No. ____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2008, during the Great Recession, General Motors Corporation (Old GM) was insolvent and nearing collapse. The only viable way to avert the demise of the domestic auto industry was for the government to form a new corporate entity and purchase Old GM's assets in a sale under Section 363 of the Bankruptcy Code. As authorized by Section 363(f), the Sale Order provided that the government-owned entity obtained Old GM's assets "free and clear" of Old GM's liabilities (other than those expressly assumed). Years after the sale closed, groups of plaintiffs sued the good-faith purchaser of Old GM's assets, seeking to impose successor liability for Old GM's alleged pre-sale wrongdoing. The plaintiffs claimed that they could strip the good-faith purchaser of its "free and clear" protection because the seller, Old GM, gave them inadequate notice of the Section 363 sale. The bankruptcy court rejected that claim, but the Second Circuit reversed and exposed the good-faith purchaser to enormous potential liability for the supposed sale notice failures of the seller.

The questions presented are:

1. Whether the Due Process Clause requires a debtor selling its assets under Section 363 to notify its creditors not only of the details of the sale, as required by Section 363, but also of the grounds for potential claims against the seller.

2. Whether a seller's failure to provide potential creditors with adequate notice of a Section 363 sale deprives the good-faith purchaser of Section 363's "free and clear" protections.

PARTIES TO THE PROCEEDING

Petitioner General Motors LLC was an Appellee/Cross-Appellant below.

Respondents Celestine Elliott, Lawrence Elliott, Berenice Summerville, and Sesay and Bledsoe Plaintiffs were Appellants/Cross-Appellees below.

Respondents Ignition Switch Plaintiffs; Ignition Switch Pre-Closing Accident Plaintiffs; State of Arizona; People of the State of California; and Groman Plaintiffs were Appellants below.

Respondents Wilmington Trust Company and Participating Unitholders were an Appellee-Cross-Appellant below.

CORPORATE DISCLOSURE STATEMENT

General Motors LLC is a Delaware limited liability company whose only member is General Motors Holdings LLC. General Motors Holdings LLC's only member is General Motors Company, a Delaware corporation with its principal place of business in Wayne County, Michigan. General Motors Company owns 100% of General Motors Holdings LLC.

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PETITION FOR WRIT OF CERTIORARI

This case emanates from one of the largest and most highly publicized bankruptcies in history. When General Motors Corporation (Old GM), the nation's largest auto manufacturer, was on the brink of collapse, the government determined that the only way to save the domestic auto industry and the countless jobs that depended on it was to purchase Old GM's assets through a sale under Section 363 of the Bankruptcy Code. Section 363 permits a good-faith purchaser—here, a new company formed and owned by the government—to obtain a debtor's rapidly deteriorating assets before the confirmation of a Chapter 11 plan, and "free and clear" of the debtor's liabilities. This "free and clear" protection assures good-faith purchasers that they can acquire the debtor's assets without also assuming the risk of successor liability for the debtor's past acts. That assurance also helps maximize the price paid for the debtor's assets, which in turn provides creditors with more substantial recoveries after the ensuing claims-resolution process. The finality of a "free and clear" sale is so fundamental to Section 363's functioning that Congress has prohibited reviewing courts from invalidating or even modifying the terms of a sale to a good-faith purchaser once consummated.

Section 363 worked as intended during Old GM's bankruptcy. Old GM's creditors received significant recovery from the sale proceeds, and the government-backed good-faith purchaser (NGMCO) used the assets it bought to build a stable business that employs hundreds of thousands of people. The government, for its part, later sold its shares in

NGMCO once markets stabilized. Now, however, seven years after the good-faith purchaser acquired Old GM's assets, and after millions of transactions have taken place in reliance on the inviolability of the Sale Order, the Second Circuit has retroactively stripped NGMCO of its "free and clear" protections. Incredibly, the Second Circuit did this not because the *good-faith purchaser* did anything wrong, but because the *seller* allegedly provided inadequate notice to certain potential creditors before consummating the Section 363 sale.

The Second Circuit reached that inverted and extraordinary outcome by way of two fundamental errors, both of which warrant this Court's review. The first was holding that the Due Process Clause demands that debtors proposing Section 363 sales provide more notice than the Bankruptcy Code requires—in other words, effectively holding Section 363 unconstitutional as applied. According to the Second Circuit, debtors must inform their potential creditors not just that a Section 363 sale is taking place (as the Code and Bankruptcy Rules require), but also of the basis for any potential claims against the debtor. The court cited no authority for that novel holding, and there is none. It is emphatically wrong, and threatens the viability of Section 363, as superimposing that constitutional notice obligation atop what the Code and Rules require would jeopardize debtors' ability to quickly sell already-distressed and rapidly deteriorating assets. That onerous requirement is also wholly disproportionate to the harm it seeks to avoid, as Section 363 sales do not extinguish creditors' claims, but instead generate proceeds for distribution to creditors in accordance

with the Code and the ensuing claims-resolution process.

The decision strayed even further afield when it held that the remedy for the *seller*'s failure to provide this notice is to impose potentially massive successor liability on the *good-faith purchaser*. Section 363 itself expressly prohibits that result, as Congress recognized that an emergency asset sale can perform its value-maximizing function only if good-faith purchasers are confident that they can truly take the assets "free and clear." Indeed, this Court has held that even a creditor who receives *no* notice of a bankruptcy sale lacks recourse against the good-faith purchaser, who bears no responsibility for any notice defects. *See Factors' & Traders' Ins. Co. v. Murphy*, 111 U.S. 738 (1884). And the Seventh Circuit has followed that holding to reject the argument that a notice defect can undo the good-faith purchaser's "free and clear" protections in a Section 363 sale. *In re Edwards*, 962 F.2d 641 (7th Cir. 1992). The decision below cannot be reconciled with either of those decisions—let alone with Congress' express prohibition on modifying a Section 363 sale after the fact to the detriment of a good-faith purchaser.

Left standing, the decision below not only will undermine a crucial aspect of one of the biggest and most important bankruptcies in history, but also will vitiate the very provisions that make Section 363 sales viable. If good-faith purchasers cannot be assured that they are purchasing the debtor's assets free and clear of its liabilities, they will demand steep discounts to offset the very risks Congress intended to eliminate, and creditors will have to settle for

meager recoveries. Meanwhile, creditors will be incentivized to follow plaintiffs' lead and ignore the Bankruptcy Code's priority scheme, jump ahead of other creditors, and pursue recovery from good-faith purchasers instead of bankruptcy estates.

