Supreme Court, U.S.
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No. 11-166

In the Supreme Court of the United States

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

v.

AMALGAMATED BANK,
Respondent.

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

PETITIONERS' REPLY BRIEF

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CORPORATE DISCLOSURE

The corporate disclosure statement included in the petition for writ of certiorari remains accurate.

TABLE OF CONTENTS

CORPORATE DISCLOSURE i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. The Case is Not Moot. 2

A. There is a live controversy and the parties have a concrete interest in the outcome. . . . 2

B. Even if the case is moot, it fits squarely within the exception to mootness for cases capable of repetition yet evade review. 6

II. The Issue Presented is of Pressing National Importance. 7

III. This Case Presents an Ideal Opportunity for the Court to Resolve this Important Issue of Bankruptcy Law. 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Erie v. Pap's A.M.,
529 U.S. 227 (2000) 5

Fed. Election Comm'n v. Wisconsin Right to Life, Inc.,
551 U.S. 449 (2007) 6

In re Phila. Newspapers, LLC,
599 F.3d 298 (3d Cir. 2010) 4, 8, 9, 10

North Carolina v. Rice,
404 U.S. 244 (1971) 2, 3

Powell v. McCormack,
395 U.S. 486 (1969) 2

Scotia Pac. Co., LLC v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.),
584 F.3d 229 (5th Cir. 2009) 8, 9, 11

Statutes

11 U.S.C. § 362(a) 2
11 U.S.C. § 362(d) 11
11 U.S.C. § 362(d)(3) 11
11 U.S.C. § 1121(b) 11
11 U.S.C. § 1129(b)(2)(A) ..... *passim*
11 U.S.C. § 1129(b)(2)(A)(iii) 7, 9
28 U.S.C. § 1408 10

Reply in Support of Petition for Certiorari

ARGUMENT

Respondent attempts to manufacture a jurisdiction problem by characterizing the case as moot. This argument completely misses the mark. The petition does not ask the Court to determine whether a particular chapter 11 plan may be confirmed, but rather whether Petitioners may pursue an auction sale of assets free of liens using bid procedures that prohibit its secured creditor from credit bidding at the sale. The parties continue to actively contest that important question of law that has split the circuits. The Court's decision will therefore have a concrete impact on the legal rights of the parties going forward. There is an active controversy this Court needs to resolve.

Respondent's vigorous opposition to Petitioners' proposed bid procedures in this case demonstrates that the issue presented is much more than a mere interesting academic question. Respondent concedes that the right to credit bid at a bankruptcy sale of collateral is a vital protection for secured creditors. Whether that right must be provided in any sale under chapter 11 is therefore critically important, affecting billions of dollars in secured debt. The Seventh Circuit's decision below creates a square conflict on this issue with prior decisions by the Fifth and Third Circuits and upsets the uniform application of the Bankruptcy Code. The Court should grant the writ of certiorari and resolve this issue.

I. The Case is Not Moot.

As it did below, Respondent attempts to distract the Court from the important issue presented in this case by raising the specter of mootness. Respondent's mootness argument has been repeatedly rejected by the bankruptcy court and was readily dispatched by the Seventh Circuit. *See* Pet. App. at 7a-9a. The same result should obtain here.

A. There is a live controversy and the parties have a concrete interest in the outcome.

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

In this case, there is no doubt that a live controversy exists. Petitioners are still pursuing an auction sale of their assets and the parties continue to vigorously contest whether section 1129(b)(2)(A) of the Bankruptcy Code requires Petitioners to permit Respondent to credit bid at the auction. In recognition of this ongoing dispute, the bankruptcy court has twice refused to lift the automatic stay imposed by 11 U.S.C. § 362(a) while this appeal has been pending—including most recently just two weeks

ago—despite Respondent's contention, *inter alia*, that the appeal is moot. *See* Bankruptcy Dkt. No. 505.

Likewise, the parties have a legally cognizable interest in the outcome of this appeal. If the Court grants review and agrees with Petitioners' interpretation of section 1129(b)(2)(A), Petitioners will implement bid procedures for an asset sale that preclude Respondent from credit bidding. If the judgment of the lower court is affirmed, Petitioners will be required to consider alternative strategies for exiting bankruptcy and Respondent will renew its request for relief from the automatic stay. Accordingly, this controversy "touch[es] on the legal relations of parties having adverse legal interests" and a decision from the Court will provide "specific relief through a decree of a conclusive character" in this bankruptcy case. *Rice*, 404 U.S. at 246.

