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IN THE SUPREME COURT OF THE UNITED STATES

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RADLAX GATEWAY HOTEL, LLC, ET AL., :

Petitioners : No. 11-166

v. :

AMALGAMATED BANK :

- - - - - x

Washington, D.C.

Monday, April 23, 2012

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

APPEARANCES:

DAVID M. NEFF, ESQ., Chicago, Illinois; on behalf of Petitioners.

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

SARAH E. HARRINGTON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

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

Mr. Neff.

ORAL ARGUMENT OF DAVID M. NEFF  
ON BEHALF OF THE PETITIONERS

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

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

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

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

Under subsection (i), the plan must allow 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, a  
10 plan sale without credit bidding under subsection (iii).

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

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

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

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

24 MR. NEFF: Well, here's what happens  
25 typically. The debtor files a motion, as we did in this

1 case, to approve bid procedures. The court then  
2 determines whether those bid procedures are appropriate  
3 for the sale. The sale is then conducted. Then the  
4 debtor goes to plan confirmation; and, at the plan  
5 confirmation hearing, aside from establishing the 16  
6 requirements of section 1129 for a plan to be confirmed,  
7 the debtor also seeks to confirm the results of the  
8 sale.

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

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

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

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

25 For instance, it could say, well, they

1 conducted this auction, but I have an appraisal here  
2 that says the property is worth much more. So this  
3 can't possibly be -- my --

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

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

10 JUSTICE ALITO: -- namely, where there can  
11 be credit bidding, which is what the -- which is what  
12 the Respondent would like?

13 MR. NEFF: It's going to be the judge, after  
14 reviewing what happens at the sale.

15 The problem with allowing a creditor the  
16 right to credit bid under all circumstances is, in a  
17 case like ours, we don't believe we will ever get to an  
18 auction because no one else will show up.

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

23 The reason why there's an issue is because  
24 they don't think that what the judge will decide will  
25 indubitably provide the indubitable equivalent.

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

5 CHIEF JUSTICE ROBERTS: Isn't that -- isn't  
6 that pretty much what he bargained for when he insisted  
7 upon security before giving the loan?

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

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

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

20 CHIEF JUSTICE ROBERTS: Did I cut off your  
21 answer to Justice Alito?

22 MR. NEFF: Well, with regard to the  
23 indubitable equivalent, clearly the judge is going to  
24 make that determination, but that's no different than  
25 the judge making a determination under subsection (i) as

1 to what the fair market value of the collateral is for  
2 purposes of determining the note that the creditor is  
3 going to receive and be paid off over time.

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

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

15 JUSTICE SCALIA: Now, you're --

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

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

22 JUSTICE SOTOMAYOR: The maximum value always  
23 has to be the value of the credit.

24 MR. NEFF: Well, I --

25 JUSTICE SOTOMAYOR: If the -- if the -- if



1 the creditor is willing to put it at risk that way.

2 MR. NEFF: Your Honor, I would disagree. I  
3 think in a situation like ours, no one else is going to  
4 come to bid, because creditors who are -- or potential  
5 purchasers who are looking to buy a hotel have multiple  
6 opportunities to buy other hotels. So if they know that  
7 they are going to show up at a sale where a creditor is  
8 owed substantially in excess of what the property is  
9 likely to sell for, they are not going to spend their  
10 time and effort doing the due diligence that is required  
11 to acquire or make a bid on an asset like a hotel.

12 JUSTICE BREYER: What's wrong with that? I  
13 mean, a creditor loaned you a million dollars. For the  
14 million dollars, he got an interest, a secured interest  
15 in a piece of property. And that property is worth  
16 whatever it was -- whatever it's worth, less than a  
17 million. And he says that's the deal. I -- I have a  
18 secured interest in this; I want the property. You are  
19 better off because you can stretch out the payments over  
20 time and maybe you don't have to give it to him  
21 immediately, but I don't see anything unfair about  
22 saying, give him the property if he wants it.

23 MR. NEFF: That in essence would be denying  
24 chapter 11 relief to a host of debtors where their  
25 collateral is worth --

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

3 MR. NEFF: What -- the problem is, you are  
4 cutting off the bankruptcy process really before it  
5 has --

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

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

20 Choice (iii), something else which comes up  
21 in different situations, for example, a creditor who is  
22 over-secured, see, and they want to sell the piece of  
23 property. And he says, sure, I will let you sell it,  
24 but I want something that's the equivalent. Give me  
25 this other property over here that you own that has no

1 liens at all. And the judge can look at that and say  
2 that's fair. That's what (iii) is basically about, as  
3 far as I could understand it.

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

7 MR. NEFF: Your Honor --

8 JUSTICE BREYER: So that's the whole thing  
9 as I am seeing it at this moment. So I'll give you a  
10 chance to reply.

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

18 JUSTICE BREYER: No, it doesn't have the  
19 language, which is why we have a case. But I mean,  
20 trying to interpret it in a way that makes sense, what  
21 is wrong with what I said as a way that makes sense? I  
22 mean, why, since we are trying to give the -- the  
23 creditor the indubitable value, at the very least -- the  
24 best way to do that would be let the creditor credit  
25 bid.

1 MR. NEFF: Well --

2 JUSTICE BREYER: So why not? And you can  
3 read it. You don't have to read it the way that you  
4 want. You could read it the opposite way, too.

