No. 15-1286

IN THE

Supreme Court of the United States

UNITE HERE LOCAL 54.,

Petitioner,

v.

TRUMP ENTERTAINMENT RESORTS, INC, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113, permits a Chapter 11 debtor to reject a collective bargaining agreement ("CBA") if certain conditions are met. The court below determined that section 1113 applies in this case even though the employment contract at issue expired shortly after the debtors filed for bankruptcy because, among other reasons, the terms of the expired CBA continued to govern the parties' relationship. Recognizing that its ruling "presents a question of first impression among the courts of appeals," the court below properly framed the question presented as follows: "is a Chapter 11 debtor-employer able to reject the continuing terms and conditions of a CBA under § 1113 after the CBA has expired?" Pet. App. 5.

RULE 29.6 STATEMENT

Trump Entertainment Resorts, Inc., is owned by IEH Investments I, LLC, which is not publicly owned. No publicly held corporation owns 10% or more of its stock.

Trump Entertainment Resorts Holdings, L.P., has one parent corporation: Trump Entertainment Resorts, Inc. No other publicly held corporation owns 10% or more of its stock.

Trump Plaza Associates, LLC, has two parent corporations: Trump Entertainment Resorts, Inc., and Trump Entertainment Resorts Holdings, L.P. No other publicly held corporation owns 10% or more of its stock.

Trump Marina Associates, LLC, has two parent corporations: Trump Entertainment Resorts, Inc., and Trump Entertainment Resorts Holdings, L.P. No other publicly held corporation owns 10% or more of its stock.

Trump Taj Mahal Associates, LLC, has two parent corporations: Trump Entertainment Resorts, Inc., and Trump Entertainment Resorts Holdings, L.P. No other publicly held corporation owns 10% or more of its stock.

Trump Entertainment Resorts Development Co., LLC, has two parent corporations: Trump Entertainment Resorts, Inc., and Trump Entertainment Resorts

Holdings, L.P. No other publicly held corporation owns 10% or more of its stock.

Debtor TER Development Co., LLC, has two parent corporations: Trump Entertainment Resorts, Inc., and Trump Entertainment Resorts Holdings, L.P. No other publicly held corporation owns 10% or more of its stock.

Debtor TERH LP Inc. has one parent corporation: Trump Entertainment Resorts, Inc. No other publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

Page

PRELIMINARY STATEMENT

This matter arises out of the Chapter 11 bankruptcy proceedings of respondents Trump Entertainment Resorts, Inc., Trump Entertainment Resorts Holdings, L.P., Trump Plaza Associates, LLC, Trump Marina Associates, LLC, Trump Taj Majal Associates, LLC, TER Development Co., LLC, and TERH LP Inc. (collectively, the "Debtors"). Petitioner, UNITE HERE Local 54 (the "Union") represents the majority of the unionized employees at the Trump Taj Majal Casino (the "Casino") located in Atlantic City, New Jersey. One or more of the Debtors owned and operated the Casino and were parties to a collective bargaining agreement with the Union.

As the court below acknowledged, the question presented is one "of first impression among the courts of appeals," Pet. App. 5, and involves the proper interpretation of section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113. Section 1113 governs a debtor's ability to reject a collective bargaining agreement ("CBA") in a Chapter 11 case, expressly allowing rejection if, among other things, doing so is "necessary to permit the reorganization of the debtor." *Id.* § 1113(b)(1)(A). In the courts below, the Union opposed rejection, contending that, because the CBA had expired shortly after the Debtors commenced their bankruptcy case, section 1113 did not apply. Rejecting this argument, the

bankruptcy court determined that the statutory criteria for rejection had been satisfied. Affirming that determination, the Third Circuit framed the question presented as follows: "is a Chapter 11 debtor-employer able to reject the continuing terms and conditions of a CBA under § 1113 after the CBA has expired?" Pet. App. 5. Answering this question in the affirmative, the court noted that, even though the CBA had expired shortly after the Debtors filed for bankruptcy, the terms of the expired agreement continued to govern the relationship between the parties under applicable law. *See* National Labor Relations Act ("NLRA") § 8, 29 U.S.C. § 158. Accordingly, the Debtors owed the same financial obligations to the Union both pre- and post-expiration, and thus had the same need for relief from those obligations in order to reorganize notwithstanding the CBA's post-bankruptcy expiration.