Respondent attempts to conflate the issue presented to create a mootness problem that does not exist by diverting the Court's attention from the specific bid procedure provision on appeal to the underlying asset purchase agreement and chapter 11 plan. *See, e.g.*, Opp'n at 17-18. The specific order on appeal, however, is the bankruptcy court's denial of Petitioners' motion to establish bid procedures for the sale of collateral because it precludes credit bidding. *See* Pet. App. at 40a-45a. Neither the adequacy of the underlying asset purchase agreement nor the confirmability of Petitioners' chapter 11 plan was before the bankruptcy court or even addressed in the order below. Consequently, neither is at issue in this appeal. The *only* issue before the Court is whether Petitioners may establish bid procedures that preclude Respondent from credit bidding at an auction sale of

collateral under section 1129(b)(2)(A). The Third Circuit recognized the importance of this distinction in *Philadelphia Newspapers*:

> We are asked here not to determine whether the "indubitable equivalent" would necessarily be satisfied by the sale; rather, we are asked to interpret the requirements of § 1129(b)(2)(A) as a matter of law. This distinction is critical.

In re Phila. Newspapers, LLC, 599 F.3d 298, 312-13 (3d Cir. 2010).

In any event, Respondent's contention that Petitioners have "abandoned" their chapter 11 plan is false. As the Seventh Circuit correctly recognized, and as is plain from the continued prosecution of this appeal, Petitioners remain committed to pursuing a chapter 11 plan involving the sale of substantially all their assets without credit bidding as contemplated by the bid procedures motion. To that end, during the appeal process, Petitioners filed an amended asset purchase agreement ("APA") and amended chapter 11 plan, both of which are virtually identical to their predecessors except that (1) the purchase price was increased to account for the appreciation in value of Petitioners' assets during these cases; and (2) the deadlines for approval of the bid procedures motion were extended. *See* Bankruptcy Dkt. No. 428, 429. The proposed stalking horse bidder has not terminated the APA and therefore remains bound by its terms. *See* Bankruptcy Dkt. No. 429 at § 4.4. Consequently, the Seventh Circuit correctly concluded that Petitioners have not abandoned their proposed asset sale:

> It does not appear that the Debtors' reorganization plans suffer from either of the defects—the passing of expiration dates or abandonment—identified by the Lenders.
>
> * * *
>
> [T]he Debtors' statements before this court and the fact that they have filed amended agreements provide convincing evidence that the Debtors have not abandoned their asset sale plans.

Pet. App. at 8a.

Respondent unsuccessfully advanced this same mootness argument three times in the bankruptcy court—once in opposition to a direct appeal to the Seventh Circuit and twice in requests to modify the automatic stay. Each time the bankruptcy court rejected Respondent's argument, recognizing instead that the pending appeal "will materially advance this case by settling whether the debtors may proceed with their proposed chapter 11 plan." Pet. App. at 37a.

The mootness red herring is merely a pretext for Respondent's attempt to insulate a favorable decision from review. *See Erie v. Pap's A.M.*, 529 U.S. 227, 288 (2000) ("Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness."). This strategy is further revealed by Respondent's suggestion that the Court should not grant the petition because the Seventh Circuit's decision below was correct. Opp'n at 23. Respondent mischaracterizes the purpose of certiorari, which depends not on the

correctness of the decision being reviewed, but rather the need for resolution of an important issue of law that has divided the circuits. Such is the case here.

B. Even if the case is moot, it fits squarely within the exception to mootness for cases capable of repetition yet evade review.

Even if the passing of certain deadlines in the underlying APA or chapter 11 plan would render this appeal moot, it nonetheless should be reviewed as a case that is capable of repetition, yet evades review due to the inherently short time periods required for a bankruptcy sale. This well-established exception to mootness applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same appealing party will be subject to the same action again. *See, e.g., Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007).