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

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

9 MR. NEFF: Okay.

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

14 MR. NEFF: I agree, and there are other  
15 parties and interests in a bankruptcy case, including  
16 obviously unsecured creditors, that get nothing if the  
17 result is all the creditor gets is the relief from the  
18 automatic stay to foreclose on the collateral when you  
19 have this great discrepancy between what --

20 JUSTICE KAGAN: Well, how would they get  
21 anything, anyway? I mean, your brief suggests that  
22 somehow there are these unsecured creditors in the mix  
23 who are going to receive some benefit if your  
24 understanding of this statute goes forward. But you  
25 know, in a circumstance like this, doesn't the secured

1 creditor either get the property or get the money from  
2 the property and the unsecured creditors are out of the  
3 mix regardless?

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

8 JUSTICE KAGAN: But those are -- those  
9 continue forward, so even if the secured creditor got  
10 the property, there would be mechanic's liens on the  
11 property, isn't that right?

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

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

20 MR. NEFF: I was only going to say that in  
21 our particular instance the stalking horse had agreed  
22 over a future time after it obtains the property to  
23 provide for recovery to general unsecured creditors.

24 JUSTICE SCALIA: Can I -- let's look at the  
25 text. Little (ii) provides for exactly what you want to

1 do here. What you want to do under (iii) is precisely  
2 what (ii) says, except you want to eliminate subject to  
3 section 363(k) of this title. Right?

4 Does it -- does it make sense for a  
5 provision to say you can do it three ways: number (i),  
6 number (ii), you can have this sale subject to credit  
7 bidding, and number (iii), after -- after saying that,  
8 specifically, oh, you can have this sale not subject to  
9 credit bidding?

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

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

17 JUSTICE SOTOMAYOR: But that's just not true  
18 from what you just said. Meaning what you just said is  
19 that the buyer obviously is paying other things off, and  
20 by definition he's deducting that from the purchase  
21 price. No one gives a purchase price for a piece of  
22 property and agrees to pay something else and gives the  
23 highest price for the property once they've done that.  
24 So what you're asking for is permission for the debtor  
25 to use this property to pay other debts, and that's what

1 I thought a secured interest prevented.

2 MR. NEFF: With regard to Justice Scalia's  
3 question, all I was trying to point out is that in  
4 subsection (ii), regardless of the price that is  
5 achieved as long as you allow the secured creditor the  
6 right to credit bid.

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

8 MR. NEFF: That's the fair and equitable --

9 JUSTICE SOTOMAYOR: Why doesn't he get  
10 everything that the buyer is promising to everyone else?  
11 For that indubitably is part of the price, because he is  
12 giving out money to others, that's part of the value of  
13 this property. So why isn't the creditor, the secured  
14 creditor, entitled to all of the proceeds from the  
15 property?

16 MR. NEFF: The secured creditor will get all  
17 the proceeds from the property.

18 JUSTICE SOTOMAYOR: Not -- with sales price,  
19 but not from all the payments.

20 MR. NEFF: Right. With regard to the  
21 pavements that are in the future, those are after the --  
22 the sale would be consummated to the stalking horse  
23 bidder.

24 JUSTICE SOTOMAYOR: You still haven't  
25 answered my --

1           MR. NEFF: There are other benefits that the  
2 secured -- that will get, that will increase the -- the  
3 price that is received by having sold the property in  
4 bankruptcy. For instance when you sell through a plan,  
5 you avoid the payment of transfer taxes.

6           JUSTICE SCALIA: Yes.

7           MR. NEFF: So clearly to the extent that the  
8 transfer taxes being saved are in an amount that  
9 ultimately exceeds what ultimately goes to the unsecured  
10 creditors, these --

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

15          MR. NEFF: It would be our obligation to  
16 show at confirmation that the creditor is paying the top  
17 dollar for the asset. If the creditor desires to pay a  
18 bonus or a premium on top of that, we would have to show  
19 that, nonetheless, that the secured creditor is  
20 receiving the indubitable equivalent and either have to  
21 show by argument that -- a savings on the transfer tax  
22 or some other way that this is not causing the secured  
23 creditor to not receive the indubitable equivalent.

24          JUSTICE SOTOMAYOR: Could you explain what  
25 the reasoning is for requiring a credit bid if property



1 is sold during the plan, but not permitting it when it's  
2 sold at the plan's --

3 MR. NEFF: Sure.

4 JUSTICE SOTOMAYOR: Doesn't that delay the  
5 bankruptcy in every situation? I can't actually  
6 understand what benefit other than delay of the  
7 bankruptcy process that would occasion.

8 MR. NEFF: Is your question why we always  
9 have it under section 363, but not under the plan?

10 JUSTICE SOTOMAYOR: Uh-hmm.

11 MR. NEFF: Section 363 allows the sale of  
12 property outside the ordinary course of business during  
13 a bankruptcy case. It can be done as quickly as on  
14 21 days notice, so it can be done on a very truncated  
15 basis, or even more quickly if the debtor can show that  
16 there is cause, some reason to have an even faster sale.  
17 There is no requirement that you show that any of the  
18 plan requirements in section 1129 must be met.

19 So there are good reasons to have this  
20 protection for the secured creditor when you are selling  
21 under section 363 outside of a plan context that don't  
22 necessarily exist when you are selling in the course of  
23 a plan because a plan takes a much longer time period,  
24 usually at least 2 months notice, if not much longer.

25 JUSTICE SCALIA: Mr. Neff, don't you feel

1 sorry for the United States? The United States is often  
2 in the creditor situation, and the United States cannot  
3 come up with cash.

