once everybody has shown their hand, put their
18 bids in, what, are you going to take a mulligan after
19 the -- after the bankruptcy court says, no, they're not
20 getting their indubitable equivalent because I find they
21 would have bid more in their security?

22 Well, that's just -- that -- who's going to
23 bid in that situation?

24 CHIEF JUSTICE ROBERTS: How does it -- how
25 does it work in practice? Is this something that is

1 subject of extensive negotiation? The secured creditor
2 says, well, I'm interested in bidding in a credit bid,
3 but I appreciate that that's going to make it difficult
4 for you to get cash.

5 And you've got these unsecured creditors who
6 would want -- and so, what? I'm not going to credit
7 bid, so long as -- or I will only credit bid up to this
8 particular amount; or let's sit down and work out a
9 deal, negotiate over exactly how we're going to handle
10 my security. Is -- is that really how it happens? Or
11 is that not -- or not.

12 MS. MAYNARD: I think all those things are
13 ways that it can happen, Mr. Chief Justice. And,
14 certainly, counsel was distinguishing the --
15 during the plan sale requirement, where he concedes
16 that, if you do a 363(b) sale -- you know, 363(k)
17 applies, but he says it's not a problem because you can
18 negotiate.

19 There are actually many negotiations in a --
20 in a plan sale context. And it would be odd, I would --
21 I would suggest, that you can do a cramdown plan over
22 the secured creditor's objection and have less credit
23 bidding rights than you can when you agree to do it.

24 And so, in the end, there's nothing wrong
25 with the secured creditor coming in and bidding its

1 credit and taking the asset. After all, they already
2 put in \$142 million. They're owed \$130 million. The
3 debtors have no equity in -- in this process.

4 JUSTICE GINSBURG: Wouldn't that be a reason
5 for saying that there's no adequate -- there's nothing
6 under (iii) that would be the indubitable equivalent?

7 In other words, one thing is to say that, if
8 you -- if (ii) -- if you fit into (ii), that's it, you
9 don't go to (iii). Another is to say, well, you can go
10 to (iii), but it's most unlikely that there would be the
11 indubitable equivalent of allowing credit bidding.

12 MS. MAYNARD: I don't think that latter way
13 would be the better reading of the statute, Justice
14 Ginsburg, because Congress turned its attention to this
15 precise problem and decided that the best way to protect
16 the secured creditor against the risk of undervaluation
17 was to allow it to -- to bid. And I -- and I think, for
18 the reasons I said earlier, the system that they propose
19 is -- is not a workable system or a good system, and it
20 wouldn't be good to have there be uncertainty about the
21 auction -- about whether or not it was going to
22 ultimately -- you know, go through.

23 And as long as the secured creditor is
24 willing to bid at the -- at the auction its secured
25 credit, put its money where its mouth is, that is the

1 value of its -- of its secured claim, and so it could
2 never be the indubitable equivalent to go under (iii),
3 where it's not allowed to bid.

4 JUSTICE KAGAN: The Petitioner suggests that
5 the usual rule that the specific governs, rather than
6 the general provision, doesn't apply in this case
7 because the specific is not a subset of the general.
8 What's -- what's -- what's your view about that?

9 MS. MAYNARD: Well, this Court's never
10 applied the rule in that way. And I think the Court --
11 it's -- it's always the case that, when the Court's
12 looking at these kinds of problems, that the general
13 provision could be read to encompass what the party
14 before the Court is seeking to do.

15 But the -- when Congress has set up a
16 precise scheme -- and, here, I think it's important to
17 realize it's not just the requirements, but also the
18 exception to the requirements -- and then, also, the way
19 that (ii) is -- refers to (iii), and (iii) doesn't kick
20 in until after the sale --

21 JUSTICE SCALIA: I lost you. I lost you.

22 MS. MAYNARD: Okay.

23 JUSTICE SCALIA: It's not just the
24 requirements, but the exceptions to the requirements.

25 What are you referring to?

1 MS. MAYNARD: The for cause.

2 So by reading in 363(k), Justice Scalia,
3 it's not only the requirement of credit bidding, but
4 also the only exception.