As the Seventh Circuit correctly held, Petitioners' appeal readily satisfies both prongs of this exception. *See* Pet. App. at 9a. First, asset sales in bankruptcy typically require short deadlines to protect the parties from market fluctuations, dissipation of value and other unforeseen events. *See* Opp'n. at 3 (recognizing "quick timing and insufficient notice or marketing" attendant with asset sales in bankruptcy). Second, if this petition is denied as moot, Petitioners would simply renew their motion in the bankruptcy court to approve the same bid procedures with a new APA, which would be subject to the same adverse ruling. Consequently, Petitioners would be forced into a position where they could never seek appellate review

of their proposed bid procedures because the inherently short deadlines required for such a sale would inevitably expire before the litigation has run its course. This is precisely the dilemma that the "capable of repetition, yet evading review" exception to mootness is designed to avoid.

Furthermore, if this petition is rendered moot, Petitioners would likely be deprived of any further appellate review of their proposed bid procedures because the bankruptcy court will likely grant Respondent's renewed request for stay relief.

Accordingly, even if there were any merit to Respondent's mootness argument (there is not), the petition fits comfortably within the exception for cases that are capable of repetition, yet evade review.

II. The Issue Presented is of Pressing National Importance.

Despite the significant attention this case has garnered in the bankruptcy community, *see* Pet. at 13 n.1, Respondent attempts to trivialize the issue presented by contending that "its resolution will have no bearing on the resolution of most bankruptcy cases." Opp'n at 15. In support of this argument, Respondent first contends that most debtors will continue to sell assets outside of a plan under section 363, which specifically requires credit bidding. *Id.* at 15-16. That argument is true only when the secured creditor wants its collateral sold (and thus will not credit bid to obtain it). However, it fails when, as here, the secured creditor opposes the sale. In that instance, a debtor's only option is to sell the collateral without credit bidding under section 1129(b)(2)(A)(iii).

Respondent also disparages the importance of credit bidding, claiming that most secured lenders can replicate its protections by bidding cash. *Id.* at 16. This argument contradicts Respondent's vigorous opposition to Petitioners' proposed bid procedures that preclude credit bidding (but permit cash bidding) and Respondent's own description of credit bidding as a "well-recognized" and "important check" against the undervaluation of collateral at bankruptcy sales. *Id.* at 3. Respondent's position is further belied by the two amicus curiae briefs filed in support of the petition, including a brief for the Loan Syndications and Trading Association ("LSTA"), a leading financial trade association. Notably, both amicus curiae disagree with Petitioners on the merits of the issue presented but nonetheless recognize the pressing need for the Court to settle the circuit split regarding the correct interpretation of section 1129(b)(2)(A).

Furthermore, Respondent misconstrues *Pacific Lumber* in an attempt to diminish the extent of the circuit split. *Id.* at 13. However, the issue presented in that case was the exact same issue presented in *Philadelphia Newspapers* and in this case—whether section 1129(b)(2)(A) requires credit bidding whenever there is a sale of collateral free of liens. The Fifth and Third Circuits held that it does not; the Seventh Circuit in this case held that it does. There is a clear and direct split involving all three circuits. Whether the sale is conducted as an auction (as in *Philadelphia Newspapers* and in this case) or as a private sale (as in *Pacific Lumber*) is irrelevant. If the Court were to affirm the Seventh Circuit's decision, it would overrule the holdings in both *Philadelphia Newspapers* and *Pacific Lumber* that a debtor may sell collateral free of

liens without credit bidding under section 1129(b)(2)(A)(iii).

As further evidence of the direct nature of the split, Petitioners' bid procedures were modeled after the bid procedures in *Philadelphia Newspapers* and thus the factual circumstances of these two cases are nearly identical. Although *Pacific Lumber* involved a different type of sale, the majority in *Philadelphia Newspapers* relied heavily on that decision to support its holding that a debtor may sell collateral free of liens without credit bidding under section 1129(b)(2)(A)(iii). *See Phila. Newspapers*, 599 F.3d at 309. Likewise, the Seventh Circuit acknowledged how both the *Philadelphia Newspapers* and *Pacific Lumber* decisions authorize a sale of assets free of liens without credit bidding:

> Two of our sister circuits recently issued opinions analyzing Section 1129(b)(2)(A). . . Both majority opinions held that Subsection (iii)'s scope was not limited by its neighboring subsections and that the proceeds from the sale of encumbered assets constituted the indubitable equivalent of the secured creditors' claims.