4 Are they going to run to Congress and get an  
5 appropriation for each -- each security case it has?  
6 What -- what do you propose we do with the United  
7 States? The United States just can't take any security  
8 interests anymore or what?

9 MR. NEFF: Well, no, I don't think that that  
10 is the case. And I did see that in their brief, and I  
11 don't know the extent that in practice that actually  
12 occurs because, for instance, they pointed out the SBA  
13 loans, those are typically guaranteed loans. So there  
14 would be a motivation, at least by the principals of the  
15 debtor, to maximize the return to the SBA.

16 But as far as them not being allowed to  
17 credit bid, there are -- they have the opportunity to  
18 have a greater voice in the sale process. They can  
19 seek --

20 JUSTICE SCALIA: I don't understand.

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

25 JUSTICE SOTOMAYOR: They don't have that

1 right now? They don't have that right now?

2 MR. NEFF: Well, when we sell assets the  
3 debtor typically has the control over how it's going to  
4 be marketed and sold. They may give some input rights  
5 to the secured creditor, but they're usually not going  
6 to give the secured creditor the veto power over how to  
7 conduct the sale.

8 But I would suggest that when you have a  
9 situation with a creditor that truly cannot bid cash,  
10 that there would be an opportunity to impress upon the  
11 judge that they need to have a greater role when you are  
12 actually marketing and selling the property.

13 JUSTICE KAGAN: Mr. Neff, can I understand  
14 how your system would actually work in practice?  
15 Suppose you have an auction and there is the top value  
16 was \$500, and then you have the secured creditor let's  
17 say is in the position of the United States and comes in  
18 and says: We couldn't credit bid, but we -- excuse  
19 me -- we couldn't pay cash, but we think it's \$750.

20 MR. NEFF: Right.

21 JUSTICE KAGAN: And now the court has to  
22 decide whether it's \$500 or \$750 after the auction has  
23 gone forward. What happens?

24 MR. NEFF: The court is going to review the  
25 process to actually sell the asset, who was -- where was

1 it marketed, who knew about it, who showed up at the  
2 auction, how many bids were made.

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

6 MR. NEFF: Right.

7 JUSTICE KAGAN: And you've sold it for \$500.

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

12 JUSTICE SCALIA: But wouldn't the court  
13 always say, when it's confronted with this situation,  
14 the government comes in and the court says, yes, well,  
15 you know, I guess that that price is probably so low  
16 because nobody could credit bid. Wouldn't that always  
17 be a -- a frailty of whatever -- whatever price it sold  
18 for? Wouldn't it always be?

19 MR. NEFF: No, because you are going to have  
20 situations where creditors -- secured creditors will  
21 credit bid amounts that have no relationship to the fair  
22 market value, what we call, for instance, loan-to-own  
23 lenders, where their only interest is actually getting  
24 the title to the property. So you are going to have  
25 situations that -- where the credit bid does not equate

1 to market --

2 JUSTICE SCALIA: Well, that might be, but it  
3 doesn't -- it doesn't take a genius to figure out that  
4 if you allow people to bid for cash or for credit, you  
5 are going to get more bids and higher bids than if you  
6 allow them to bid for cash only.

7 MR. NEFF: The problem is when you are  
8 dealing with larger assets, like what we are dealing  
9 with, you are not going to get a sophisticated buyer to  
10 come in to bid against a lender that can credit bid,  
11 particularly in a situation like our case, where the  
12 lender has said: I simply want the property back.

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

15 MR. NEFF: Well, we believe that -- that  
16 subsection (iii) allows us to show that the secured  
17 creditors receiving the --

18 JUSTICE BREYER: Look, in subsection (iii),  
19 if it applies here -- I assume -- suppose it doesn't  
20 apply here. There is a safeguard against having no  
21 bidder.

22 Bidders who would bid more than what the  
23 creditor thinks it's worth, the creditor will want them  
24 in this, and if he doesn't want it in, it's because he  
25 thinks it's worth more in his own hands. So what's the

1 problem?

2 But there is a problem the other way. The  
3 problem the other way, and I'm not saying it's this  
4 case, but there are -- is that the insiders say to the  
5 stalking horse: We would like you to put this up at a  
6 low price and give us a job. And if they keep the  
7 creditor out, well, that's a big incentive. And they  
8 are the ones who know what a hotel is worth. The judge  
9 doesn't know, and there is always leeway. And so that  
10 was worrying me about this fact pattern. You want --  
11 you want to get rid of my worry?

12 MR. NEFF: Yes, I do.

13 JUSTICE BREYER: Good.

14 MR. NEFF: The bankruptcy judge sees this in  
15 a variety of cases. Just the natural tension that you  
16 have in a bankruptcy, individuals who may be  
17 self-interested, yet they are supposed to be fiduciaries  
18 for the estate. It's part of our roles as lawyers to be  
19 the fiduciaries as well.

20 Our particular instance, it's not a concern  
21 because the property is being marketed to a wide array  
22 of people. There's no requirement that they keep the  
23 management company, and there's every opportunity for  
24 any other hotel company to come in or any other  
25 strategic buyer --

1 JUSTICE BREYER: But the concern was, I  
2 gather, there is no other bidder, you have said. You've  
3 just found the stalking horse. You agree to pay the  
4 stalking horse a million and a half dollars in case he  
5 doesn't get it. And then the people from the inside are  
6 being hired by the stalking horse if he wins.

