No. 16-764

IN THE

Supreme Court of the United States

GENERAL MOTORS LLC,

Petitioner,

v.

CELESTINE ELLIOTT, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENTS IGNITION SWITCH PLAINTIFFS

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QUESTIONS PRESENTED

In light of the record, Second Circuit opinion and governing law,[1] the issues raised by petitioner General Motors LLC (GM) are the following:

1. Absent a circuit split and on an interlocutory basis, should this Court review the fact-intensive holding that plaintiffs (respondents here) were known creditors with a long acknowledged right to actual and meaningful notice under both bankruptcy law and the Fifth Amendment Due Process Clause?

2. Also absent a circuit split and on an interlocutory basis, should this Court review the unremarkable holding that – given the concealment by General Motors Corporation (Old GM) of known claims – these plaintiffs are not bound by the Sale Order's "free and clear" provision and thus may seek to demonstrate in the district court, with no guaranteed result, GM's successor liability?[2]

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[1] S. Ct. R. 14(1)(a) (questions presented should be stated "in relation to the circumstances of the case").

[2] Quoting Pet. App., 7a, 53a. "Pet." and "Pet. App." refer to the certiorari petition and its appendix.

CORPORATE DISCLOSURE STATEMENT

No respondent has a parent company and no publicly held company owns 10% or more of the stock in any respondent. S. Ct. R. 29.6.

GM's listing of the respondents (Pet., ii) is correct except the State of Arizona and People of the State of California are not parties in this Court.

The respondents on this opposition are the "Ignition Switch Plaintiffs" through their Court appointed co-lead counsel, Steve W. Berman and Elizabeth Cabraser. The "Ignition Switch Plaintiffs" refers to purchasers of approximately 1.7 million GM vehicles that claim economic losses arising from their purchase of a car with a hidden safety defect. A separate brief in opposition will be filed by the lead counsel for the "Accident Plaintiffs."

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BRIEF IN OPPOSITION OF RESPONDENTS IGNITION SWITCH PLAINTIFFS

GM seeks interlocutory review of a ruling that is well-grounded in the Bankruptcy Code and constitutional due process. In light of Old GM's deceptive and willful concealment of the ignition switch defect known to it alone, Old GM failed to give notice to a discrete and easily identifiable group of creditors with known claims. Holding GM, through the same executives who had knowledge of the defect while at Old GM, accountable for this cover-up neither undermines, nor seeks an end-run around, bankruptcy protections. The Second Circuit ruled, unremarkably, that the plaintiffs may plead and seek to prove, under established principles of successor liability, that GM is liable for Old GM's conduct in concealing the ignition switch defect.

GM suggests this case is too big *not* to take, but that notion is both legally and factually flawed.

Bigger is no basis for certiorari absent legal issues warranting the Court's attention. On GM's two questions presented, there is no circuit split. The utter lack of circuit disagreement is unsurprising because the issues on appeal were peculiar to the GM bankruptcy and decided on an unusual record (additional considerations cutting against certiorari).

GM disregards, moreover, that it has faced and will continue to face defect-related litigation, such as claims grounded on GM's own malfeasance, not impacted by the Sale Order. Even if this Court foreclosed any possibility of successor liability on discrete claims, as the petition urges, GM will be litigating defect-related claims grounded on similar fact pat-

terns where successor liability presents no issue. Plaintiffs here seeking an opportunity to prove successor liability (the Second Circuit's limited holding) should not be wholly foreclosed now from the same relief, stemming from the same defect, that Old GM and then GM deliberately concealed.

As to the bankruptcy, the year 2008 was, as GM itself says, extraordinary. It concluded with Old GM's chief executive officer begging Congress for billions of dollars to stave off an imminent insolvency. After lawmakers balked, the executive branch sprang into action. Taxpayer dollars rescued the automotive titan from extinction.

This set the stage for a *sui generis* bankruptcy – not one presenting legal questions likely to arise in future debtor proceedings. In 2009, GM emerged from its bankruptcy effectively nationalized. The U.S. Treasury Department became the majority owner until GM could restore its financial footing, which it has now done. But GM's evolution did not require a violation of bankruptcy and constitutional law to succeed. Only those in the transitioning GM entity knew one had occurred. Especially due to the peculiar, unlikely-to-recur circumstances, there is no basis for certiorari jurisdiction here.