5 But then also, if I could just elaborate
6 this -- the point about how it refers to clause (iii),
7 on 20(a) of our brief, we set forth the text. The final
8 clause of clause (ii) says that, once the sale goes
9 through, the liens attach to the proceeds of the sale.
10 And the treatment of those liens on the proceeds are
11 done under clause (i) or clause (iii) of this
12 subparagraph.

13 So clause (ii) contemplates that there will
14 be some judicial determination of indubitable
15 equivalence, but only after the amount of the
16 proceeds -- because -- after all, what we're trying to
17 determine here is the value of the secured claim.

18 CHIEF JUSTICE ROBERTS: You said, earlier,
19 we have never said that the specific has to be a subset
20 of the general. How do -- how would it otherwise be
21 specific and the one general? It seems, if they are not
22 a subset, then they are alternatives. I don't see how
23 the whole doctrine makes any sense, if the specific is
24 not a subset of the general.

25 MS. MAYNARD: Well, maybe I misunderstood

1 Justice Kagan's question or I misunderstood their point.
2 I thought their point was looking specifically at the --
3 the facts of the Speedy Trial Act case and saying
4 because it's a list and it says, "includes," and then
5 there are subsets under the list, that's how I
6 understood their argument.

7 Yes, it's certainly true -- like, take the
8 venue statute case -- you know, the general venue
9 provision clearly covered patent infringement suits.
10 But then there was a specific patent infringement venue
11 statute, and the -- the patent infringement statute
12 didn't say it was the exclusive patent venue statute, and
13 the general venue statute didn't say, "except as
14 otherwise provided in the code," yet this Court said,
15 well, the patent -- Congress turned its attention to
16 patent infringement suits and created this venue. And
17 that's --

18 CHIEF JUSTICE ROBERTS: So when we say, our
19 doctrine says the specific controls over the general,
20 the specific is a subset of the general?

21 MS. MAYNARD: Yes, to the extent that I
22 think it's always fair to say that what the party who's
23 claiming they fit within the general does could
24 definitionally possibly fit within the general. We --

25 CHIEF JUSTICE ROBERTS: Thank you.

1 MS. MAYNARD: Thank you.

2 CHIEF JUSTICE ROBERTS: Ms. Harrington?

3 ORAL ARGUMENT OF SARAH E. HARRINGTON,

4 FOR THE UNITED STATES, AS AMICUS CURIAE,

5 SUPPORTING THE RESPONDENT

6 MS. HARRINGTON: Thank you,

7 Mr. Chief Justice, and may it please --

8 JUSTICE SCALIA: Big case for the

9 government, Ms. Harrington, isn't it?

10 MS. HARRINGTON: Pardon me?

11 JUSTICE SCALIA: It is a big case for the

12 government.

13 MS. HARRINGTON: It is a big case for the

14 government. As you suggest, the government is in the

15 position of -- that actually many secured creditors are

16 in these days, which is that we have constraints on our

17 ability to cash bid at the sale of our collateral

18 through a bankruptcy. And the detailed cramdown

19 provisions of Chapter 11 are designed to protect the

20 rights of secured creditors.

21 The essence of being a secured creditor, of

22 course, as the Court has suggested, is that the secured

23 creditor has bargained for the right either to get its

24 money back or to get the thing that secures its loan, to

25 get its collateral.

1 And the type of sale that is contemplated in
2 clause (ii) of Section 1129(b)(2)(A) is precisely
3 designed to guarantee that the creditor will get the
4 benefit of its bargain.

5 CHIEF JUSTICE ROBERTS: You have got a whole
6 cadre of U.S. trustees that, presumably, can look out
7 for the interests of the poor United States.

8 MS. HARRINGTON: Well, in most Chapter
9 11 cases, the U.S. trustee doesn't play a role because
10 it's a debtor in possession. And so the trustee is not
11 in charge of the property of the estate. The debtor --

12 CHIEF JUSTICE ROBERTS: I thought we were
13 worried about the situation where it's a creditor.

14 MS. HARRINGTON: Where the -- where the
15 United States is a creditor. That -- that's true. But
16 if there's --

17 CHIEF JUSTICE ROBERTS: In those cases, of
18 course, the trustee's there, right?

19 MS. HARRINGTON: The trustee is there. But,
20 if the debtor proposes a plan that wouldn't allow the
21 United States to credit bid at an auction that is
22 selling its collateral, then the United States is
23 usually out of luck because the Antideficiency Act
24 prevents us from bidding cash.