7 Now, I'm not -- I'm sure they are acting  
8 very honestly, but you would have to say in such a  
9 situation that there is an incentive to try to value  
10 everything on the low side by the debtor to make sure  
11 that stalking horse gets the property. And that  
12 incentive is destroyed, or at least doesn't work, if you  
13 allow the creditor bid.

14 MR. NEFF: Interestingly, the process  
15 actually works a little different than that.

16 Debtors will go out and their financial  
17 advisers will actually go out and try to market the  
18 ability to be the stalking horse, to actually try to get  
19 the best stalking horse bid.

20 In this particular instance what we got was  
21 the -- ultimately the \$55 million. We are confidently  
22 the property ultimately will sell for more.

23 JUSTICE ALITO: When this procedure is  
24 followed, how often does a buyer other than the stalking  
25 horse obtain the property?

1                   MR. NEFF: I don't know from a statistical  
2 basis. And, you know, a stalking horse, if they have  
3 the -- a break-up fee, they have that built-in cushion.  
4 And in our case, I would point out the judge had not yet  
5 approved the break-up fee, but it was a standard  
6 3 percent of the -- of the bid price. So I don't know  
7 what percentage it is, you know, from my own experience.

8                   JUSTICE SCALIA: I didn't realize the judge  
9 had to approve --

10                  MR. NEFF: The stalking horse?

11                  JUSTICE SCALIA: Yes.

12                  MR. NEFF: Yes.

13                  JUSTICE SCALIA: The judge has to approve  
14 the stalking horse?

15                  MR. NEFF: That's part of the bid  
16 procedures.

17                  And buyers, more sophisticated buyers and  
18 when you deal with bigger assets, they're used to the  
19 process being this way, that there is going to be a  
20 stalking horse and that there is going to be some sort  
21 of protection.

22                  JUSTICE SOTOMAYOR: The vast majority of  
23 bankruptcy courts have permitted credit bidding in these  
24 situations. So if the vast majority of bankruptcies  
25 have stalking horses, then the norm is working without



1 us having to rule in your favor.

2 MR. NEFF: I would say the vast majority of  
3 cases occur under section 363, where there is no  
4 question because of 363(k) that there is the right --

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

8 MR. NEFF: That is true. The major  
9 difference is that a sale under section 363(k) almost  
10 invariably the secured creditor supports, so there is no  
11 question but that there is going to be a transaction  
12 occurring, whereas --

13 JUSTICE SCALIA: Say it again? I didn't --  
14 I didn't understand that.

15 MR. NEFF: When you are selling under  
16 section 363, because of 363(k) there must be a right to  
17 credit bid; and, in most situations, the secured  
18 creditor wants the assets sold when you are doing a  
19 section 363 sale. So there is no question in the minds  
20 of a buyer but that there is going to be a transaction,  
21 and there is a reason to spend your time and effort  
22 learning more and doing due diligence about the asset.

23 CHIEF JUSTICE ROBERTS: Well, this is a  
24 case, though, where you would not want the asset sold.  
25 In other words, looking at it he thinks for particular

1 unusual situations, this is vastly undervalued; I am  
2 holding an asset that is going to appreciate if I hold  
3 onto it. So he doesn't want the asset sold.

4 MR. NEFF: That's correct. And -- and it's  
5 our belief that the Bankruptcy Code provides the ability  
6 in subsection (iii) to conduct the sale and pay the  
7 secured creditor the indubitable equivalent of its  
8 claim.

9 CHIEF JUSTICE ROBERTS: What is the  
10 doubtless equivalent of his claim? Measured by the  
11 current market conditions, or does that include some  
12 premium based on the assumption that it's going to  
13 increase in value over some period?

14 MR. NEFF: It's going to be measured by the  
15 current market conditions, but to the extent that the  
16 secured creditor brings in an appraisal that will  
17 invariably be based on what the projections are going to  
18 be and take that into account.

19 If I could reserve the remainder of my time.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
21 Ms. Maynard.

22 ORAL ARGUMENT OF DEANNE E. MAYNARD

23 ON BEHALF OF THE RESPONDENT

24 MS. MAYNARD: Mr. Chief Justice, and may it  
25 please the Court:

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

4           When a chapter 11 bankruptcy plan is going  
5 to cram down a plan over the objection of a secured  
6 creditor, section 1129(b)(2)(A) gives the secured  
7 creditor the ability to protect those rights regardless  
8 of the proposed treatment of its collateral.

9           Specifically, when the plan proposes, as  
10 here, to sell the collateral free and clear of the  
11 secured creditor's liens and give the secured creditor  
12 nothing but the proceeds from that sale, clause (ii)  
13 entitles the secured creditor to bid what it is owed in  
14 the absence of cause to preclude it.

15           CHIEF JUSTICE ROBERTS: Or -- or he is  
16 entitled to realize the indubitable equivalent of his  
17 claims. You really do just kind of elide the fact that  
18 the statute says "or."

19           MS. MAYNARD: No, Your Honor. We give full  
20 meaning to the "or." We don't dispute that these are  
21 three alternative ways to cram down -- down a plan. The  
22 question here is or what? And the question is the scope  
23 of the alternatives and in which circumstances in they  
24 apply.