As to GM's argument that the Second Circuit has undermined long-standing bankruptcy protections, the opposite is true. Based on the stipulated factual record, the Second Circuit affirmed the finding that the plaintiffs were known creditors. Known creditors are entitled to actual notice under the Bankruptcy Code and due process. As the Second Circuit held, had the plaintiffs been given proper notice, a variety of things could have happened (ranging from filing

claims in real time, to expressly having GM retain those explicit claims, to other accommodations) that would not have interfered with the goals of the reorganization. And if GM had given proper notice in 2009, this could have avoided or mitigated harm and loss to known but un-notified creditors.

Thus, far from breaching an impenetrable shield with consequences for all Section 363 bankruptcies, the Second Circuit was fully attentive to the specific circumstances of this bankruptcy proceeding while holding that the Bankruptcy Code and due process still fully applied, as designed, to protect the rights of all parties involved.

The plaintiffs' multifaceted and mainstream claims are at their threshold stages and should proceed through determination on the merits as the lower courts are doing now. Whether GM will actually be subject to successor liability under principles of state law is an issue currently pending before the Multidistrict Litigation (MDL) judge, which GM will be able to challenge by motions to dismiss. Having presented no colorable argument for certiorari, the petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. After Consumer Complaints And Fatalities Due to the Ignition Switch Defect, GM Recalls Millions of Cars

As detailed in the Second Circuit opinion, the corporate malfeasance reflected in the long cover-up of the ignition switch defect was pronounced and atypical. Pet. App., 14a-19a.

The defective ignition switch at issue never passed testing. *Id.*, 16a. In 2002, Old GM

nonetheless approved it for production. *Id.* "Almost immediately," consumers complained to Old GM and then GM. *Id.*, 16a. Incidents and reports putting the two entities on notice rolled in for over a decade, including the period overlapping the 2009 bankruptcy. *Id.*, 16a-19a.

The defect in the switch was extremely dangerous. It could result in the ignition turning off while the vehicle was moving. *Id.*, 3a, 16a. This shut down the engine and disabled critical systems (power steering, braking, and airbags) in place to protect the driver and passengers. *Id.* There were not just injuries but, as the court of appeals noted, "fatalities." *Id.*, 17a.

When Old GM restructured, at least 24 personnel with knowledge of the defect – a critical mass of senior managers, engineers, and attorneys – transferred to GM. Pet. App., 12a; Dkt. No. 315 at 12.[1] As GM observes, in a Section 363 transaction, "the purchaser often retains many of the seller's employees" as GM did in the 2009 reorganization. Pet., 5. But not until 2014 did GM begin recalling roughly 1.7 million cars due to the ignition switch defect that was the subject of the Second Circuit's due process holding. Dkt. 219-4 at A-10037-10075 (recall notices identifying affected vehicles).

[1] "Dkt." refers to the filings and record in Second Circuit lead appeal No. 15-2844.

B. To Recover For Harm Caused By The Defect And Its Concealment, Plaintiffs File Suit

Shortly after GM finally disclosed the ignition switch defect in 2014, many plaintiffs brought suit against GM to recover for losses and injuries arising from the defect and others in recalled vehicles. Pet. App., 4a.

Those seeking relief included respondents here, a proposed class known as the "Ignition Switch Plaintiffs." *Id.*, 20a. They seek to recover economic losses resulting from the belated revelation that for years Old GM, and then GM, intentionally concealed the defect. *Id.*, 14a-20a. For example, in 2006, Old GM engineers modified the switch design but "did so quietly, without changing the ignition switch's part number, a change that would have signaled that improvements or adjustments had been made." *Id.*, 17a-18a.

As relevant to GM's certiorari petition, the United States Bankruptcy Court for the Southern District of New York issued a Sale Order in 2009. It barred claims against Old GM from being asserted against GM, the successor corporation. *Id.*, 4a. In 2014, after GM moved to enforce the Sale Order against the Ignition Switch Plaintiffs and other plaintiffs who had sued, the bankruptcy court enjoined certain claims against GM. *Id.*

The bankruptcy court determined that plaintiffs did not receive notice of the Sale Order as required by the Fifth Amendment Due Process Clause. *Id.* Because the ignition switch claims were known to or reasonably ascertainable by Old GM before the sale, plaintiffs were entitled to actual notice. *Id.*, 21a. In

2009, the bankruptcy court heard over 850 objections to the proposed sale terms. *Id.*, 11a. But the Ignition Switch Plaintiffs were not among them. They had no opportunity to appear because they never received actual notice of the proceeding.