In short, this case presents exceptionally important questions, and the Second Circuit's answers were exceptionally wrong. The Court should grant review.

OPINIONS BELOW

The Second Circuit's opinion is reported at 829 F.3d 135 and reproduced at App.1-62. The bankruptcy court's opinion is reported at 529 B.R. 510 and reproduced at App.65-238.

JURISDICTION

The Second Circuit issued its opinion on July 13, 2016, and denied NGMCO's petition for rehearing on September 14, 2016. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause and Section 363 of the Bankruptcy Code are reproduced at App.239-42.

STATEMENT OF THE CASE

A. Statutory Background

Section 363 of the Bankruptcy Code authorizes a debtor-in-possession to sell property before the confirmation of a Chapter 11 plan. 11 U.S.C. §363. Section 363 typically is used when the debtor has rapidly deteriorating assets that must be sold promptly to retain their value. After the sale, the

purchaser will use the assets in its own business, and the bankruptcy estate will use the sale proceeds to satisfy creditors' claims under a Chapter 11 plan. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 37 n.2 (2008). While some Section 363 sales involve discrete assets, many involve essentially the entirety of the debtor's business. Particularly in that context, the goal is to sell the assets "as quickly as possible, so that the business can continue in other hands than the bankrupt's, free of the stigma and uncertainty of bankruptcy." *In re Met-L-Wood Corp.*, 861 F.2d 1012, 1017 (7th Cir. 1988). To maximize the value of the newly purchased assets, minimize the loss of customers, and preserve jobs, the purchaser often retains many of the seller's employees. *See, e.g.*, *In re Trans World Airlines, Inc.*, 322 F.3d 283, 293 (3d Cir. 2003).

Section 363 cannot achieve its objective of maximizing the value of the estate unless purchasers are assured that they are acquiring valuable assets, not costly headaches. To that end, Section 363(f) allows good-faith purchasers to obtain a debtor's assets "free and clear" of its liabilities. This cornerstone provision is critical because purchasers would not buy the assets if doing so could expose them to the liabilities that put the seller into bankruptcy. Nor would they buy the assets if that "free and clear" protection were not inviolable. Accordingly, Congress has flatly prohibited courts from invalidating or modifying a consummated Section 363 sale to the detriment of a good-faith purchaser, even on direct appeal. 11 U.S.C. §363(m). That protection ultimately benefits the debtor's creditors as well. A Section 363 sale does not

extinguish creditors' claims against the debtor. Those claims survive the sale and attach to the proceeds it generates. And by enabling the debtor to sell its assets at maximum value, Section 363's "free and clear" protections maximize creditor recoveries from the estate.

Consistent with the fact that Section 363 sales do not extinguish creditors' claims, the Code imposes only limited notice requirements before a Section 363 sale may take place. Section 363(b)(1) requires "notice and a hearing" before a sale may be approved, and the Bankruptcy Rules require the seller to provide notice to "all creditors." Fed. R. Bankr. P. 2002(a)(2); *see also* Fed. R. Bankr. P. 6004(a). The "content of notice" must include only "the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections." Fed. R. Bankr. P. 2002(c)(1). The seller need not notify creditors of the grounds for potential claims against it. The seller generally must provide direct-mail notice to "known" creditors, but only publication notice to "unknown" creditors. *See Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995). These notice obligations fall solely on the seller; the purchaser has no notice obligation whatsoever.

Creditors may object to a Section 363 sale, and the bankruptcy court must consider those objections in deciding whether to approve the sale. Regardless of whether a creditor objects, however, its claim against the debtor survives the sale. Objectors may also ask the courts to stay an approved sale pending appeal, but if the courts decline and the sale goes

forward, Section 363(m) bars any court from undoing or altering the sale to the detriment of the good-faith purchaser.

B. Factual Background

1. The Section 363 Sale

In 2008, the domestic auto industry was in extremis. The Great Recession reduced consumers' ability to acquire credit, and rising oil prices reduced their appetite for new cars. Amidst that crisis, Old GM and Chrysler—two of the "Big Three" domestic auto manufacturers and among the largest corporations in the world—posted nine-figure losses for six consecutive quarters. That situation proved untenable. Old GM alone was responsible for a quarter-million American jobs, and hundreds of thousands more depended on its continuing vitality. Given the stakes, the government took unprecedented action, providing Old GM and Chrysler with billions of dollars in emergency loans. The loans kept the automakers afloat for a short time, but they ultimately proved insufficient. Chrysler entered bankruptcy in April 2009; Old GM followed suit in June 2009. Old GM's bankruptcy was, at the time, the fourth-largest in U.S. history.

Had Old GM simply liquidated, the results would have been "disastrous," not just "for [its] creditors," but also for "its employees, the suppliers who depend on [it] for their own existence, and the communities in which [it] operates." *In re Gen. Motors Corp.*, 407 B.R. 463, 474 (Bankr. S.D.N.Y. 2009). The only viable option was to sell Old GM's core assets through a Section 363 sale, so they could be used to operate an auto business "free of any entanglement

with the bankruptcy." *Id.* at 480. And the only entity willing and able to purchase those assets was the government. To do so, the government formed a new corporate entity called NGMCO, Inc., and used that entity to purchase the assets at a bankruptcy-court-supervised auction. App.6-7. When the sale closed, three entities owned the vast majority of NGMCO common stock: the U.S. Treasury (60.8%); the governments of Canada and Ontario (11.7%); and a trust for UAW retirees (17.5%). *In re Gen. Motors*, 407 B.R. at 482. The remaining 10% was earmarked for subsequent distribution to Old GM's creditors. *Id.* at 483.

The government owners agreed that NGMCO would assume certain specific Old GM obligations, including to honor certain warranties and satisfy claims arising out of accidents involving Old GM vehicles that took place after the sale. App.11-12. They were not willing, however, for NGMCO to take on any additional liabilities. Instead, as authorized by Section 363(f), NGMCO insisted on acquiring the assets "free and clear" of liabilities not expressly assumed, including successor-liability claims. App.9. This "free and clear" provision "was integral to resolving Old GM's bankruptcy," as it assured the government NGMCO could acquire Old GM's assets without also acquiring Old GM's massive actual and potential liabilities. App.26.