25           And here Congress turned its attention to

1 precisely the situation at hand and determined what the  
2 requirements were, but not just the requirements for a  
3 sale free and clear. It's not like clause (ii) says:  
4 If you sell it free and clear and you allow credit  
5 bidding, then that's way to go. It's not just the  
6 requirement of credit bidding. It also sets forth the  
7 only exception to credit bidding. And Petitioners'  
8 reading would read clause (iii) to be a much bigger  
9 exception.

10 Now, Petitioners here tried and failed in  
11 the Bankruptcy Court to prove cause, and they don't  
12 appeal that. So they are trying to create a much bigger  
13 exception to the exception Congress allowed.

14 JUSTICE SCALIA: They tried and failed to  
15 prove what?

16 JUSTICE ALITO: Cause.

17 MS. MAYNARD: Your Honor, cause.

18 JUSTICE SCALIA: Cause.

19 MS. MAYNARD: So under -- we reprint the  
20 1129 clause (ii) is on 20a in the red brief at the back.  
21 And it provides: "For the sale, subject to section  
22 363(k) of this title, of any property that is subject to  
23 liens securing such claims free and clear of such  
24 liens." And that refers you to 363(k), which is also at  
25 the back of our brief. And 363(k) provides that:

1 "Unless the court for cause orders otherwise, the holder  
2 of such claim may bid at such sale; and if the holder of  
3 such claim purchases such property, such holder may  
4 offset such claim against the purchase price of such  
5 property."

6 So my point is, clause (ii) is not just if  
7 you let them credit bid then that's one way to go to  
8 fair and equitable. It's you must let them credit bid  
9 unless cause is shown. And they tried in the Bankruptcy  
10 Court, Justice Scalia, to prove cause, and the district  
11 court found against them on that point, and they don't  
12 appeal it.

13 CHIEF JUSTICE ROBERTS: Your -- your friend  
14 on the other side suggests that (ii) and (iii) address  
15 different ways of protecting the secured creditor. (ii)  
16 is procedural, right? You can go through these  
17 procedures and you can cram down so long as you are  
18 going through these procedures, which include credit  
19 bidding, or you can cram down if you ensure that he  
20 receives the indubitable equivalent, a substantive  
21 protection. What is wrong with that reading?

22 MS. MAYNARD: I don't think that's a fair  
23 characterization of the three clauses, Mr. Chief  
24 Justice, because all three of the clauses have both  
25 procedural and substantive components. And essentially

1 what Petitioners seek to do here is exchange their  
2 preferred procedure, which is a sale without allowing us  
3 to credit bid followed by a judicial determination of  
4 whether whatever number that sale produces is high  
5 enough to be our secured claim.

6 But the whole point is, if the secured  
7 creditor is willing to bid one more dollar of what it's  
8 owed at the sale, that is the value of our secured  
9 claim.

10 JUSTICE ALITO: Is it correct that really  
11 the heart of your argument is that the real value of  
12 this property is greater than the value that you think  
13 the Bankruptcy Court would assign to it if this were  
14 done under subsection (iii)?

15 MS. MAYNARD: That is definitely the fear,  
16 Justice Alito.

17 JUSTICE ALITO: Why? Why do you have that  
18 fear?

19 MS. MAYNARD: Because valuations are  
20 inherently uncertain, and Congress knew that. And in  
21 this Bankruptcy Code Congress tried to move away from  
22 judicial valuations for precisely that reason.

23 JUSTICE KAGAN: But doesn't clause (i)  
24 depend upon a judicial valuation? In clause (i) the  
25 Court has to say: What is the present value of your

1 property, so that it knows what the right income stream  
2 is.

3 MS. MAYNARD: That's true, Justice Kagan.  
4 But if you proceed through clause (i), the code provides  
5 a secured creditor with a different protection against  
6 undervaluation. So the whole code structure is set up  
7 to protect the secured creditor against the risk of  
8 undervaluation of its claim. And that's the section  
9 1111(b) election. So section 1111(b) election allows  
10 the secured creditor who is undersecured and is afraid  
11 that their value of their property will be misvalued in  
12 a clause (i) to elect to have their entire face value of  
13 their claim treated as secured.

14 So here, the lenders are owed more than  
15 \$130 million. If they were to proceed under clause (i),  
16 the lenders would have the option to have that whole  
17 \$130 million treated as secured. And that would be the  
18 value of the secured claim.

19 And under clause (i), yes, we would then be  
20 subject to the judicial determination of the present  
21 value of whatever a note paying out \$130 million would  
22 be, but two protections we would have. They wouldn't be  
23 determining the principal. The principal, the face  
24 value of the note would have to be \$130 million; and the  
25 lien that we would retain would be \$130 million.

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

4 MS. MAYNARD: That would be true, but I  
5 think in that situation we would also have the option to  
6 make the 1111(b) election. And, therefore, they would  
7 have to substitute collateral that would be up to the  
8 \$130 million mark. So it's true -- and it's true that  
9 Congress did leave this other, but it is an other.

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

15 JUSTICE ALITO: What is it about the  
16 auction -- what is it about the auction process that you  
17 think is likely to produce or creates an unacceptable  
18 risk of producing a valuation that is -- that is too  
19 low? Is it because of the use of the stalking horse  
20 or -- or what is it about the process?

21 MS. MAYNARD: If the secured creditors  
22 aren't able to come in and bid their credit, and if the  
23 secured creditors can't, as is a real risk, raise enough  
24 cash to bid the amount of their credit in cash -- and in  
25 some instances, as with the government, they can't, they



1 actually can't. But in a lot of these complicated loans  
2 there is multiple lenders and it would be very difficult  
3 to come up with the money to put in, and they are,  
4 therefore -- you are taking out of the marketplace one  
5 of the most knowledgeable bidders about this property.