Reasoning that plaintiffs had not been prejudiced, however, the bankruptcy court barred successor liability claims to be attempted against GM. *Id.*, 21a. The bankruptcy court entered judgment and certified it for direct appeal. *Id.*, 23a.

C. In Its Interlocutory Ruling, The Second Circuit Reverses In Part And Affirms In Part

In a unanimous opinion, the Second Circuit reversed in part, affirmed in part, vacated certain rulings, and remanded for further proceedings in the ongoing litigation against GM. Pet. App., 62a.

Plaintiffs have never sought, in the appeal or elsewhere, to undo the 2009 bankruptcy facilitating the sale of Old GM's assets to GM. This is a red herring. Plaintiffs' appeal challenged, in relevant part, "whether GM may use the Sale Order's 'free and clear' provision to shield itself from claims primarily arising out of the ignition switch defect and other defects." *Id.*, 23a.

To put the questions presented in context, the Second Circuit made the following holdings as to the Ignition Switch Plaintiffs:

1. Affirming the bankruptcy court's decision that it had subject matter jurisdiction to interpret and enforce the Sale Order (*id.*, 27a);

2. Although deeming the holding a "closer call" than other plaintiffs' claims, concluding the Sale Order's "free and clear" provision applied to the Ignition Switch Plaintiffs (*id.*, 33a-35a);

3. Reversing the decision to enforce the Sale Order against the Ignition Switch Plaintiffs, because due process required actual notice of their claims and they were prejudiced by lack of opportunity to impact the sale terms (*id.*, 54a-55a); and

4. Vacating as advisory the decision on equitable mootness because no plaintiffs had filed proofs of claim in the bankruptcy court (*id.*, 62a).

GM here mischaracterizes the Second Circuit's rulings in two crucial respects.

First, the petition largely ignores that the court of appeals held only that plaintiffs, given the due process violation, are not bound by the Sale Order. *Id.*, 55a. This gives plaintiffs the right to argue that GM has successor liability for Old GM, but does not assure a result.

Second, GM overstates the number of people affected by the Second Circuit's ruling. The impact is simply that only owners and lessees of approximately 1.7 million vehicles plagued by the ignition switch defect were deprived of due process and, therefore, are not bound by the Sales Order's "free and clear" provision. Dkt. 219-4 at A-10037-10075.

D. GM's Arguments Here Have Been Thoroughly Considered And Rejected, And The Litigation Is Ongoing In The Trial Court

GM petitioned for panel or en banc rehearing. Dkt. No. 408. The court of appeals accepted two amicus curiae briefs (from the same entities now supporting the certiorari petition).[2] The full Second Circuit denied rehearing. Pet. App., 63a-64a. GM then moved to stay the mandate. Dkt. No. 446-2. Before the Ignition Switch Plaintiffs could respond, the Second Circuit denied GM's motion. Dkt. No. 453. The mandate issued on September 30, 2016. Dkt. No. 454.

Now that jurisdiction has been fully restored in the district court, the economic loss switch-defect litigation against GM is moving forward. As relevant to GM's certiorari petition, its potential successor liability (as to plaintiffs in certain states) is currently being litigated before the MDL judge, and is almost fully briefed on GM's motion for summary judgment.[3]

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[2] Dkt. Nos. 438 (National Association of Manufacturers) & 440 (U.S. Chamber of Commerce).

[3] *In re General Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (S.D.N.Y.) (Furman, J.); *see, e.g.,* Doc. No. 3617 (Ignition Switch Plaintiffs' position on successor liability).

REASONS FOR DENYING THE PETITION

I. THE NOTICE HOLDING DOES NOT CREATE A CIRCUIT SPLIT AND IS NEITHER NOVEL NOR ERRONEOUS

On the first question presented, GM merely disagrees with the lower courts' fact-bound conclusion that plaintiffs should have received actual notice. GM does not dispute that known creditors have a right to actual notice of a Section 363 bankruptcy sale impacting their interests. Old GM had contact information for millions of drivers with defective ignition switches that gave rise to liability (in some instances, killing people). Plaintiffs' rights were at stake but they had no opportunity to influence the terms of the GM restructuring.