Old GM, as the seller, was responsible for providing notice of the sale to its creditors. App.10-11. Old GM sent direct-mail notice to its "known" creditors—*i.e.*, anyone who had contracted with or filed a demand or claim against it—and provided

notice to any "unknown" creditors in several major publications. *Id.* Both notices were virtually identical, and both were approved by the bankruptcy court. The notices explained that "a purchaser sponsored by the United States Department of the Treasury" would purchase Old GM's assets "free and clear of all liens, claims, encumbrances, and other interests." Dkt.92-4 at 2. They also explained when and where the sale would take place and how to bid or object. The notices were supplemented by more than 1,250 news stories about Old GM's bankruptcy and the impending sale.

Recipients of both forms of notice, ranging from consumer organizations to state attorneys general to accident victims, objected to the sale, including to its "free and clear" provision. In their view, NGMCO should have been required to assume all consumer liabilities, including any claims owners of Old GM vehicles might later bring based on Old GM's conduct. Some objections precipitated limited concessions; in particular, the government agreed to allow NGMCO to assume Old GM's liability for state "Lemon Law" claims. But the government held fast in refusing to allow NGCMO to assume additional Old GM liabilities. App.11-12.

After considering and rejecting hundreds of objections, including strenuous objections to the "free and clear" provision, the bankruptcy court approved the sale. In doing so, the court expressly found that NGMCO was "a good faith purchaser." *In re Gen. Motors*, 407 B.R. at 494. Various objectors sought a stay pending appeal, which the bankruptcy court denied. *In re Gen. Motors*, 409 B.R. 24 (Bankr.

S.D.N.Y. 2009). The objectors sought an emergency stay from the district court, which also turned them down. *In re Gen. Motors*, 2009 WL 2033079, at *1-2 (S.D.N.Y. July 9, 2009). The sale then closed on July 10, 2009.

Although Section 363(m) barred courts from undoing or altering the sale terms at that point, some objectors appealed nonetheless. First, individuals pressing product-liability claims against Old GM based on pre-sale accidents tried to persuade the bankruptcy court that NGMCO could not obtain Old GM's assets "free and clear" of its liabilities. The bankruptcy court disagreed, and the district court held their appeal moot because the sale had closed. *In re Motors Liquidation Co.*, 428 B.R. 43 (S.D.N.Y. 2010). Second, one objector tried to escape the Sale Order by arguing that NGMCO was not a good-faith purchaser, but the district court disagreed, finding nothing that "casts any doubt on [NGMCO's] integrity or good faith." *In re Motors Liquidation Co.*, 430 B.R. 65, 79 (S.D.N.Y. 2010). The court also rejected the argument that Old GM provided constitutionally inadequate notice under the Due Process Clause, finding that "the record clearly demonstrates that adequate notice was provided." *Id.* at 99. The objector appealed, and the Second Circuit dismissed the appeal as equitably moot. Mot. Order, *In re Motors Liquidation Co.*, No. 10-4882-BK (2d Cir. July 28, 2011).

Over the next several years, the bankruptcy court managed Old GM's Chapter 11 case. App.12. Pursuant to the confirmed plan, Old GM paid secured and other priority claims in full with, *inter*

alia, the proceeds of the Section 363 sale. App.13. Old GM (and its successor, GUC Trust) also made distributions on allowed unsecured claims from the sale proceeds. Those creditors receive quarterly distributions from GUC Trust on a pro rata basis, which include both NGMCO securities and "units" of the trust. App.12-13.

NGMCO, which later became known as General Motors Company,[1] had its initial public offering in November 2010, well after the sale closed and Section 363(m) foreclosed any possibility of undoing it. The U.S. government gradually sold its shares over the next three years, selling the last of its stake in December 2013. Millions of transactions have taken place over the past six years in reliance on the terms and inviolability of the Sale Order.

2. The Ignition-Switch Defect and the Ensuing Class Actions

In 2014, NGMCO informed the National Highway Traffic Safety Administration that certain vehicles manufactured by Old GM had defective ignition switches. App.14. In accordance with its covenant to comply with Old GM's recall obligations, NGMCO recalled all affected vehicles, offering to replace the defective ignition switches for free. App.15. Remedies also existed for anyone who suffered a personal injury on account of an accident caused by the defect. If the accident pre-dated the sale, the injured party had a remedy against Old

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[1] For ease of reference, the petition refers to NGMCO, General Motors LLC, and General Motors Company (petitioner's parent) collectively as NGMCO.

GM/GUC Trust, with its claim to be paid on the same pro rata basis as any other unsecured creditor. If the accident post-dated the sale, the injured party had a remedy against NGMCO, which expressly assumed Old GM's liabilities for claims arising out of post-sale accidents. App.68 n.4. Accordingly, no one had to pay to fix the defect, and no one who suffered an injury on account of it lacked a remedy.

Nonetheless, shortly after the recall, several groups of plaintiffs filed class-action lawsuits relating to the defect—and filed them against NGMCO, seeking to hold it liable through exactly the kinds of "successor-liability" claims that the "free and clear" provision of the Sale Order precludes. Most of the plaintiffs fall into two groups. The "Economic Loss Plaintiffs" allege that even though NGMCO fixed ignition-switch defects for free, the defect caused them "economic loss" by reducing the value of their Old GM vehicles. App.20. According to these plaintiffs, their claims are worth "$7 to $10 billion." *Id.* The "Pre-Sale Accident Plaintiffs" are individuals who were in accidents before the Section 363 sale that allegedly were caused by the ignition-switch defect. *Id.* These plaintiffs unquestionably had "the right to assert [their] claims against Old GM (the only entity that was in existence at the time their accidents took place)." App.69. But they strategically decided to file suit against NGMCO instead of GUC Trust after learning of the defect, in hopes of abrogating the Sale Order and obtaining

greater recovery than other unsecured creditors. App.103-04.[2]

In all, over 100 class actions were filed, most of which involve Economic Loss Plaintiffs and have been consolidated in the Southern District of New York. *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (S.D.N.Y.). When plaintiffs filed their lawsuits, GUC Trust was (and is) still making distributions. App.102-03. In October 2014, after GUC Trust announced that it was planning to make a further distribution, plaintiffs' counsel advised the trust that plaintiffs were "known potential contingent beneficiaries of the GUC Trust" and asked it to "not make any further distributions." App.103. The trust replied that it would proceed with the distribution absent a court order. *Id.* For "admitted strategic reasons," App.103-04, plaintiffs neither sought a court order nor filed claims against GUC Trust.