6 And there is no good reason to do that.  
7 These -- it's not like they are bidding funny money.  
8 They have already put in \$142 million.

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

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

22 CHIEF JUSTICE ROBERTS: Well, maybe in this  
23 particular case, but that's not going to be true in  
24 every case and we are asked to issue a ruling that is  
25 going to apply in every case.

1 MS. MAYNARD: In every case where the  
2 property is under water, there will be -- in every case  
3 in which the secured creditor has a lien on the  
4 property, the secured creditor takes first. So until --  
5 so underwater or not, until the secured creditor is  
6 paid --

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

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

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

24 JUSTICE BREYER: I was just guessing before,  
25 but, I mean, if you're right, what is the (iii), the

1 indubitable equivalent, what kind of situation does that  
2 come up?

3 I mean, I was guessing it would come up,  
4 maybe an over secured creditor, they want to -- they  
5 want to sell the property, and he still wants his  
6 security, and they have to put in equivalent property  
7 that wasn't mortgaged, but I was just guessing. So --  
8 so what is it really -- what is it really used for, in  
9 your opinion?

10 MS. MAYNARD: The legislative history,  
11 Justice Breyer, suggests two meanings for it.

12 JUSTICE BREYER: What?

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

17 JUSTICE BREYER: Yes, I'm sure.

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

1           Or, as Justice Kagan was suggesting, some of  
2 the cases involve providing a substitute lien. But the  
3 courts are --

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

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

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

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

1 back as much as they can of the money that they --

2 JUSTICE SOTOMAYOR: So it is the stalking  
3 horse dance. At what point do they credit bid until  
4 they get the highest price from someone else and then  
5 let that other person have it, is that it?

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

13 JUSTICE SOTOMAYOR: When do you think under  
14 363(k), what's good -- what would constitute or has  
15 constituted in the case law good cause not to permit  
16 credit bidding? What situations have arisen under  
17 363(k) where a court has found good cause?

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

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

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

23 JUSTICE SOTOMAYOR: How does a creditor  
24 commit malfeasance?

25 MS. MAYNARD: I'm sorry, I can't remember

1 any specific examples.

2 But another instance, and it's actually one  
3 that -- that goes to something Justice Kagan asked  
4 earlier, which is, when there's some dispute about  
5 priority or whether there might be senior liens.

6 So in this case, the bankruptcy judge  
7 provided at 44(a) and 45(a), because there -- there are  
8 some real estate taxes that would be senior to our  
9 liens, and there's a debate about whether the mechanic  
10 liens are senior or not. And so the bankruptcy judge  
11 provided that -- that -- that here, it would be  
12 appropriate for us to either put up cash in that amount,  
13 the amount of the potentially senior liens, or to offer,  
14 you know, some security to cover those in the event that  
15 they turn up. And that is an example of cause, and that  
16 is -- clearly answers the concern that there may be  
17 others.

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

1 have -- the cash collateral is these secured creditors',  
2 the hotel and the parking garage are all these secured  
3 creditors' collateral.

4 Now, the Petitioners say this is going to --  
5 if you let the secured creditors bid, this is going to  
6 chill credit bidding. Well, they tried to prove that in  
7 the bankruptcy court, and the bankruptcy court, at pages  
8 43(a) and 44(a), rejected that as a matter of fact.

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

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

24 Well, that's just -- that -- who's going to  
25 bid in that situation?

1 CHIEF JUSTICE ROBERTS: How does it work in  
2 practice? Is this something that is subject of  
3 extensive negotiation? The secured creditor says, well,  
4 I'm interested in bidding in a credit bid, but I  
5 appreciate that that's going to make it difficult for  
6 you to get cash. And you've got these unsecured  
7 creditors who would want -- and so, what? I'm not going  
8 to credit bid, so long as -- or I will only credit bid  
9 up to this particular amount; or, let's sit down and  
10 work out a deal, negotiate over exactly how we're going  
11 to handle my security. Is that really how it happens,  
12 or is that not -- or not?

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

19 There are actually many negotiations in a  
20 plan sale context. And it would be odd, I would  
21 suggest, that you can do a cramdown plan over the  
22 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 there's no adequate -- there's nothing under  
6 (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 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 the  
6 general provision doesn't apply in this case because the  
7 specific is not a subset of the general.

8 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 always the case that when the Court's looking at  
12 these kinds of problems, that the general provision  
13 could be read to encompass what the party before the  
14 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 It's not just the requirements but the  
23 exceptions to the requirements.

24 What are you referring to?

25 MS. MAYNARD: The for cause.

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

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

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

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

24                   MS. MAYNARD: Well, maybe I misunderstood  
25 Justice Kagan's question or misunderstood their point.

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you.