A. GM's Disagreement With The Record On Its Knowledge Of The Defect Is No Basis For Certiorari

Preliminarily, GM contests what it knew and when as to the ignition switch defect. Its desire to revisit fact-finding cuts against certiorari and underscores that this is not an optimal procedural stage for this Court to review issues in this case. Dispositive motions have yet to be decided and are in progress in the district court. Even GM's potential successor liability (the issue that the Second Circuit has allowed simply to be argued) is unresolved on the merits.

To lay a foundation for its position that actual notice in the 2009 bankruptcy was not required, GM asserts without citation that "[s]ome Old GM employees were aware of instances in which vehicles experienced issues with airbag non-deployment, igni-

tion switches, or stalls. Only later, in approximately the spring of 2012, was it determined that an ignition-switch safety defect was the cause." Pet., 14-15 n.3. The petition even contends: "[T]here was no notice violation by Old GM in the first place." *Id.*, 17.

The record is otherwise. "The facts paint a picture," the Second Circuit summarized, "that Old GM did nothing, even as it knew that the ignition switch defect impacted consumers." Pet. App., 40a. The opinion surveyed the overwhelming evidence of an indifferent corporate culture, which then continued at GM. For over a decade, the company and its successor were aware of the ignition switch defect – from the switch's initial development to its ongoing installation and sale for years in affected vehicles.

As "early as August 2001" – before the defective switch was used in GM cars – "at least some Old GM engineers understood that turning off the ignition switch could prevent airbags from deploying." *Id.*, 17a. In "December 2005, Old GM issued a bulletin to dealers, but not to customers, warning them that 'low ignition key cylinder torque' could cause cars to turn off." *Id.* In "late 2005 through 2006, news of deaths from airbag non-deployments in crashes where airbags should have deployed reached the desks of Old GM's legal team." *Id.*

Customers complained of moving stalls and airbags that failed to deploy. There were federal regulatory inquiries and at least one police report flagging the defect. *Id.*, 39a-41a. As the Second Circuit noted, during the 2009 bankruptcy, "Old GM knew," for example, "that the defect caused stalls and had linked the airbag non-deployments to the defect." *Id.*, 40a.

When the bankruptcy sale closed in 2009, the knowledge of Old GM became the knowledge of GM. At least two dozen Old GM personnel with knowledge of the defect transferred to GM, which did not divulge any issue until the 2014 recalls. *Id.*, 12a, 15a, 19a; Dkt. No. 315 at 12. Thus, whether GM's "government owners knew about the ignition-switch defect before the sale" and acted in "unquestioned good faith" is a diversion. Pet., 28. GM itself knew and the U.S. Treasury Department did not at any time manage GM.

As federal law required, Old GM kept records (inherited by GM in 2009) of first owners of vehicles. Pet. App., 39a. Reflecting recordkeeping advances, subsequent purchasers and used car owners are also commonly tracked and identifiable by car manufacturers. As a result, GM would "necessarily know the identity of a significant number of affected owners." *Id.* After acquiring Old GM's assets, GM perpetuated the concealment by failing to provide any notice until five years after the bankruptcy. *Id.*, 19a.

Rather than "taking action," Old GM and then successor GM employees "would claim the need to keep searching for the 'root cause.'" *Id.* The court of appeals continued: "This 'search for root cause became a basis for doing nothing to resolve the problem for years.'" *Id.* (quoting Valukas Report at 9906). After acquiring Old GM in 2009, GM knew of the same defect but did not disclose it to drivers as they continued to be harmed.

The highest court in the land, especially on an interlocutory appeal, does not sit to resolve factual disputes. GM's disagreement with the evidence showing its knowledge only undermines its request

for certiorari. *See, e.g., Visa, Inc. v. Osborn*, 137 S.Ct. 289, 289-90 (2016) (dismissing as improvidently granted); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) (same).

B. On The Facts Here, The Requirement of Actual Notice To Known Creditors Flows From Bedrock Bankruptcy And Due Process Principles

Actual notice to plaintiffs of the Section 363 sale was compulsory under both bankruptcy law and due process. The Second Circuit's limited relief – the right to pursue and argue successor liability and to develop the facts for presentation to a trier of fact, with no guaranteed outcome – is anticipated by bankruptcy law. And the court of appeals correctly held that on the "peculiar" facts presented, the Fifth Amendment required GM to give identifiable owners and lessees actual notice of the bankruptcy proceeding. Pet. App., 39a-42a, 53a-54a.