3. The Bankruptcy Court Proceedings

NGMCO asked the same bankruptcy court judge who approved the Sale Order to enforce its "free and clear" provision by enjoining plaintiffs' successor-liability claims. NGMCO explained that while "it had voluntarily undertaken … an array of Old GM

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[2] The other two groups of plaintiffs are "Used Car Purchasers"—*i.e.*, individuals who purchased used Old GM vehicles after the Section 363 sale—and "Non-Ignition-Switch Defect Plaintiffs"—*i.e.*, individuals whose Old GM vehicles were recalled for defects other than the ignition-switch defect. App.20. Both groups are pursuing the same types of claims as the Economic Loss Plaintiffs.

liabilities," the Sale Order blocked any other claims. App.68, 71.

Plaintiffs did not contend that they had pled around the Sale Order; nor did they dispute that the order, by its terms, barred their successor-liability claims. Instead, they argued that enforcing the order against them would violate their constitutional right to procedural due process. In their view, Old GM knew enough about the ignition-switch defect before the sale that it should have treated plaintiffs as "known" creditors entitled to direct-mail notice. Moreover, in their view, they were entitled not just to direct-mail notice of the sale, but also to notice of the *defect*. And rather than simply ask to be allowed to file late claims to share in the sale proceeds like other unsecured creditors, plaintiffs claimed that the remedy for this purported constitutional violation by the *seller* (Old GM) should be to strip the *good-faith purchaser* (NGMCO) of its "free and clear" protection under the Sale Order. App.21.

The bankruptcy court rejected plaintiffs' arguments and enforced the Sale Order to enjoin their claims insofar as they arose from Old GM's conduct. According to the court, Old GM knew enough about the ignition-switch defect that it should have issued a recall notice pursuant to the National Traffic and Motor Vehicle Safety Act before the sale. App.145-52.[3] But the court found that this violation

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[3] The bankruptcy court purported to base this holding on the parties' stipulated facts, but the stipulated facts state that some Old GM employees were aware of instances in which vehicles experienced issues with airbag non-deployment, ignition switches, or stalls. Only later, in approximately the spring of

did not prejudice plaintiffs, as they failed to explain "why they would have, or even *could* have" persuaded NGMCO to assume *their* successor-liability claims when they concededly made no arguments different from those considered and rejected by the bankruptcy court when it approved the sale over the objections of other creditors seeking to preserve successor-liability claims. App.167-69. The court further found that it "would not have disapproved the 363 Sale or conditioned its approval on modifications to the carefully negotiated restructuring to favor one or more groups seeking special treatment." App.170-71.

4. The Second Circuit's Decision

The Second Circuit reversed. Like the bankruptcy court, it found that Old GM committed a notice violation. Unlike the bankruptcy court, however, the Second Circuit did not ground this violation in the Safety Act or any other recall obligation. Instead, the court reasoned only that Old GM knew enough about the ignition-switch defect that it should have treated plaintiffs as "known" creditors and given them direct-mail notice, rather than the publication notice plaintiffs undisputedly received. App.47.

In determining whether this purported violation caused plaintiffs any prejudice, however, the court did not ask whether plaintiffs would have successfully objected to the sale had they learned of it by mail rather than by publication. Instead, the

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2012, was it determined that an ignition-switch safety defect was the cause. NGMCO has since acknowledged that the recall should have been initiated at that time.

court asked whether plaintiffs would have successfully objected had "Old GM disclosed the ignition switch defect." App.47. And in direct contradiction to the findings of the bankruptcy judge who presided over the sale and the Treasury Department's testimony during the sale proceedings that NGMCO would not assume any additional liabilities, the court concluded that there was "a reasonable possibility that plaintiffs could have negotiated some relief from the Sale Order." App.53.

Although the only constitutional violation the court found was by *Old GM*, the remedy it imposed was to strip *NGMCO* of its "free and clear" protection under the Sale Order. App.54-55. The court did not explain that non-sequitur or make any effort to square it with Section 363(m)'s absolute protections for good-faith purchasers. Nor did it explain why its conclusion that plaintiffs might have obtained "some relief" from the Sale Order entitled plaintiffs to pursue *complete* relief from NGMCO.

REASONS FOR GRANTING THE PETITION

The decision below essentially holds Section 363 unconstitutional as applied, and eviscerates the well-established and statutorily prescribed rule that a good-faith purchaser takes title "free and clear." That alone would be enough to merit plenary review. But the decision also threatens to undermine one of the largest bankruptcies in history, and to deprive bankruptcy estates large and small of a critical tool for protecting creditors by selling assets expeditiously before the dynamic that put the debtor in bankruptcy further erodes their value. The need for this Court's review is thus truly imperative.

Section 363 is an indispensable tool for maximizing the value of bankruptcy estates, and its sale notice requirements are well settled. First and foremost, all agree that only *sellers* have notice obligations; purchasers have none. That alone renders the decision to punish the good-faith purchaser for a notice violation *by the seller* deeply flawed and contrary to settled law. But the decision below is all the more indefensible because there was no notice violation by Old GM in the first place. The Second Circuit concluded otherwise based on a fundamental misunderstanding of the role Section 363 plays in the course of a bankruptcy. Seemingly convinced that a Section 363 sale extinguishes creditors' claims, the court reached the erroneous conclusion that the Constitution requires notice that goes far beyond what the Bankruptcy Rules specify—notice not just of the Section 363 sale, but also of creditors' potential claims against the debtor. That decision essentially holds Section 363 and the related Bankruptcy Rules unconstitutional as applied.

In reaching that mistaken conclusion, the Second Circuit lost sight of Section 363's role in the overall scheme of the Code. Unlike other bankruptcy proceedings, a Section 363 sale does not extinguish creditors' claims. Creditors may assert their claims against the sale proceeds, and will recover more than they would have if the sale had not occurred and the estate's assets had further deteriorated. The Bankruptcy Rules thus provide for relatively streamlined notice, and Congress even took the extraordinary step of limiting direct appeals of the sale's validity, all toward the end of maximizing the sale's proceeds to the ultimate benefit of creditors.