24 MS. MAYNARD: Thank you.

25 CHIEF JUSTICE ROBERTS: Ms. Harrington.

1 ORAL ARGUMENT OF SARAH E. HARRINGTON,  
2 FOR THE UNITED STATES, AS AMICUS CURIAE,  
3 SUPPORTING THE RESPONDENT

4 MS. HARRINGTON: Thank you,  
5 Mr. Chief Justice, and may it please --

6 JUSTICE SCALIA: -- big case for the  
7 government, Ms. Harrington, isn't it?

8 MS. HARRINGTON: Pardon me?

9 JUSTICE SCALIA: It is a big case for the  
10 government.

11 MS. HARRINGTON: It is a big case for the  
12 government. As you suggest, the government is in the  
13 position of -- that actually many secured creditors are  
14 in these days, which is that we have constraints on our  
15 ability to cash bid at the sale of our collateral  
16 through a bankruptcy, and the detailed cramdown  
17 provisions of chapter 11 are designed to protect the  
18 rights of secured creditors. The essence of being a  
19 secured creditor, of course, as the Court has suggested,  
20 is that the secured creditor has bargained for the right  
21 either to get its money back or to get the thing that  
22 secures its loan, to get its collateral.

23 And the type of sale that is contemplated in  
24 clause (ii) of section 1129(b)(2)(A) is precisely  
25 designed to guarantee that the creditor will get the

1 benefit of its bargain.

2 CHIEF JUSTICE ROBERTS: You have got a whole  
3 cadre of U.S. trustees that presumably can look out for  
4 the interests of the poor United States.

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

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

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

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

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

23 Now, I would like to respond to one -- one  
24 sort of assumption that has seemed to permeate the  
25 conversation here, which is that a secured creditor will

1 always have an incentive to bid the full amount of its  
2 claim at an auction of its assets where the auction is  
3 supposed to be free of liens. That is actually not  
4 true. As my friend Ms. Maynard suggested, unless a bank  
5 is trying to get into the business of running a hotel or  
6 running whatever business is the collateral, the  
7 creditor will only want to take the property if it  
8 thinks it can make a profit by then turning around and  
9 selling the property.

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

17 So allowing the credit bidding won't have  
18 the effect of serving as a veto on what would be a fair  
19 sale price by a cash bidder. The secured creditor's  
20 incentive is only to bid up to what it -- up to what it  
21 views as the value of the property and not a penny more,  
22 because it's not trying to take the property just for  
23 the property's sake. In most cases it wants to take the  
24 property and then sell the property.

25 CHIEF JUSTICE ROBERTS: Well, but of course

1 it could bid up if it thinks that there are going to be  
2 other bidders, right? It has a lot more flexibility  
3 than the other bidders to -- to the extent of its  
4 security interest.

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

11 The Congress gave secured creditors a right  
12 to have a role where they get to put their money where  
13 their mouth any time there is --

14 CHIEF JUSTICE ROBERTS: That just begs the  
15 question. Congress gave them a right -- I mean, that's  
16 what we are deciding, right?

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

23 But Congress also enacted two much more  
24 specific provisions right next to clause (iii), and in  
25 those provisions, number (i), which governs -- governs



1 the retention of liens on -- on collateral, and number  
2 (ii), which the sale of -- the sale of collateral free  
3 of liens, there are very specific protections written  
4 into clauses (i) and clause (ii). And this Court's  
5 interpretive canon that a specific provision will trump  
6 a more general provision where both could apply would  
7 seem clearly to apply here.

8           If a plan proposes a disposition of a claim  
9 that is addressed by a clause (i) or a clause (ii), it  
10 doesn't make any sense to allow them to strip out  
11 protections that are provided in those clauses by  
12 purporting to go under the more general standard of  
13 indubitable equivalent. That is especially true because  
14 the type of judicial valuation of the property that  
15 would take place under Petitioners' type of scheme is  
16 not guaranteed to make sure that the creditor gets what  
17 it bargained for, which is either its money or its  
18 property, but that is exactly what clause (ii), that  
19 type of auction, is guaranteed to do.

20           JUSTICE GINSBURG: What is the reference?  
21 In clause (ii) we were just told, the last clause refers  
22 to "under clause (i) or clause (iii)." What -- what is  
23 the reference in (ii) to clause (iii)? What does that  
24 mean?

25           MS. HARRINGTON: Well, the type of sale

1 contemplated in clause (ii) is essentially a liquidation  
2 of the secured creditor's lien on a property. And so  
3 you -- the sale would essentially liquidate the lien and  
4 then clause (ii) provides that -- that there would need  
5 to be a replacement lien on the proceeds of the sale.  
6 That replacement lien would then have to be treated  
7 under clause (i) or clause (iii).

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

19 I think one of the assumptions that  
20 permeates Petitioners' brief is that valuation -- that  
21 the value of collateral is something we can all know and  
22 agree upon. But valuation is an inherently difficult  
23 undertaking, and this Court has recognized that when  
24 Congress enacted the code in 1978 it shifted the  
25 preference to move from judicial valuation towards

1 market valuations.

2           And here Congress in clause (ii) expressed  
3 its view that -- that the type of market that would  
4 value this property would include one of the most  
5 interested market participants, who is -- which is the  
6 secured creditor who has an interest in the property.

7           CHIEF JUSTICE ROBERTS: Of course, valuing  
8 property is what bankruptcy judges do all the time,  
9 right?

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

19           But as judge -- as my friend Ms. Maynard  
20 pointed out -- maybe she will be a judge some day --

21           (Laughter.)

22           MS. HARRINGTON: -- the creditor in that  
23 situation has a role in -- in protecting itself against  
24 undervaluation because it can make the 1111(b) election,  
25 retain the full amount of its claim if it wants, and --

1 and protect itself going forward. I think one way  
2 that's important is that it protects -- it prevents  
3 debtors from cashing out creditors at a low value, at a  
4 point where -- in the market where the value of the  
5 property is low, because they retain the lien for the  
6 full amount.