Under established bankruptcy principles, "[k]nown creditors must be provided with actual written notice of a debtor's bankruptcy filing and bar claims date." *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995). A "known" creditor is "one whose identity is either known or 'reasonably ascertainable by the debtor.'" *Id.* (quoting *Tulsa Professional Collection Serv., Inc. v. Pope,* 485 U.S. 478, 490 (1988)). A "claim" in bankruptcy is broadly defined as "a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, se-

cured or unsecured." 11 U.S.C. § 101(5)(A). This certainly includes plaintiffs' claims.

Under GM's own authority, the "requisite search" for known creditors "focuses on the debtor's own books and records." *Chemetron*, 72 F.3d at 346. In light of Old GM's records, ascertaining plaintiffs' identity presented no difficulty. *See* 49 U.S.C. § 30117(b)(1).

GM relies on *Chemetron* for the proposition that a "debtor does not have a 'duty to search out each conceivable or possible creditor and urge that person or entity to make a claim against it.'" Pet., 25. But that is not this case. In its facts, *Chemetron* is not remotely analogous.

The issue there was "whether a group of former residents and occasional visitors to a neighborhood containing a toxic site were 'known' creditors entitled to actual written notice of the debtor's bankruptcy filing and bar claims date." *Chemetron*, 72 F.3d at 344. The answer, unsurprisingly, was "no." The Third Circuit was "hard-pressed to conceive of any way the debtor could identify, locate, and provide actual notice to these claimants." *Id.* at 347. Here, Old GM knew how to find its customer with defective ignition switches – automakers are called upon to find and verify their customers repeatedly of safety records.

GM also relies on a Fifth Circuit decision drawing on *Chemetron*. But, with good reason, GM in the proceedings below never cited *In re Placid Oil Co.*, 753 F.3d 151 (5th Cir. 2014). On different facts – "no instances of asbestos-related injury or illness were known" to the debtor – the plaintiffs were unknown creditors. *Id.* at 157. GM's excerpt on notice content,

cited for the proposition that the ignition switch defect did not need to be disclosed, concerned the less rigorous threshold for adequate *publication* notice. *Id.* at 158.

Discussing general principles, the Fifth Circuit, consistent with the Second Circuit opinion, stated that creditors are "known" where, as here, Old GM "knew of specific complaints or injuries." *Id.* at 156. GM disputes that it should have provided known individuals notice of the ignition switch defect. But, as a former state Attorney General emphasized in hearings shortly after GM disclosed the defect, he could not have foreseen a "material adverse fact being concealed" as "gigantic as this one." Pet. App., 52a.

On due process, the Second Circuit holding is fully consistent with and complements bankruptcy law on notifying known creditors.

Citing no authority, GM asserts that "potential claims" are not constitutionally protected property interests. Pet., 20. But, consistent with bankruptcy law, this Court settled decades ago that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause," *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), and thus also by the Fifth Amendment counterpart.

The Court "traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts," such as plaintiffs here "attempting to redress grievances" against GM. *Id.* at 429. Contrary to GM's assumption, consumers need not initiate suit for their claims to have value and constitute a property interest. A court may not deny "*potential* litigants use of established adjudicatory

procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed rights.'" *Id.* at 429-30 (emphasis added and brackets omitted).

In part, GM agrees: "Creditors may object to a Section 363 sale, and the bankruptcy court must consider those objections in deciding whether to approve the sale." Pet., 6. But due to lack of actual notice – meaning notice by mail – the Ignition Switch Plaintiffs were deprived of any chance to object and shape the sale terms.

The Second Circuit thus was faithful to "one of the most fundamental requisites of due process – the right to be heard." *Schroeder v. City of N.Y.*, 371 U.S. 208, 212 (1962). Meaningful notice and an opportunity to be heard serve "to minimize substantively unfair … deprivations of property." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

The Court's due process precedents mandated actual notice to plaintiffs. Quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), the Second Circuit observed that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Pet. App., 37a.