25 Now, I would like to respond to one -- one

1 sort of assumption that has seemed to permeate the
2 conversation here, which is that a secured creditor will
3 always have an incentive to bid the full amount of its
4 claim at an auction of its assets, where the auction is
5 supposed to be free of liens. That is actually not
6 true.

7 As my friend Ms. Maynard suggested, unless a
8 bank is trying to get into the business of running a
9 hotel or running whatever business is the collateral,
10 the creditor will only want to take the property if it
11 thinks it can make a profit by then turning around and
12 selling the property.

13 So if there is an auction, where there is a
14 cash bid, and the creditor thinks that the value of --
15 the amount of the cash bid is actually a fair valuation
16 of the property, the creditor has no incentive to bid
17 higher than that in credit because it has no expectation
18 of getting more money than that when it then takes the
19 property and turns around and sells it.

20 So allowing the credit bidding won't have
21 the effect of serving as a veto on what would be a fair
22 sale price by a cash bidder. The -- the secured
23 creditor's incentive is only to bid up to what it -- up
24 to what it views as the value of the property and not a
25 penny more because it's not trying to take the property

1 just for the property's sake. In most cases, it wants
2 to take the property and then sell the property.

3 CHIEF JUSTICE ROBERTS: Well, but, of
4 course, it could bid up if it thinks that there are
5 going to be other bidders, right? It has a lot more
6 flexibility than the other bidders to -- to the extent
7 of its security interest.

8 MS. HARRINGTON: I mean, it has more
9 flexibility because it has already put up its money.
10 But every bidder has that incentive that you suggest,
11 which is to try to make sure that it's -- to sort of
12 game the system a little bit and -- and -- and make
13 everybody put their money where their mouth is.

14 But Congress gave secured creditors a right
15 to have a role, where they get to put their money where
16 their mouth is, any time there is --

17 CHIEF JUSTICE ROBERTS: That just begs the
18 question, Congress gave them a right -- I mean, that's
19 what we are deciding, right?

20 MS. HARRINGTON: Absolutely. And -- and
21 Petitioner is certainly correct, that the phrase
22 "indubitable equivalence," an unusual phrase in the
23 statute, that that phrase is broad enough to cover any
24 type of disposition of a secured creditor's claim,
25 including the sale of property free of liens.

1 But Congress also enacted two much more
2 specific provisions right next to clause (iii). And, in
3 those provisions, number (i), which governs -- governs
4 the retention of liens on -- on collateral, and number
5 (ii), which governs the sale of -- the sale of
6 collateral free of liens, there are very specific
7 protections written into clauses (i) and clause (ii).
8 And this Court's interpretive canon that a specific
9 provision will trump a more general provision, where
10 both could apply, would seem clearly to apply here.

11 If a plan proposes a disposition of a claim
12 that is addressed by a clause (i) or a clause (ii), it
13 doesn't make any sense to allow them to strip out
14 protections that are provided in those clauses by
15 purporting to go under the more general standard of
16 indubitable equivalence.

17 That is especially true because the type of
18 judicial valuation of the property that would take place
19 under Petitioners' type of scheme is not guaranteed to
20 make sure that the creditor gets what it bargained for,
21 which is either its money or its property, but that is
22 exactly what clause (ii), that type of auction, is
23 guaranteed to do.

24 JUSTICE GINSBURG: What is the reference?
25 In clause (ii), we were just told, the -- the last

1 clause refers to "under clause (i) or clause (iii)."

2 What -- what is the reference in (ii) to clause (iii)?

3 What does that mean?

4 MS. HARRINGTON: Well, the type of sale
5 contemplated in clause (ii) is, essentially, a
6 liquidation of the secured creditor's lien on a
7 property. And so you -- the sale would, essentially,
8 liquidate the lien. And then clause (ii) provides
9 that -- that there would need to be a replacement lien
10 on the proceeds of the sale. That replacement lien
11 would then have to be treated under clause (i) or clause
12 (iii).