While additional safeguards apply before claims may be extinguished in the ensuing Chapter 11 proceedings, Congress provided streamlined protections that precisely fit the distinct role of Section 363 sales. The Second Circuit's determination, years after the fact, that the Due Process Clause requires more is antithetical to Congress' policy decisions embodied in provisions like Sections 363(b)(1) and (m). Requiring a debtor, amidst the urgency of an emergency asset sale, to issue notices that identify every potential claim that might someday be brought against it would cause untold delay and defeat Section 363's core objective of facilitating expeditious sales at prices that will provide the greatest benefit to creditors.

But even if the Second Circuit were correct that Old GM failed to comply with its due process obligations, nothing in bankruptcy law, the Constitution, or common sense supports the court's decision to remedy the seller's mistake by punishing the good-faith purchaser (NGMCO). In fact, Section 363(m) expressly prohibits that result, as do this Court's decision in *Factors'* and the Seventh Circuit's decision in *Edwards*. Tellingly, the Second Circuit provided no explanation for how it arrived at its profoundly misguided remedy. Instead, the court just proceeded as if there were no meaningful difference between the seller and the good-faith purchaser. That is plainly wrong as a matter of fact and law, and is impossible to reconcile with Section 363's paramount protections for a good-faith purchaser, which the government-owned NGMCO unquestionably was.

The decision below is supremely unfair not just to NGMCO, but also to stakeholders in both Old GM's bankruptcy and NGMCO. The Bankruptcy Code ensures that Old GM's unsecured creditors recover only against the bankruptcy estate, only in accordance with the Code's priority scheme, and only on a pro rata basis. The decision below allows plaintiffs—*and plaintiffs alone*, among the universe of unsecured creditors—to circumvent the priority scheme, jump to the front of the line, and seek payment in full from the good-faith purchaser. And any recovery against NGMCO will directly harm the thousands of innocent shareholders who purchased stock on the understanding that NGMCO could not be held liable for Old GM's wrongdoings.

Those manifestly unjust results underscore the Second Circuit's fundamental error and the pressing need for this Court's intervention. Section 363 sales will work only if they are expeditious and truly final. By imposing unprecedented notice obligations years after the fact, the decision below ensures they will be neither. And by allowing plaintiffs to strip purchasers of their free and clear protections for the supposed sins of the seller, the decision threatens to destroy the efficacy of Section 363 for future bankruptcies big and small. There is always a temptation, after the Bankruptcy Code has worked as intended and averted the disaster of an immediate liquidation, to revisit matters and extract more value for creditors. But a host of precedents and statutory provisions, *e.g.*, Section 363(m), stand as an obstacle, lest the success of the last Section 363 sale eliminate the tools necessary to avert the next disaster. By failing to resist that temptation, the decision below

not only conflicts with precedent and statute, but also deprives estates of a critical tool for maximizing creditor recovery. The decision merits this Court's immediate review.

I. The Decision Below Imposes A Novel And Unjustifiable Constitutional Notice Requirement.

Under long-settled law, a debtor who seeks to sell its assets through a Section 363 sale need only provide its known and unknown creditors with notice of the sale. The debtor does *not* have to provide either with notice of their potential claims against it. That is not just a matter of custom; the "content of notice" debtors must provide before an asset sale is spelled out in the Bankruptcy Rules: The notice need only "include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections." Fed. R. Bankr. P. 2002(c)(1). Neither the Rules nor the Code entitles creditors to notice of their claims—whether existing or potential—against the debtor. And with good reason, as Section 363 sales do not extinguish those claims; to the contrary, they maximize the value of the estate that will pay those claims in the ensuing Chapter 11 proceedings. Imposing costly and unwieldy notice obligations would threaten the time-sensitive transactions Section 363 contemplates—and do so to the detriment of creditors.

Yet according to the decision below, even though *the Bankruptcy Rules* entitle creditors only to notice of the sale, *the Due Process Clause* entitles them to much more: notice of all claims about which "the debtor knew or reasonably should have known."

App.38. In other words, according to the Second Circuit, a severely distressed debtor cannot sell its dissipating assets through a Section 363 sale without first affirmatively inviting claims against it, and indeed advising potential claimants of the claims they might bring.

That the Second Circuit imposed such an obligation is clear from how it analyzed the due process issue. While the court purported to rest its holding on whether plaintiffs were "known" creditors entitled to direct-mail notice or "unknown" creditors entitled to publication notice, it grounded its holding in its belief that "the outcome of the §363 sale proceedings [might not] have been the same *had Old GM disclosed the ignition switch defect*." App.47 (emphasis added). Thus, according to the Second Circuit, the problem was not just that plaintiffs did not receive notice of the sale by mail. Indeed, that could not possibly have been the problem, as plaintiffs have never disputed that they (like nearly every other "sentient American," *In re Gen. Motors*, 2009 WL 2033079, at *1) were aware of the sale, and they cannot plausibly have been prejudiced by learning of it by publication rather than by mail. Instead, according to the Second Circuit, the problem was that plaintiffs were not given notice of *the defect*. But neither the Code nor the Rules entitles potential creditors to notice of potential *claims*. Accordingly, the Second Circuit's decision can only be understood as imposing on Old GM a freestanding *constitutional* obligation to provide that much more extensive notice.

That conclusion is both unprecedented and wrong. The notice requirements of procedural due process are not particularly demanding in any context. Notice need only be "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." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). That inquiry is inherently context-specific and must be sensitive to all interests at stake. *Id.* The balance of interests in the Section 363 context weighs decidedly in favor of streamlined notice. Section 363 sales do not extinguish creditors' claims; claims resolution is a separate process with separate notice requirements. Section 363 sales thus are not focused on the merits of any creditor's claim; they are simply focused on whether the sale should go forward. Moreover, they are focused on the sale's benefits to the creditor class as a whole; indeed, the whole point of quickly selling the assets is to maximize their value so the estate will have more money to pay its creditors.