There was a right to actual notice here because, for both constitutional and bankruptcy purposes, the Ignition Switch Plaintiffs were known creditors. To fulfill due process in a bankruptcy proceeding, "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected in-

terests are directly affected by the proceedings in question." *Id.*, 38a. If "the debtor knew or reasonably should have known about the claims, then due process entitles potential claimants to actual notice of the bankruptcy proceedings." *Id.*

The bankruptcy court found, and the Second Circuit agreed, "that because Old GM knew or reasonably should have known about the ignition switch defect prior to bankruptcy, it should have provided direct mail notice to vehicle owners." *Id.*, 39a; *see also id.*, 42a-43a. This finding was not "clear error." *Id.*, 39a. As discussed, the bankruptcy court's factual determination, affirmed on appeal, is supported by a fulsome evidentiary record, despite GM's challenge to that record. *Id.*

GM says it did enough by providing publication notice, but this falls well short of actual notice to known individuals identifiable through GM's records. As a fallback, GM reasons that the events surrounding the bailout and bankruptcy were widely reported. By 2009, however, many Americans, including GM customers, were mired in the Great Recession (without a bailout) and not following the business news closely.

At any rate, whatever plaintiffs knew during Old GM's "'quick, surgical bankruptcy'" is irrelevant. *Id.*, 3a. Creditors have no duty "to inquire for themselves about possible court orders limiting the time for filing claims." *City of N.Y. v. N.Y., N. H. & H. R. Co.*, 344 U.S. 293, 297 (1953). They "have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred." *Id.*

In addition, constitutionally sufficient notice turns on not just the method, but the content. The Second Circuit and bankruptcy court were on solid ground in concluding that meaningful notice here had to advise the Ignition Switch Plaintiffs of the otherwise unknown (to them) safety defect giving rise to their claims. Notice is inadequate if it does not supply enough information for recipients to determine whether they possess legal rights that may be extinguished. *See, e.g., Schroeder*, 371 U.S. at 212.

Old GM was obligated, but failed, to provide that quality of notice to millions of owners and lessees. As the court of appeals explained: "While the desire to move through bankruptcy as expeditiously as possible was laudable, Old GM's precarious situation and the need for speed did not obviate basic constitutional principles. Due process applies even in a company's moment of crisis." Pet. App., 42a.

II. GM'S POTENTIAL LIABILITY UNDER UNIQUE CIRCUMSTANCES ALSO CAUSES NO CIRCUIT SPLIT OR INJUSTICE MERITING REVIEW

On the second question presented, GM seeks to foreclose prematurely a potential remedy – successor liability – that is legally supported and appropriate given the evidence adduced to date. The bankruptcy court found, and the Second Circuit affirmed, that Old GM knew or should have known of the ignition defect and hence disclosed it to those impacted. Only debts revealed, not concealed, may be discharged in bankruptcy.

As discussed, after taking over Old GM's operations in 2009, GM also knew of the defect. This awareness, like the continuity from Old GM to GM as known today, was seamless. But GM did not advise consumers of any issue until a mandatory recall in 2014. The court of appeals held only that plaintiffs, given the due process violation, cannot be bound by the Sale Order.

A. The Holding That Plaintiffs Are Not Bound By The Sale Order Due To Lack Of Notice Reflects The Mainstream Rule

GM calls the Sale Order "inviolable." Pet., 5. This is not the law and, in any event, plaintiffs' limited relief does not undo the Sale Order.

Due process "is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The court of appeals joined a wealth of decisions holding that the particular situation called for a more balanced approach – selective relief from the Sale Order without altering its terms.

The Second Circuit enforced the bargain at the heart of Section 363(f)'s "free and clear" liability shield. That is, "a completely unencumbered new beginning" is given to the "honest but unfortunate debtor." Pet. App., 39a. Bankruptcy's "vast protections" attach only if the struggling company is fully candid and transparent. *Id.* But, as with Old GM, "if a debtor does not reveal claims that it is aware of, then bankruptcy law cannot protect it." *Id.* GM makes no effort to grapple with the decision quoted here, *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991).

Instead, the petition tries to reframe the issue as whether GM was a "good-faith purchaser" – a term used 50 times – entitled to rely categorically on the Sale Order. But "good-faith purchaser" does not appear in the Second Circuit opinion. This was not at issue then and is not at issue now.