The decision of the Court of Appeals does not warrant certiorari review. First, there is no split of authority among the courts of appeals on the question presented. Although the Union argues that the decision below is inconsistent with the decision of the Fourth Circuit in *Gloria Manufacturing Corp. v. International Ladies' Garment Workers' Union*, 734 F.2d 1020 (4th Cir. 1984), that case involved the interpretation of a markedly different statute, and the court below properly concluded that the question presented here is a matter of first impression

among the courts of appeals. Second, the decision below does not conflict with prior decisions of this Court. This Court has never had the occasion to interpret section 1113. Moreover, the labor-law cases that the Union cites regarding the nature of ongoing obligations under expired CBAs do not demonstrate that the court below disregarded this Court's precedent in its resolution of the bankruptcy question presented in this matter. Third, this case presents an issue that arises rarely and, contrary to the Union's assertions, the resolution below does not materially affect the general administration of the relationship between employers and unions under the NLRA.

Certiorari should also be denied because this case presents a poor vehicle for resolving the question presented. Following the rulings below, the Debtors consummated their Chapter 11 plan, the terms of which are built around the rejection of the CBA. Under applicable bankruptcy mootness principles, substantial changes to the Chapter 11 plan are no longer possible, and thus the relief the Union ultimately seeks—reinstatement of the terms of the CBA and/or the re-imposition of onerous financial obligations on the Debtors—is proscribed. In addition, this case presents a poor vehicle for resolving the question presented because here the CBA expired *after* the debtors filed for bankruptcy relief. As this Court has explained, the general rule in bankruptcy is that "the rights of creditors are

fixed . . . as of the filing of the petition in bankruptcy." *United States v. Marxen*, 307 U.S. 200, 207 (1939). A better vehicle for considering the question presented would be a case in which the relevant CBA expired *before* the debtor sought bankruptcy protection. Finally, certiorari is further unwarranted because the decision of the Third Circuit is entirely correct. The Petition should be denied.

STATEMENT

A. Legal Background

Congress enacted section 1113 of the Bankruptcy Code in response to this Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 525-26 (1984), holding that collective bargaining agreements are "executory contracts" that may be rejected in bankruptcy under section 365(a) of the Code. *See* Pet. App. 17. Section 1113 affirms the bankruptcy court's ability to authorize the rejection of CBAs in Chapter 11 cases, but only if certain requirements are satisfied. As part of its requirements, section 1113 directs a unique pre-rejection negotiation procedure. Under this procedure, the debtor is first required to make a proposal to the union setting out changes to the parties' CBA that are "necessary to permit the reorganization of the debtor" and that treats all parties "fairly and equitably." 11 U.S.C. § 1113(b)(1)(A). Along with the proposal, the debtor must also provide

adequate information to permit the union to evaluate its terms, *id.* § 1113(b)(1)(B), and the debtor must thereafter bargain with the union in good faith, *id.* § 1113(b)(2). Even after satisfying these requirements, the bankruptcy court may authorize the debtor to reject the CBA only if the union has rejected the debtor's proposal "without good cause" and if "the balance of the equities clearly favors rejection," *id.* § 1113(c). As the Third Circuit observed in this case, the procedure specified in section 1113 "establishes an expedited negotiation process for modifying a CBA and allows for judicial evaluation of a petition to reject a CBA if negotiations are unsuccessful." Pet. App. 14-15.

B. Factual Background

The parties executed the CBA at issue here in 2011. Pet. App. 6. By its terms, the CBA was set to expire on September 14, 2014. *Id.*

By 2014 the Debtors were in "desperate" financial straits. *Id.* at 33. Experiencing large losses, the Casino found itself "on the brink of running out of cash," and its situation was exacerbated by the "onerous terms of the CBA." *Id.* at 35-36. In March, the Debtors requested that the Union begin negotiations to modify the CBA's terms. *Id.* at 7. In response, the Union indicated that it was not yet ready to do so, but "would 'contact [the Debtors] within the next several months.'" *Id.* (alteration in original). In

August, at the Debtors' request, the Debtors and the Union met to discuss new terms for the CBA. *Id.* At that time, the Debtors "emphasized their critical financial situation" and proposed certain modifications to the CBA, but no agreement was reached. *Id.*

Unable to resolve their deteriorating financial condition outside the bankruptcy reorganization setting, the Debtors filed for Chapter 11 relief on September 9, 2014. *Id.* Two days later, the Debtors asked the Union to extend the terms of the CBA voluntarily, but the Union refused. *Id.* at 7-8. Thus, the CBA expired on September 14, 2014. Under applicable law, however, the terms of the CBA remained in effect and continued to govern the parties' relationship. *Id.* at 41.