Precisely because time is of the essence in a Section 363 sale, requiring the debtor to "search out each conceivable or possible creditor and urge that person or entity to make a claim against it," *Chemetron*, 72 F.3d at 346, before consummating the sale would hurt creditors far more than any notice imperfections. Indeed, the potential harm to creditors who wanted more detailed notice is dwarfed by the harm to the creditor class as a whole if the delay caused by onerous notice obligations reduces the value of the assets or, worse still, forces a fire-sale liquidation. Accordingly, this is plainly a context

in which "reasonable risks" that some creditors might not receive all the notice they want "are justifiable." *Mullane*, 339 U.S. at 319.

This is a case in point. Despite the best efforts of two national governments, Old GM faced immediate liquidation. Before the sale, "[t]he cash bleeding was brutal; Old GM suffered negative cash flow of $9.4 billion in the first quarter of 2009 alone." App.86. "Without a very quick end to the bleeding, Old GM would [have] plunge[d] into liquidation," which would have "result[ed] in the loss of over 200,000 jobs at Old GM alone, and grievous loss to the approximately 11,500 vendors, with more than 500,000 workers, in the Supplier Chain." App.86-87. Immediate liquidation would have resulted "in virtually no recovery for any of Old GM's prepetition creditors," let alone for plaintiffs here. App.87. Halting the sale process while Old GM was losing millions of dollars a day so it could investigate all varieties of potential claims and send direct-mail notice to *70 million* vehicle owners, describing any and all claims they might someday try to bring, would have accelerated the decline of Old GM's already-depleted assets and sharply increased the likelihood of immediate liquidation.

The Second Circuit seemed to think that the extensive extra-Code notice obligation it imposed followed from the broader policies of the Bankruptcy Code. As the court put it, the "vast protections" of Section 363's "'free and clear' provisions" should "act as liability shield" for "a debtor" only if the "debtor reveals in bankruptcy the claims against it." App.38-39. That profoundly flawed reasoning reveals the

court's fundamental misconception of Section 363. Section 363 does not give the *debtor* a "fresh start" or a "liability shield." The "free and clear" provision protects only the *good-faith purchaser*; the debtor just employs Section 363 to sell its assets expeditiously—which inures to the ultimate *benefit* of creditors because the debtor *retains* all liabilities that the purchaser is unwilling to assume. Those liabilities will be satisfied or extinguished only through the ordinary Chapter 11 proceeding that follows, with its own distinct and more rigorous notice requirements. Section 363's more limited notice requirements, by contrast, follow its function: to enable expeditious sales that benefit creditors without extinguishing their claims. The Second Circuit's extra-Code protections are thus wholly out of place in this context.

Indeed, even in contexts where (unlike here) a creditor alleges constitutionally deficient notice of a proceeding that *did* extinguish its claim, courts have refused to require the claims-based notice that the decision below demands. For instance, in *In re Placid Oil Co.*, 753 F.3d 151 (5th Cir. 2014), creditors argued that they could not be barred from bringing asbestos-related claims because the debtor knew that its employees had been exposed to asbestos but did not notify them before the cut-off date for asserting claims. The Fifth Circuit rejected that due process argument, concluding that it had "never required bar date notices to contain information about specific potential claims," and "declin[ing] to articulate a new rule that would require more specific notice." *Id.* at 158. Likewise, in *Chemetron*, the debtor knew that the community surrounding its toxic site was exposed

to radiation but did not notify individuals who had not yet suffered identifiable injuries. The Third Circuit rejected the plaintiffs' due process arguments, concluding 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.'" 72 F.3d at 346-47.[4]

This case should have followed *a fortiori* from *Placid Oil* and *Chemetron*. If, as those courts held, due process does not require creditors to be informed of potential claims even when failure to assert those claims will *extinguish* them, then due process certainly does not require Section 363 sale notices to inform creditors of potential claims that the sale will not extinguish. Yet the Second Circuit, without a word about creditors' recourse to the sale proceeds, or any deference to the bankruptcy court's findings about "Old GM's precarious situation and the need for speed," App.42, superimposed a brand-new constitutional obligation that conflicts with the very purpose of a Section 363 sale. And to make matters worse, the court found the violation of this purported obligation *prejudicial* for the flimsiest of reasons, essentially deeming it sufficient that the outcome *might* have differed in some unidentifiable way had plaintiffs known of the defect. The court reached that conclusion, moreover, even though the

[4] As those decisions confirm, the Second Circuit was equally wrong to classify plaintiffs as "known" creditors; most plaintiffs' claims are not "based on an actualized injury" that existed pre-sale. *Placid Oil*, 753 F.3d at 156. Indeed, even taking their allegations at face value, it is far from clear that the Economic Loss Plaintiffs have *ever* suffered any legally cognizable injury.

bankruptcy judge, who actually presided over the Section 363 sale and rejected all the same arguments when made by other creditors seeking to preserve their potential successor-liability claims, expressly found exactly the opposite. That holding cannot be reconciled with decisions rejecting the same arguments in contexts where claims are actually extinguished. Left standing, it threatens the viability of Section 363 sales as an efficient and effective mechanism that benefits debtor, purchaser, and creditor alike.

II. The Decision Below Erroneously Punishes A Good-Faith Purchaser For The Seller's Purported Notice Failings.

Even if Old GM failed to comply with its due process obligations, nothing in bankruptcy law, the Constitution, or common sense supports the Second Circuit's decision to remedy the seller's mistake by punishing the innocent good-faith purchaser. Indeed, the Second Circuit did not even try to reconcile that remarkable holding with Section 363 or the Bankruptcy Code. Instead, perhaps confused by the reality that both Old GM and NGMCO sell GM-branded vehicles (or implicitly adopting the demonstrably wrong premise that NGMCO was a successor to Old GM), the court just proceeded as if it were obvious that the remedy for a notice violation by the seller is to strip the good-faith purchaser of its "free and clear" protections. That unprecedented holding is wrong at every turn: It is irreconcilable with the text and purpose of Section 363; it conflicts with decisions from this Court and the Seventh Circuit; and it allows plaintiffs to circumvent the

Bankruptcy Code's priority scheme, to the ultimate detriment of other creditors.