7 The same thing is true here. If this is a  
8 particularly low point in the market and the creditor is  
9 trying to sell the property at auction -- I'm sorry --  
10 the debtor is trying to sell the property at auction,  
11 the creditor can come in and take the property and  
12 realize any -- any upside down the road.

13 If there are no further questions?

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 MS. HARRINGTON: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Neff, you have 4  
17 minutes remaining.

18 REBUTTAL ARGUMENT OF DAVID M. NEFF

19 ON BEHALF OF THE PETITIONERS

20 MR. NEFF: With regard to the market  
21 valuation, we are doing a market valuation, as this  
22 Court instructed in the 203 North LaSalle case from  
23 1999, by having an auction, and after that auction still  
24 having to prove up that we've given the indubitable  
25 equivalent by showing what occurred at that auction.

1 And if the lenders would like to bring at that point  
2 their appraisals and show that we didn't achieve that  
3 amount, then we are not going to be able to satisfy the  
4 indubitable equivalent standard.

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

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

11 MR. NEFF: If they can --

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

15 MR. NEFF: Right. The question -- it's a  
16 very high standard.

17 JUSTICE SCALIA: Indubitable is indubitable.

18 MR. NEFF: It's a very high standard. And  
19 as long as --

20 JUSTICE SCALIA: If you have one honest  
21 appraiser who says --

22 MR. NEFF: If it is a creditable appraisal  
23 and we were unable to achieve that, then we will have a  
24 very difficult time satisfying that standard; but, the  
25 process will have been allowed to play out, which is

1 extremely important because those of us who have done  
2 debtor work know how many times a lender doesn't want to  
3 do something, and ultimately you have a sale or  
4 otherwise some sort of disposition of assets, the price  
5 gets high enough, and they are willing to go along with  
6 it.

7 So with regard to the market test --

8 JUSTICE SCALIA: What happens if you go to  
9 the judge and the judge says: There is one higher bid,  
10 so I can't say it's indubitable? Then what happens?

11 MR. NEFF: Then you would have to provide  
12 additional consideration to the secured creditor to get  
13 it to the level that the judge would find it to be  
14 indubitable.

15 So it's no different than at any plan  
16 confirmation hearing if you say: Judge, my plan is  
17 dependent upon the interest rate being set at 5 percent.  
18 The judge says: Well, I find it should be 6 percent.  
19 You have to find a way to bridge that gap.

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

24 MR. NEFF: It's more so that the purchaser  
25 would have to come up with that, would have to come up

1 with that or find some other way to bridge that gap.

2           It's not really a waste of time because  
3 again you are allowing the process to play itself out.  
4 Too many times we see with secured creditors they're  
5 unwilling to deal with debtors because they have gotten  
6 them in the particular situation. And then when you are  
7 able to actually have an auction, they are surprised by  
8 how high the bidding gets. Because bankruptcy auctions  
9 are very fulsome events and create -- can create quite a  
10 lot of bidding that can really generate very high --  
11 high value for the property.

12           As far as the role that (iii) plays in (ii),  
13 it's a bit convoluted; but, if you pursue a plan sale  
14 through subsection (ii), you don't have to show  
15 indubitable equivalents as long as they are allowed to  
16 credit bid. But if, in fact, they don't credit bid or  
17 they are topped, and you are able to raise cash, that  
18 cash must be treated in an indubitable equivalents way  
19 or in accordance with subsection (i).

20           JUSTICE SOTOMAYOR: Counsel, I'm a person  
21 who believes that in the business world the greatest  
22 security is just knowledge of what courts will do. And  
23 what the two courts who have agreed with you have done  
24 is contrary to what the majority of courts have done for  
25 the longest time.

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

2                   MR. NEFF:    Okay.

3                   JUSTICE SOTOMAYOR:   What's the business

4 value for upsetting the norm?

5                   MR. NEFF:    With regard to what courts have

6 done for a very long time, for the 30 years that have

7 been referenced have been primarily in section -- with

8 regard to section 363 sales as opposed to plan sales.

9                   JUSTICE SOTOMAYOR:   That it means, because

10 people didn't think they could do it in plan sales.  So

11 why should we upset the expectation?

12                   MR. NEFF:    It's also difficult in a

13 bankruptcy situation to keep the case alive long enough

14 to get to plan confirmation, particularly if it's a --

15 if it's a business that's struggling financially,

16 because the secured creditor has an ability to get

17 relief from the automatic stay.  So that's why we would

18 have more section 363 sales.

19                   But with regard to the benefit, you look at

20 a case like Philadelphia, or a case like the Pacific

21 Lumber out of the Fifth Circuit, which allowed an entire

22 enterprise to be restructured out of a very positive

23 sale of the timberlands, that would not have occurred if

24 in fact the Court had required credit bidding because

25 the lender simply would have taken back that one crucial



1 asset around which the entire enterprise was  
2 restructured.

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

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

8 MR. NEFF: If --

9 CHIEF JUSTICE ROBERTS: Please.

10 MR. NEFF: They could have gone under (i) if  
11 in fact that -- that the lender would have been  
12 precluded from making a Section 1111(b) election and  
13 also precluded from credit bidding, because credit  
14 bidding's not required under subsection (i), and an  
15 1111(b) election does not apply when there is a sale.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 The case is submitted.

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

21

22

23

24

25

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