Pet. App. at 14a. Consequently, Respondent's contention that *Pacific Lumber* "has little relevance to the present dispute" is unfounded. Opp'n at 13.

Finally, Respondent's characterization of the *Philadelphia Newspapers* and *Pacific Lumber* rulings as "a recent anomaly" and "novel" is misplaced. Opp'n at 11-12. These decisions currently represent the majority view regarding the proper interpretation of

section 1129(b)(2)(A). Furthermore, the impact of these decisions has been significant, especially considering that *Philadelphia Newspapers* is binding precedent for the District of Delaware, where many complex chapter 11 bankruptcy cases are filed. Additionally, the uniquely permissive bankruptcy venue statute provides debtors with great latitude in choosing a jurisdiction in which to file their case. *See* 28 U.S.C. § 1408. As such, the decisions of the Third and Fifth Circuits have broad implications for the future administration of chapter 11 bankruptcy cases.

III. This Case Presents an Ideal Opportunity for the Court to Resolve this Important Issue of Bankruptcy Law.

Respondent urges the Court to delay review of this critical issue of bankruptcy law for another day to allow further percolation in the courts of appeals. *See* Opp'n at 15. However, as both amici point out, this issue has already received extensive treatment in three reported opinions in the Third, Fifth and Seventh Circuits, each of which administers a substantial bankruptcy docket. The arguments on each side of the issue have already been crystallized in carefully reasoned decisions authored by circuit court judges with considerable bankruptcy experience. It is highly unlikely that delaying resolution of this issue further would provide the Court with any additional benefit or insight.

In contrast, denying this petition will likely cause the entrenched circuit split to persist indefinitely. Chapter 11 cases, by their very nature, must be resolved quickly to staunch the loss of value typically associated with a distressed enterprise. In recognition

of this economic reality, the Bankruptcy Code imposes various deadlines to motivate expeditious resolutions. *See, e.g.*, 11 U.S.C. §§ 362(d)(3) (requiring monthly interest payments or stay relief for a secured creditor 90 days after a bankruptcy case involving single asset real estate is filed); 1121(b) (limiting a debtor's exclusive period to propose a chapter 11 plan to 120 days after a bankruptcy case is filed). If a debtor is unable to meet these deadlines or show reasonable progress towards a viable reorganization, the Bankruptcy Code requires the bankruptcy court to modify the automatic stay to allow the secured creditor to pursue its state law rights against the collateral. *See* 11 U.S.C. § 362(d). Consequently, the duration of a typical bankruptcy case is often too short to accommodate full appellate review. *See, e.g., Scotia Pac. Co., LLC v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 241-42 (5th Cir. 2009) (recognizing the lack of "binding appellate precedent in bankruptcy, whose caselaw has been plagued by indeterminacy.").

Furthermore, once a chapter 11 plan is confirmed, appellate review can be complicated and impractical because resolutions in bankruptcy carry immediate financial consequences for a debtor's stakeholders that are difficult—if not impossible—to undo. Accordingly, courts of appeals have long applied the doctrine of "equitable mootness," which counsels against appellate review in bankruptcy cases where certain financial arrangements, such as a chapter 11 plan, have already become effective. *See, e.g., Pac. Lumber*, 584 F.3d at 240 ("'Equitable mootness' has evolved in bankruptcy appeals to constrain appellate review, and potential reversal, of orders confirming reorganization plans. Equitable mootness is a kind of appellate abstention

that favors the finality of reorganizations and protects the interrelated multi-party expectations on which they rest.").

For these reasons, chapter 11 cases are particularly unlikely to receive appellate review, and rarely reach this Court. Consequently, there is real possibility that the issue presented in this appeal—which arises exclusively in a chapter 11 reorganization—may not come before the Court again for some time, if at all. As such, this case presents a unique opportunity for the Court to resolve a significant issue of chapter 11 bankruptcy law over which the circuits are split.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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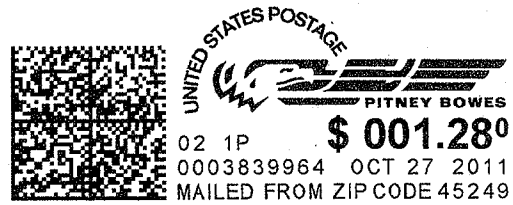

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