Rather, the question was whether plaintiffs have a remedy for a due process violation in a debtor proceeding. Bankruptcy law ensures that they do. The "innocence or good faith of third parties" involved in such sales does not "justify departures from due process standards in adjudicating property rights." *In re Ex-Cel Concrete Co.*, 178 B.R. 198, 204-05 (B.A.P. 9th Cir. 1995); *see also In re Fernwood Mkts.*, 73 B.R. 616, 619 (Bankr. E.D. Pa. 1987).

As relief, the Second Circuit did not scuttle the Sale Order and plaintiffs did not ask it to do so. In response to GM, the court of appeals explained that "we do not *modify* the Sale Order. Instead, we merely interpret the Sale Order in accordance with bankruptcy law." Pet. App., 35a.

Hence, contrary to GM's suggestion, this case presents no issue of an appellate court "invalidating or even modifying the terms of a sale" under Section 363 or otherwise "undoing or modifying sale orders." Pet., 1, 27. Likewise, no issue is presented of plaintiffs "abrogating the Sale Order and obtaining greater recovery than other unsecured creditors." *Id.*, 12-13.

GM implies that the specter of any further post-sale liability beyond those liabilities expressly retained would have prevented the Sale Order from finalizing. In its thorough opinion, the Second Circuit

carefully considered any delay that might have resulted and correctly concluded this point was speculative. Pet. App., 52a-53a. The federal government was committed to preserving GM. Plaintiffs were wrongly excluded from "a negotiated deal with input from multiple parties" but not them. *Id.*, 48a.

The Second Circuit's holding is unremarkable given that failure to comply with notice requirements "is by far the most frequent mistake or infirmity held to warrant vacating a confirmed sale." *In re Rounds*, 229 B.R. 758, 765 (Bankr. W.D. Ar. 1999). A "claim cannot be discharged if the claimant is denied due process because of lack of adequate notice." *DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 747 F.3d 145, 150 (2d Cir. 2014); *see also In re Johns-Manville Corp.*, 600 F.3d 135, 158 (2d Cir. 2010) (due process rights given effect by allowing party to bring independent claims against non-debtor).

Tailored to the "particular situation," *Morrissey*, 408 U.S. at 481, the Second Circuit appropriately held: "Because enforcing the Sale Order would violate procedural due process in these circumstances . . . these plaintiffs thus cannot be bound by the terms of the Sale Order." Pet. App., 55a (internal quotation marks, brackets and citation omitted).

GM's plea to disregard due process protections, for one debtor proceeding, would unsettle the law that bankruptcy judges have long applied. And again, the Second Circuit did not rewrite the Sale Order. It instead directed selective relief on "peculiar" facts as a remedy for the due process violation. *Id.*, 53a. This holding on this record does not warrant certiorari – especially where, as the Second Circuit observed, "'use of a section 363 sale probably

reached its zenith' with the GM bankruptcy." *Id.*, 23a (quoting 3 *Collier on Bankruptcy* ¶ 363.02[2] (Alan N. Resnick & Harry J. Sommer eds., 16th ed. 2013)).

GM says plaintiffs had recourse against other entities, so that "no one had to pay to fix the defect, and no one who suffered an injury on account of it lacked a remedy." Pet., 12. As GM knows, however, its conduct and the conduct of Old GM have greatly prejudiced plaintiffs' ability to recover from the GUC Trust set up to pay unsecured creditors' allowed claims in Old GM's bankruptcy.

As of March 31, 2014 – just before plaintiffs initiated suit – the GUC Trust had distributed roughly 90 percent of its assets. Pet. App., 14a. The expected value of allowed unsecured claims was $32 billion. *Id.* This was three billion dollars less than the sum necessary to trigger GM's obligation to make additional payments under the Sale Order's "accordion feature." *Id.*

By April 2015, it was "undisputed" that there were no remaining "assets in the GUC Trust not already allocated for other purposes." *Id.*, 210a. Consequently, although plaintiffs have recently filed motions for authorization to file late proofs of claim, plaintiffs' chance of recovery has been greatly compromised by the conduct of both Old GM and GM. And both GM and the GUC Trust will oppose any effort to file late proofs of claim.

More fundamentally, GM cites no authority precluding plaintiffs from proceeding against GM if they have a right to do so. The court of appeals correctly concluded that because plaintiffs are not bound by

the Sale Order, they should have the opportunity to prove liability theories against GM that they were never able to present against Old GM. *Id.*, 54a-55a.