In Section 363, Congress "deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012). Recognizing the near-impossibility of finding a buyer who would be willing to pay anything close to fair market value for an insolvent debtor's assets if the debtor's liabilities necessarily came with them, Congress authorized good-faith purchasers to obtain a debtor's assets "free and clear" of those liabilities, so long as certain conditions (undisputed here) are met. 11 U.S.C. §363(f). That "free and clear" protection is no minor detail. Without it, purchasers—if they materialized at all—would insist on steep discounts to offset the risk of future liability for the seller's past wrongs, *In re Gucci*, 126 F.3d 380, 387 (2d Cir. 1997), which would dramatically diminish the value of the estate to the detriment of creditors, *In re UNR Indus., Inc.*, 20 F.3d 766, 770 (7th Cir. 1994).

Congress also recognized that Section 363 could perform its value-maximizing role only if good-faith purchasers are confident that their "free and clear" protections are inviolable. Congress accordingly prohibited courts from undoing or modifying sale orders to the detriment of good-faith purchasers once a sale has been consummated. 11 U.S.C. §363(m). Absent a stay, a challenger to the sale may not even obtain relief through a direct appeal. *Id.* That extraordinary restriction underscores the unique importance of finality in this context. Once the sale is consummated, the "bona fide purchaser … gets

good title," full stop. *Edwards*, 962 F.2d at 645. It can then use the purchased assets without the lingering fear of being hauled into court by plaintiffs seeking to hold it accountable for the seller's wrongs. And third parties dealing with the good-faith purchaser have the same assurance, thus enhancing the purchaser's ability to successfully utilize the assets.

The decision below is impossible to reconcile with those clear statutory mandates and the uniquely important interest in finality they serve. There is no question that NGMCO was a good-faith purchaser. A district court expressly found as much, *see In re Motors Liquidation*, 430 B.R. at 79, and plaintiffs have never suggested that NGMCO's government owners knew about the ignition-switch defect before the sale. Yet despite the unquestioned good faith of the government-owned purchaser, the decision below exposes NGMCO to potentially billions of dollars of liability for harms it did not even know *existed* when it purchased Old GM's assets "free and clear" of exactly those kinds of liabilities. And the decision does so not on direct appeal, but years after the fact, after countless transactions have proceeded in reliance on the finality accorded the Section 363 sale. Worse still, the decision allows this extraordinary reopening not because of anything *NGMCO* did wrong, but because *Old GM* purportedly failed to provide plaintiffs with adequate notice.

Not only does that result squarely conflict with the plain terms of Section 363; it also conflicts with this Court's decision in *Factors'* and the Seventh Circuit's decision in *Edwards*, both of which confirm

that the remedy for a notice violation by the seller is decidedly *not* to impose liability on the good-faith purchaser. In *Factors'*, the Court considered a bankruptcy sale that extinguished the liens of several mortgagees, one of whom (Murphy) concededly received *no notice* of the sale. 111 U.S. at 740-41. Upon learning of the mistake, Murphy argued that her lien should continue to encumber the property because of the notice defect, meaning the good-faith purchaser would not take title "free and clear." *Id.* This Court rejected that contention out of hand. Even though Murphy received no notice of the sale, and that sale (unlike a Section 363 sale) actually extinguished her lien, this Court found it "impossible to shut one's eyes to the injustice" of allowing her to maintain her lien against the good-faith purchaser's property and thus obtain priority over similarly (or better) situated lienholders. *Id.* at 741-42. Instead, Murphy had only two options: (1) ratify the sale and accept her share of the proceeds, or (2) demand a new sale of the property, "subject to the rights of all parties as they stood before the other sale." *Id.* at 742-43.

Following *Factors'*, the Seventh Circuit applied the same rule to Section 363 sales. *Edwards*, 962 F.2d 641. The debtor in *Edwards* sold its property "free and clear" of all liens pursuant to Section 363, but failed to notify the second mortgagee. That mortgagee argued that this notice defect allowed it to circumvent the sale order's "free and clear" provision and obtain a lien on the good-faith purchaser's assets. *Id.* at 642-43. The Seventh Circuit rejected that argument, confirming that "a bona fide purchaser at a bankruptcy sale gets good title," and

explaining that finality "would mean rather little if years after the sale a secured creditor could undo it by showing that through some slip-up he hadn't got notice." *Id.* at 645. As in *Factors'*, the mortgagee's options did not include a remedy against the innocent good-faith purchaser. Nor could they, as "the liquidation of bankrupt estates will be impeded if the bona fide purchaser cannot obtain a good title, and creditors will suffer." *Id.*[5]

The decision below squarely conflicts with those decisions. Indeed, if anything, this case should have followed *a fortiori* from *Factors'* and *Edwards*, as the creditors in those cases received *no* notice of the sale. Here, by contrast, plaintiffs have never disputed that they knew of the sale; they are just complaining that they were entitled to notice of something more—namely, information about specific claims they may have had. They were not entitled to that extensive, extra-Code notice, but even if they were, *Factors'*, *Edwards*, and Section 363 all foreclose their effort to use the seller's inadequate notice to impose liability on the good-faith purchaser. And with good reason, as any other result not only would be fundamentally unfair to the purchaser, but also would defeat the Bankruptcy Code's "main purpose" of "secur[ing] an equal distribution of an insolvent debtor's property among all his creditors." *Factors'*, 111 U.S. at 742.

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[5] Notably, the mortgagee sought relief pursuant to Rule 60(b), which the court concluded "must be interpreted in light of" "[t]he strong policy of finality of bankruptcy sales embodied in section 363(m)." *Edwards*, 962 F.2d at 645. Rule 60(b) thus provides no better avenue for relief in this context than a direct appeal.

This case is illustrative. Old GM creditors who timely asserted their claims were required to abide by the Code's priority scheme, subordinating their claims to higher-priority creditors and settling for pro rata recovery from the limited remaining assets of the bankruptcy estate. Under the decision below, however, plaintiffs *alone* get to bypass those hurdles, jump to the front of the line, and seek payment *in full* from the good-faith purchaser. Worse still, they get to do so at the expense of the very mechanism that was used to pay other unsecured creditors, who received NGMCO common stock to satisfy their claims. App.12-13. That manifestly unjust result plainly "subvert[s] the specific priorities which define Congressional policy for bankruptcy distribution to creditors." *Trans World*, 322 F.3d at 292. Indeed, it does not even comport with the Second Circuit's own findings, as the court found only "a reasonable possibility that plaintiffs could have negotiated *some relief*," not that they could have negotiated *complete* relief, had they known about the defect before the sale. App.53 (emphasis added).