On September 17, the Debtors provided the Union with a proposal for a modified CBA together with the information required by section 1113, and likewise offered to meet to negotiate the terms of the agreement. *Id.* at 8. After meeting with the Debtors on September 24, the Union requested, and the Debtors provided, additional information. *Id.* On September 26, after failing to reach an agreement, the Debtors filed a motion under section 1113 seeking to reject the CBA. *Id.*

While the motion was pending, the Debtors continued to "implor[e] the Union to engage with

them in discussions." *Id.* at 38. The Union, in contrast, "engag[ed] in picketing, a program of misinformation and, most egregiously, communicat[ed] with customers who had scheduled conferences at the Casino to urge them to take their business elsewhere." *Id.*

On October 17, 2014, the bankruptcy court granted the motion to reject the CBA. *Id.* at 31. In rendering its decision, the court held that it had jurisdiction under section 1113 to authorize rejection even though the CBA had expired shortly after the Debtors filed for bankruptcy protection. *Id.* at 43-44. Rejecting the Union's position that section 1113 applies only to "unexpired" collective bargaining agreements, the court noted that, in enacting section 1113, Congress "recognized the need for an expedited process by which debtors could restructure labor obligations in bankruptcy." *Id.* at 48. Moreover, the court observed that denying the Debtor's motion would lead to the "absurd" result that "the Debtors would be forced to close the Casino and liquidate, resulting in the loss of approximately 3,000 jobs." *Id.* at 49. The court found that it was "absolutely clear" that the Debtors had sufficient cash to continue to operate for less than two months and that, without relief from the CBA, they would "be forced to liquidate in which event all of the Casino employees, both union and non-union, will lose their jobs and all of the benefits which are at issue." *Id.* at 54. Further, the court

determined that the Debtors had "fully satisfied" the requirement that they make a proposal to the Union, had provided the Union with all necessary information, and that the proposal treated all parties fairly and equitably. *Id.* at 55-58. The court also held that the Union's refusal to negotiate constituted rejection of the proposal without good cause and that, due to the Union's bad faith, the balance of the equities favored rejection. *Id.* at 58-60.

On appeal, the Third Circuit affirmed. *Id.* at 6. Like the bankruptcy court, the Court of Appeals reasoned that, among other things, section 1113 "balances the concerns of economically-stressed debtors in avoiding liquidation and the unions' goals of preserving labor agreements and maintaining influence in the reorganization process" by "prescrib[ing] strict procedural and substantive requirements before a CBA can be rejected." *Id.* at 21. The court held that the course of proceedings below "exemplifies the process that Congress intended" because rejection of the CBA was "essential to the Debtor's survival." *Id.* at 22. The court concluded: "In light of Chapter 11's overarching purposes and the exigencies that the Debtors faced, we conclude that the Bankruptcy Court did not err in granting the Debtors' motion." *Id.* at 30.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Conflict With The Decisions Of Other Courts Of Appeals.

This case does not present a question on which the Circuit Courts are divided. On the contrary, as the court below properly acknowledged, "[t]his case presents a question of first impression among the courts of appeals." Pet. App. 5.

The Union attempts to manufacture a circuit split between the decision below and the Fourth Circuit's decision in *Gloria Manufacturing Corp. v. International Ladies' Garment Workers' Union*, 734 F.2d 1020 (4th Cir. 1984), Pet. at 6, 17, but the Union's effort is unavailing. Decided just three months after this Court's decision in *Bildisco*, the Fourth Circuit in *Gloria Manufacturing* held that an expired collective bargaining agreement could not be rejected under section 365 of the Bankruptcy Code, 11 U.S.C. § 365, because it was not an "executory contract." 734 F.2d at 1021-22 & n.1 ("*Bildisco* is not applicable to this case because the collective bargaining agreement between Gloria and the Union had expired and *was therefore no longer executory*.") (emphasis added). Critically, whereas section 365 applies to "executory contracts," section 1113 nowhere makes use of that concept, instead referring expressly to

"collective bargaining agreements." Moreover, *Gloria Manufacturing* obviously did not address whether section 1113 permits rejection of an expired collective bargaining agreement because section 1113 had not yet been enacted at the time that case was decided. *Gloria Manufacturing* thus involved a different and distinct statutory provision with different and distinct terms. It is for this reason that the Union ultimately concedes (as it must) that the Fourth Circuit's decision is only authority for the proposition that *section 365* does not apply to expired collective bargaining agreements. Pet. at 17.