13 I think it's fair to say, in most
14 situations, what happens is that the proceeds of the
15 sale are handed over to the secured creditor, which is
16 essentially a clause (iii) treatment of the lien on the
17 proceeds, in the sense that, if the lien on the proceeds
18 is a lien on the pile of cash, if you hand over the pile
19 of cash, you're surrendering the collateral that is
20 securing that lien, which is the classic example of
21 indubitable equivalence. That is one of the examples
22 cited in the legislative history and in Judge Hand's
23 opinion in *In re Murel*.

24 I think one of the assumptions that
25 permeates the Petitioners' brief is that valuation -- that

1 the value of collateral is something we can all know and
2 agree upon.

3 But valuation is an inherently difficult
4 undertaking. And this Court has recognized that, when
5 Congress enacted the code in 1978, it shifted the
6 preference to move from judicial valuation towards
7 market valuations.

8 And, here, Congress, in clause (ii),
9 expressed its view that -- that the type of market that
10 would value this property would include one of the most
11 interested market participants, who is -- which is the
12 secured creditor who has an interest in the property.

13 CHIEF JUSTICE ROBERTS: Of course, valuing
14 property is what bankruptcy judges do all the time,
15 right?

16 MS. HARRINGTON: They -- they definitely do.
17 But I think, here, Congress provided that this would be
18 a situation where the secured creditor would have a role
19 in valuing the property, and even under -- as Justice
20 Kagan pointed out, even -- I think it was Justice
21 Kagan -- under clause (i), the judge has a role in
22 valuing the property because we have to determine the
23 present day value of the cash stream that the creditor
24 would be owed.

25 But as judge -- as my friend -- as Ms.

1 Maynard pointed out -- maybe you will be a judge some
2 day --

3 (Laughter.)

4 MS. HARRINGTON: The creditor in that
5 situation has a role in -- in protecting itself against
6 undervaluation because it can make the 1111(b) election,
7 retain the full amount of its claim if it wants, and --
8 and protect itself going forward.

9 I think one way that's important is that it
10 protects -- it prevents debtors from cashing out
11 creditors at a low value, at a point where the -- in the
12 market where the value of the property is low because
13 they retain the lien for the full amount.

14 The same thing is true here. If this is a
15 particularly low point in the market and the creditor is
16 trying to sell the property at auction -- I'm sorry --
17 the debtor is trying to sell the property at auction,
18 the creditor can come in and take the property and
19 realize any -- any upside down the road.

20 If there are no further questions?

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 MS. HARRINGTON: Thank you.

23 CHIEF JUSTICE ROBERTS: Mr. Neff, you have 4
24 minutes remaining.

25 REBUTTAL ARGUMENT OF DAVID M. NEFF

1 ON BEHALF OF THE PETITIONERS

2 MR. NEFF: With regard to the market
3 valuation, we are doing a market valuation, as this
4 Court instructed in the 203 North LaSalle case from
5 1999, by having an auction, and, after that auction,
6 still having to prove up that we've given the
7 indubitable equivalence by showing what occurred at that
8 auction. And, if the lenders would like to bring, at
9 that point, their appraisals and show that we didn't
10 achieve that amount, then we are not going to be able to
11 satisfy the indubitable equivalence standard.

12 Secondly, with regard to the role that
13 subsection (iii) plays in subsection (ii) --

14 JUSTICE SCALIA: What you just said is, so
15 long as they come in with some appraisals that are above
16 what -- what the property sold at for cash, then it's
17 not the indubitable equivalent?

18 MR. NEFF: If they can --

19 JUSTICE SCALIA: Because you've got to have
20 at least one appraiser who says it's -- it's worth more.
21 Is that all it takes?

22 MR. NEFF: Right. The -- the question --
23 it's a very high standard.

24 JUSTICE SCALIA: Indubitable is indubitable.

25 MR. NEFF: It's a very high standard. And

1 as long as --

2 JUSTICE SCALIA: If you have one honest
3 appraiser who says --

4 MR. NEFF: If it is a creditable appraisal
5 and we were unable to achieve that, then we will have a
6 very difficult time satisfying that standard, but the
7 process will have been allowed to play out, which is
8 extremely important because those of us who have done
9 debtor work know how many times a lender doesn't want to
10 do something, and, ultimately, you have a sale or
11 otherwise some sort of disposition of assets, the price
12 gets high enough, and they are willing to go along with
13 it.