Indeed, the finality objective in bankruptcy, deriving from statute, cannot supplant Fifth Amendment due process rights. By asserting that plaintiffs are wrongly "superimposing" constitutional protections, GM flips the hierarchy. Pet., 2. The Constitution is always supreme; all other laws must yield. U.S. Const. art. VI.

The federal government's essential role in rescuing Old GM is yet another reason to adhere to the Constitution. Everyone "'must turn square corners when they deal with the Government.'" *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 63 (1984) (quoting *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920) (Holmes, J.)). "[T]hose who seek public funds," as Old GM did to the tune of billions of dollars, must "act with scrupulous regard for the requirements of law." *Id.*; *see* Pet. App., 51a (discussing significance of GM not being "a truly private corporation").

GM insists that lack of notice caused no prejudice. But denial of plaintiffs' day in court – the right to be heard, not necessarily to prevail – goes to the structure of justice and is inherently prejudicial. Pet. App., 43a-44a & n.25 (collecting cases). The "right to be heard has little reality or worth unless one is informed that the matter is pending." *Mullane*, 339 U.S. at 314. Procedural due process violations are therefore not parsed for harmless error. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 266 (1978); *Fuentes*, 407 U.S. at 87. It makes no difference whether similar arguments or objections were made in GM's 2009

reorganization. Plaintiffs are not precluded by the Sale Order because they were not at the table when Old GM was allowed to restructure. *See Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (rejecting "virtual representation" exception to general rule against precluding nonparties).

Even if a showing were necessary, plaintiffs were prejudiced. Had they been notified as required, they could have used their collective heft to leverage relief and possibly avoid much of the litigation that GM faces today. This is just one scenario of what might have unfolded to impact the sale terms. Plaintiffs were prejudiced because it cannot be said "with any confidence that no accommodation would have been made for them in the Sale Order." Pet. App., 47a.

B. GM's Scant Authority Does Not Support Review

According to GM, the Second Circuit wrongly punished it for Old GM's violation of plaintiffs' constitutional and bankruptcy protections. The only basis for this conclusion, however, is GM's own say-so about the Bankruptcy Code and a few off-point decisions. GM's authorities do not show any error, much less highlight a nationally significant issue for Section 363 bankruptcies.

GM relies mainly on *Factors' & Traders' Ins. Co. v. Murphy*, 111 U.S. 738 (1884), and *In re Edwards*, 962 F.2d 641 (7th Cir. 1992). The first case long preceded Section 363 and the modern Bankruptcy Code, and neither case involved due process. Both decisions are inapposite for additional reasons.

In *Murphy*, the claimant was aware of her claims in bankruptcy. Her agent participated in the pro-

ceedings, they had "frequent conversations" about the claims, and he otherwise "explained to her what was going on, to which she made no dissent." 111 U.S. at 740-41. The Ignition Switch Plaintiffs, by contrast, had no opportunity to participate, much less object, in GM's bankruptcy proceeding.

In *Edwards*, Judge Richard Posner held that the creditor had *waived* any due process challenge by failing to press the argument. 962 F.2d at 644. The Seventh Circuit determined that a bankruptcy sale should not be undone where a mortgagee did not receive prior notice of the sale. *Id.* at 645. But with constitutional concerns out of the picture due to waiver, *Edwards* provides no guidance where the point is not waived.

Further, *Edwards* involved a *lien* creditor. As the bankruptcy court explained below, the "failure to give a lien creditor notice of a section 363 sale resulted in no more than a *de minimis* deprivation of property." Pet. App., 133a. GM does not contend, nor could it, that the plaintiffs' property deprivations are inconsequential.

GM warns that the Second Circuit opinion will "reach far beyond this particular bankruptcy." Pet., 34. But the only case cited as illustrative, the Lehman Brothers bankruptcy, did not involve the role and scope of due process protections. GM's few cited decisions do not call into question the court of appeals' conclusion on the second issue. That holding, like the first challenged, is legally sound. Neither warrants this Court's attention.

If there is a lesson to take from GM's exceptional reorganization, it is to respect the rights of known

creditors in a bankruptcy proceeding under both the Bankruptcy Code and the Constitution. This case is a reminder that without meaningful notice and an opportunity to be heard, no one can be bound by decisions rendered in their absence. *See, e.g., Martin v. Wilks*, 490 U.S. 755, 761-62 (1989) (collecting Supreme Court decisions).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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