More broadly, nothing in the Fourth Circuit's decision can or should be read as indicating any congressional intent to limit section 1113 to unexpired CBAs. The Union attaches significance to its theory that Congress did not act specifically to correct the result in *Gloria Manufacturing*. *See* Pet. at 17. But by the same token, there is also nothing in the legislative record that indicates that Congress sought to follow the decision in crafting section 1113. Indeed, as the Union also appears to concede, there is no support for such a contention in the legislative materials. Pet. at 29-30 (noting the meager legislative history for section 1113).

In addition, the fact that a few bankruptcy courts have arrived at different conclusions regarding whether section 1113 permits rejection

of expired collective bargaining agreements does not constitute a divide worthy of this Court's attention. Moreover, contrary to the Union's claim that the bankruptcy courts are "badly split" on the issue, Pet. at 6, two of the four cases cited in the Petition as holding that section 1113 does not apply to expired collective bargaining agreements do not speak directly to that specific issue. Neither the debtors in *San Rafael Baking Co. v. Northern California Bakery Drivers Security Fund* (*In re San Rafael Baking Co.)*, 219 B.R. 860, 862 (9th Cir. BAP 1998) nor *In re Charles P. Young Company*, 111 B.R. 410, 413 (Bankr. S.D.N.Y. 1990) moved the court for rejection of a collective bargaining agreement under section 1113, and the courts' statements that such a rejection would be improper are mere *dicta*. *See, e.g., In re Karykeion, Inc.*, 435 B.R. 663, 674 (C.D. Cal. 2010) ("In *dicta*, the [*San Rafael*] court found that § 1113 did not give a bankruptcy court authority to modify an expired collective bargaining agreement."). Moreover, another case cited in the Petition, *In re Sullivan Motor Delivery, Inc.*, involved the rejection of collective bargaining agreements that expired prior to the debtor filing for bankruptcy—an important factual distinction discussed more fully in Section IV *infra*. 56 B.R. 28, 30 (Bankr. E.D. Wis. 1985) (holding that section 1113 is inapplicable "where a collective bargaining agreement by its own terms expired before the Chapter 11 case was filed"). In reality, the

asserted division among the bankruptcy courts is minor and undeveloped, and certainly no substitute for an actual conflict among the courts of appeals, which does not exist here.

II. The Decision Below Does Not Conflict With This Court's Precedent.

This case also does not present a question on which the court below has deviated from or disregarded this Court's precedents. This Court has never interpreted section 1113. As noted, *Bildisco* considered the applicability of section 365 to collective bargaining agreements before section 1113 was enacted, and its conclusion that collective bargaining agreements may be rejected is entirely consistent with the Third Circuit's decision in this matter. Understandably, the Union does not argue seriously to the contrary.

The Union does suggest more generally that the decision below conflicts with this Court's decisions establishing a "fundamental difference between collective bargaining agreements and the statutory bargaining obligation." Pet. at 6-7. According to the Union, this Court "has been clear that a collective bargaining agreement and the statutory duty to keep some terms and conditions in effect pending negotiations are entirely distinct," and that Congress would have had this distinction in mind when it used the term "collective bargaining agreement" in section 1113. Pet. at 21-22. On the basis of this theory,

the Union contends that the Debtors' post-expiration obligations were statutory, not contractual under the CBA, and that therefore section 1113 does not apply. *Id.* at 12.

But neither this Court's precedents nor the plain language of section 1113 make the sort of bold distinction between "contractual" and "statutory" obligations that the Union advocates, let alone one sufficient to justify the Union's criticism of the decision below as somehow deviating from this Court's decisions. For example, the Union cites precedent establishing that while "most terms and conditions of employment are not subject to unilateral change" following the expiration of a CBA, the terms of the CBA "no longer have force by virtue of the contract." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 206 (1991). But that is a far cry from establishing that the term "collective bargaining agreement" as used in section 1113 cannot include an expired contractual arrangement kept alive by operation of law. The NLRA does not set forth any actual terms that govern the relationship between the parties to an expired CBA, but rather mandates that the terms of the agreement remain in effect. Thus, a debtor's post-expiration obligations are not merely statutory obligations as the Union alleges, but rather are determined by the combined effect of the NLRA and the terms of the parties' expired contract.