14 So with regard to the market test --

15 JUSTICE SCALIA: What -- what happens if you
16 go to the judge and the judge says, there is one higher
17 bid, so I can't say it's indubitable? Then what
18 happens?

19 MR. NEFF: Then -- then you would have to
20 provide additional consideration to the secured creditor
21 to get it to the level that the judge would find it to
22 be indubitable.

23 So it's no different than at any plan
24 confirmation hearing, if you say, judge, my plan is
25 dependent upon the interest rate being set at 5 percent.

1 The judge says, well, I find it should be 6 percent.
2 You have to find a way to bridge that gap.

3 JUSTICE KAGAN: Well, that assumes that you
4 can just pull out a wad of cash from your back pocket,
5 but, mostly, the debtors are not in that position. So
6 it just seems like a gigantic waste of time.

7 MR. NEFF: It's -- it's more so that the --
8 the purchaser would have to come up with that -- would
9 have to come up with that or find some other way to
10 bridge that gap.

11 It's not really a waste of time because,
12 again, you are allowing the process to -- to play itself
13 out. Too many times, we see, with secured creditors,
14 they're unwilling to deal with debtors because they have
15 gotten them in the particular situation. And then, when
16 you are able to actually have an auction, they are
17 surprised by how high the bidding gets because
18 bankruptcy auctions are very fulsome events and -- and
19 create -- can create quite a lot of bidding that can
20 really generate very high -- high value for the
21 property.

22 As far as the role that (iii) plays in (ii),
23 it's a bit convoluted; but, if you pursue a plan sale
24 through subsection (ii), you don't have to show
25 indubitable equivalence, as long as they are allowed to

1 credit bid. But if, in fact, they don't credit bid or
2 they -- they are topped and you are able to raise cash,
3 that cash must be treated in an indubitable equivalence
4 way or in accordance with subsection (i).

5 JUSTICE SOTOMAYOR: Counsel, I'm a person
6 who believes that, in the business world, the greatest
7 security is just knowledge of what courts will do. And
8 what the two courts who have agreed with you have done
9 is contrary to what the majority of courts have done
10 for -- for the longest time.

11 What's the value for us upsetting the norm?

12 MR. NEFF: Okay.

13 JUSTICE SOTOMAYOR: What's the business
14 value for upsetting the norm?

15 MR. NEFF: With regard to what courts have
16 done for a very long time -- for the 30 years that that
17 has been referenced have been primarily in section --
18 with regard to Section 363 sales, as opposed to plan
19 sales. What it --

20 JUSTICE SOTOMAYOR: That means, because
21 people didn't think they could do it in plan sales. So
22 why should we upset the expectation?

23 MR. NEFF: It's also difficult, in a
24 bankruptcy situation, to keep the case alive long enough
25 to get to plan confirmation, particularly if it's a --

1 if it's a business that's struggling financially because
2 the secured creditor has an ability to get relief from
3 the automatic stay. So that's why we would have more
4 Section 363 sales.

5 But, with regard to the benefit, you look at
6 a case like Philadelphia -- or a case like the Pacific
7 Lumber out of the Fifth Circuit, which allowed an entire
8 enterprise to be restructured out of a very positive
9 sale of the timberlands that would not have occurred if,
10 in fact, the Court had required credit bidding because
11 the lender simply would have taken back that one crucial
12 asset around which the entire enterprise was
13 restructured.

14 So I think, from a debtor's perspective,
15 that is, obviously, of -- of great --

16 JUSTICE SOTOMAYOR: They could have gone
17 under (i) and -- and given the secured lender what he's
18 entitled to, which is a future stream of payment.

19 CHIEF JUSTICE ROBERTS: If -- please.

20 MR. NEFF: They could have gone under (i)
21 if, in fact, that -- that the lender would have been
22 precluded from making a Section 1111(b) election and
23 also precluded from credit bidding because credit
24 bidding's not required under subsection (i), and an

25

1 1111(b) election does not apply when there is a sale.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, at 11:01 a.m., the case in the
6 above-entitled matter was submitted.)

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