While the Second Circuit never explained how it arrived at its profoundly inequitable remedy, its decision appears to be the product of two fundamental mistakes. First, as noted, the court seemed to labor under the misimpression that Section 363's "free and clear" provisions "act as liability shield" for "*a debtor*." App.38-39 (emphasis added). Indeed, the court expressed concern that foreclosing plaintiffs' claims against NGMCO might "reward debtors who conceal claims against potential creditors." App.42. As explained, *supra* pp.23-24, that is just flat wrong. Section 363(f)'s "free and

clear" provision protects *purchasers*, not debtors. Conditioning the good-faith purchaser's "free and clear" protections on whether *the debtor* was "forthright," App.39, gets matters exactly backwards: If the debtor/seller really did violate a disclosure obligation, the purchaser would be a *victim*, as the undisclosed information could have adversely impacted the price paid for the seller's assets. Punishing the good-faith purchaser for the seller's error is a non-sequitur.

The Second Circuit also seemed to think the Section 363 sale was something less than an arms-length transaction, and that it accordingly made sense to punish NGMCO for Old GM's mistakes. But Old GM and NGMCO are not one and the same.[6] NGMCO did not even exist until the government created it in 2009, and it did not take possession of Old GM's assets or hire any employees until after the sale. Thus, even accepting the lower courts' erroneous finding that Old GM knew or should have known of the safety defect and the risks it posed, that knowledge could not possibly be imputed to NGMCO until after the sale. Nor is it relevant, as the Second Circuit seemed to think, that NGMCO now operates a business similar to the one operated by Old GM and retained many of Old GM's employees. That sort of overlap is commonplace—and salutary—following

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[6] Nor, contrary to the Second Circuit's characterizations, App.4, 8, 11, 23, is NGMCO the "successor" to Old GM. The only "successor" to Old GM is GUC Trust, a distinct entity with distinct interests separately represented in this litigation. *See In re Motors Liquidation Co.*, 462 B.R. 494, 497-98 (Bankr. S.D.N.Y. 2012).

Section 363 sales, *see, e.g.*, *Trans World*, 322 F.3d at 293, especially when substantially all the debtor's assets are sold. Thus, to the extent the Second Circuit thought NGMCO shared some of the blame for the deficient pre-sale notice, once again, that is inexplicable.

In short, the Second Circuit effectuated its desired result by claiming a power that Section 363 does not provide. While the statute allows a bankruptcy court to refuse to approve a Section 363 sale, it *does not* allow courts to force purchasers to take on liabilities they did not agree to assume. But the Second Circuit exercised just that power here, and it did so well after NGMCO had lost the opportunity to walk away from the sale or renegotiate other terms. The unfairness of that one-sided amendment to the Sale Order vividly illustrates why Congress has taken great pains to assure that Section 363 sales are, in fact, final. The Second Circuit's failure to abide by that mandate effectively writes Congress' protections for good-faith purchasers out of the statute. Indeed, it cannot be understood as anything other than a *sub silentio* holding that Section 363 is unconstitutional as applied.

III. This Case Presents Exceptionally Important Questions.

The questions presented are exceptionally important, both for this case and for all Section 363 cases. As to this case, by allowing millions of claimants to retroactively abrogate the Sale Order and press forward with successor-liability claims seeking billions of dollars from NGMCO, the decision

below threatens to undermine the government's rescue of the domestic auto industry. Any recovery would come at the expense of innocent NGMCO shareholders who purchased their shares, in some cases from the government, on the understanding that this distinct entity could not be held liable for the wrongs of Old GM. Allowing plaintiffs to ignore the express terms of the sale to the detriment of the good-faith purchaser would inflict substantial harm on NGMCO and its innocent shareholders, a manifestly unjust result with considerable constitutional implications of its own. *Cf. United States v. Winstar Corp.*, 518 U.S. 839 (1996).

The harm created by the decision below will also reach far beyond this particular bankruptcy. Companies such as Lehman Brothers, Polaroid, Kodak, and more have used Section 363 to sell their core assets during their recent bankruptcies. *See, e.g.*, *In re Lehman Bros. Holdings Inc.*, 761 F.3d 303, 306 (2d Cir. 2014) ("The sale of Lehman's businesses as a going concern saved thousands of jobs and avoided losses estimated to be in the hundreds of billions of dollars."). The good-faith purchasers of those assets acted in reliance on the "free and clear" protections Section 363(f) provides and the finality Section 363(m) commands, both of which are imperiled by the Second Circuit's decision.

But the biggest threat the decision below poses is to the usefulness of Section 363 in future bankruptcies large and small. There is always a temptation after a reorganization has succeeded to revisit the terms of the bankruptcy at the behest of some unsecured creditor who was not made whole.

But numerous provisions of the Code shield against such after-the-fact efforts to undermine the finality on which the Code generally and Section 363 specifically depend to produce success stories in the first place. In the Section 363 context in particular, the finality of the sale and the free and clear provision is so paramount that even the right to a direct appeal generally yields. 11 U.S.C. §363(m). If good-faith purchasers in Section 363 sales cannot be assured that they are acquiring the debtor's assets free and clear, then they either will not purchase at all or will pay far less. Either way, creditors lose. By giving a green light to a collateral attack on a Section 363 sale years after the fact, the decision below imperils future efforts to use Section 363 to stave off the ruinous consequences of immediate liquidation. That is no mere hypothetical; the real-world impacts of the decision are already evident. *See, e.g.*, Tom Hals, *Potential bidders for Takata may balk at GM bankruptcy precedent*, Reuters (Nov. 6, 2016).

The time for intervention is now. Section 363 is one of the Bankruptcy Code's most important provisions. Yet Section 363 cases rarely reach this Court—presumably because, as Congress intended, Section 363(m) typically forecloses appeals. The very fact that this case has made it this far is a clear sign that it is an impermissible collateral attack that contravenes Congress' statutory scheme. The decision below will undermine countless Section 363 sales until another chance to correct it presents itself, and there is a very real risk that it will cripple subsequent efforts to preserve going concerns in the interim. This Court should intervene now, before the decision below deprives debtors, purchasers, and

creditors of the critically important tool that Section 363 provides.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

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