The Union also claims that this Court's decision in *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Company*, 484 U.S. 539 (1988) establishes that "[t]he duties which survive the expiration of the collective bargaining agreement are created by § 8(a)(5) [of the NLRA], not by the contract," such that, although a bankruptcy court clearly has authority to reject an unexpired collective bargaining agreement, only the NLRB can act on a violation of an expired agreement. Pet. at 12. But this is an overly broad reading of *Advanced Lightweight*, which is limited to the particular statutory ERISA provisions at issue in the case.

Advanced Lightweight addressed whether sections 502(g)(2) and 515 of ERISA, which collectively allow a trustee of a retirement plan to bring a suit in federal court against an employer who fails to make plan contributions under a collective bargaining agreement, apply after the collective bargaining agreement expires. 484 U.S. at 544-45. The Court's conclusion that the statute created a "special remedy against employers who are delinquent in meeting their *contractual* obligations," *id.* at 547 (emphasis added) was based on the statute's specific reference to contributions an employer was "obligated to make . . . *under the terms of a collectively bargained agreement*," *id.* at 546 (quoting 29 U.S.C. § 1145) (emphasis added). Critically, the Court also found that "Congress was aware of the two different sources of an

employer's duty to contribute to covered plans," *id.*, as evidenced by a separate provision, enacted as part of the same amendments to ERISA that created sections 502 and 515, defining the term "obligation to contribute" to include both obligations under collective bargaining agreements and "as a result of a duty under applicable labor-management relations law," *id.* at 545-46 & n.11 (quoting 29 U.S.C. § 1392(a)). Because the legislative history of sections 502 and 515 demonstrates only that Congress intended "to give employers a strong incentive to honor their contractual obligations to contribute and to facilitate the collection of delinquent accounts," but "contains no mention of the employer's statutory duty to make postcontract contributions while negotiations for a new contract are being conducted," the Court concluded that the district court could not enforce contributions under an expired collective bargaining agreement. *Id.* at 547-48.

Advanced Lightweight obviously does not involve section 1113, nor can its reasoning be used to infer the inapplicability of section 1113 to expired collective bargaining agreements. There is nothing in the language of section 1113, other sections of the Bankruptcy Code, or the relevant legislative history that indicates that Congress did not intend for the bankruptcy court to have the authority to authorize the rejection of an expired CBA. In contrast, Congress's clear intent in enacting section 1113 was to provide an

expedited and efficacious process permitting the restructuring of a debtor's obligations under a CBA as needed to permit the debtor's reorganization. The Union offers no reason why Congress would have excluded from this process obligations under an expired agreement that remain in effect under applicable federal law. Because of the dissimilarities between the circumstances in *Advanced Lightweight* and those at issue here, the Union's reference to *Advanced Lightweight* as establishing a conflict between the decision below and this Court's prior precedents is unavailing.

III. This Case Involves An Uncommon Issue That Does Not Warrant This Court's Review.

The Union's claim that the decision below "obliterates" the NLRB's authority to regulate labor practices after a petition for bankruptcy is filed, Pet. at 27, also grossly overstates the impact of the Third Circuit's ruling. The specific question presented arises only in the rare circumstance in which a collective bargaining agreement expires prior to the bankruptcy court ruling on a motion to reject that agreement. That this is an uncommon occurrence is evidenced by the fact that the court below was the first federal Court of Appeals to consider the effect of section 1113 on an expired collective bargaining agreement since that provision was enacted in 1984.

It is undisputed that, in the more typical situation in which a debtor moves to reject an *unexpired* collective bargaining agreement, a bankruptcy court is free to authorize the rejection if the requirements of section 1113 have all been satisfied and the court determines that rejection is necessary for a successful reorganization of the debtor. 11 U.S.C. § 1113(b)(1)(A). This determination falls properly within the office of the bankruptcy court, not the NLRB, and the Union does not argue otherwise. The Third Circuit's decision in this matter simply aligns the treatment in bankruptcy of unexpired CBAs with those that expire after the debtor files for bankruptcy relief. The NLRB's authority otherwise remains unchanged. *See* Pet. at 27.

IV. This Case Presents A Poor Vehicle For Deciding The Question Presented.

Certiorari should also be denied because this case presents a poor vehicle for resolving the question presented. To begin with, the Debtors built their Chapter 11 plan around the rejection of the onerous provisions of the CBA. Moreover, following the decisions below, the Debtors have now consummated the plan. Under relevant bankruptcy mootness principles, the relief that the Union seeks—reinstatement of the terms of the CBA and/or the imposition of its onerous financial obligations on the Debtors—is now properly foreclosed because such would conflict

with the plan and the interests of those who have relied on its consummation. *See, e.g., Samson Energy Res. Co. v. SemCrude, L.P. (In re SemCrude, L.P.)*, 728 F.3d 314, 321 (3d Cir. 2013) (relief contrary to substantially consummated Chapter 11 plan will be equitably moot where relief would fatally scramble the plan and/or would harm the interests of third parties who have justifiably relied on the plan).

Moreover, the facts of this case make it an atypical outlier even among the rare instances in which section 1113's applicability to expired collective bargaining agreements arises. The CBA was in effect when the Debtors filed for bankruptcy, but expired prior to the bankruptcy court's decision authorizing its rejection. Notably, it is a general principle of bankruptcy law that "the rights of creditors are fixed . . . as of the filing of the petition in bankruptcy." *United States v. Marxen*, 307 U.S. 200, 207 (1939). In this case, the relevant creditors seeking to assert their various rights against the Debtors are the Union and the unionized employees it represents. Under the general principle articulated in *Marxen*, the fact that the CBA expired after the Debtors commenced their Chapter 11 case should be of little moment. In order to avoid this potentially overriding rule, the better vehicle for addressing the question presented would be a case in which the relevant CBA expired *before* the commencement of a Chapter 11 case, in which the *Marxen* principle

would not apply. For these reasons as well, certiorari should be denied.

V. The Third Circuit Correctly Interpreted Section 1113 To Apply To Expired Collective Bargaining Agreements.

Finally, the Court should decline to grant certiorari because the Third Circuit's decision holding that section 1113 permits a bankruptcy court to allow rejection of an expired collective bargaining agreement is undoubtedly correct. Contrary to the Union's assertions, the decision below rests firmly on sound legal principles and not, as the Union contends, on the judges' opinion of good policy. Pet. at 32.

Rejecting the Third Circuit's sensible interpretation of the term "collective bargaining agreement" as it appears in section 1113, the Union contends that the phrase should be read to mean only *unexpired* CBAs. Among other flaws, this construction would require the interlineation into the statute of language Congress did not see fit to provide. When Congress intends a provision of the Code to apply only to "unexpired" contracts, it knows how to write the provision expressly in that manner. For example, section 365 provides that a debtor may assume or reject an "unexpired lease." 11 U.S.C. § 365(a). The fact that Congress chose to limit the kinds of leases that may be assumed or rejected under section 365 to those that are

"unexpired," but did not do so in section 1113, is indicative that it did not intend to limit section 1113 to unexpired CBAs. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citations and internal quotation marks omitted). Nor would it be proper to import such a limitation appearing elsewhere in the Code into section 1113. *See FCC v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 302 (2003) (declining to import restriction appearing in one section of the Code to another where it does not appear because "where Congress has intended to provide . . . exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly").

The Third Circuit's holding also furthers Congress's intent in enacting section 1113 of "balanc[ing] the concerns of economically-stressed debtors in avoiding liquidation and the unions' goals of preserving labor agreements and maintaining influence in the reorganization process." Pet. App. 21. Where, as here, a Chapter 11 debtor remains bound by the terms of an expired collective bargaining agreement, these concerns apply equally to expired as well as unexpired agreements. Disallowing the rejection of expired collective bargaining agreements simply because they are expired

would clearly frustrate Congress's rehabilitative purpose in enacting section 1113.

Moreover, the decision below is consistent with the Bankruptcy Code's general purpose of encouraging reorganization. As the court below properly observed, "Congress has recognized that 'it is more economically efficient to reorganize rather than to liquidate, because it preserves jobs and assets.'" Pet. App. 28 (quoting H.R. REP. NO. 95-595, at 220 (1977); *see also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." (citing H.R. REP. NO. 95-595, p. 220)); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983) ("Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap'" (citing H.R. REP. NO. 95-595, p. 220)). In many cases, section 1113 is critical to a successful Chapter 11 reorganization, and the Third Circuit correctly held that prohibiting rejection of expired collective bargaining agreements "would impede that overriding goal." Pet. App. 29. Further, limiting section 1113 relief to unexpired collective bargaining agreements would create an incentive for unions to be uncooperative in the bankruptcy process, draw out negotiations until a collective bargaining agreement expires, and then avoid the application of section 1113 altogether on

account of their own delay. An interpretation of section 1113 that rewards such non-cooperative behavior would be detrimental to the reorganization process. Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

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