No. 08-

IN THE

Supreme Court of the United States

LARRY J. WINGET and the
LARRY J. WINGET LIVING TRUST,

Petitioners,

v.

JPMORGAN CHASE BANK, N.A., a national banking association, JPMORGAN CHASE & CO., a Delaware corporation, BLACK DIAMOND COMMERCIAL FINANCE, LLC, a Delaware limited liability company, BLACK DIAMOND CAPITAL MANAGEMENT, LLC, a Delaware limited liability company,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court resolve a conflict between the Sixth Circuit and the Third and the Eleventh Circuits as to whether entry of an interim bankruptcy sale order has *res judicata* effect on all non-core claims between creditors, regardless of whether those claims were actually litigated by the bankruptcy court?

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Larry J. Winget and the Larry J. Winget Living Trust (collectively referred to as "Petitioners") respectfully petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The judgment of the Court of Appeals, *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565 (6th Cir. 2008), was issued on August 11, 2008 (App. A). The Sixth Circuit denied Winget's timely petition for rehearing and rehearing *en banc* on October 29, 2008 (App. C), and issued its mandate on November 6, 2008. Winget had appealed to the Sixth Circuit from the March 7, 2007 order of the U.S. District Court for the Eastern District of Michigan (Cohn, J.) granting Defendants' motions to dismiss (App. B). On March 12, 2007, the district court entered judgment dismissing the case pursuant to Fed. R. Civ. P. 12(b)(6) based on its March 7, 2007 order.

JURISDICTION

The Order of the Court of Appeals denying the petition of Winget and the Trust for rehearing and rehearing *en banc* was entered on October 29, 2008 (App. C). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Case Summary.

Resolution of the intractable conflict among the circuit courts of appeal addressed in this Petition will have a major impact on the effectual and uniform administration of federal bankruptcy law. The *Winget* decision, *in which the Sixth Circuit openly rejects prior rulings by the Third and Eleventh Circuits on the same issue*, forces all bankruptcy creditors and interested parties potentially affected by a bankruptcy to litigate all possible non-core claims[1] in the bankruptcy court as soon as any party seeks an interim order conceivably implicating the same transaction. The decision will subject the Sixth Circuit bankruptcy courts—and all other circuits where the *res judicata* impact of interim bankruptcy orders is unclear—to a mounting quagmire of co creditors' claims having no, or only the most speculative, relationship to the debtor's estate.

This Court should reject the *res judicata* test adopted by the Sixth Circuit for application in bankruptcy cases because it turns the broad jurisdictional boundary of what a bankruptcy court *can* resolve into an unwieldy holding pen for claims it *must*

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1. A "core claim" arises under the Bankruptcy Code, or could only arise in the bankruptcy proceeding. *Sanders Confectionary Prods. v. Heller Fin. Inc.*, 973 F.2d 474, 483 (6th Cir. 1992). Petitioners' potential defensive claims which were dismissed by the district court as discussed herein, are "non-core," arising under state law outside the bankruptcy proceeding and not under the Bankruptcy Code. See *Celotex Corp, v. Edwards*, 514 U.S. 300, 309; 115 S.Ct. 1493 (1995).

resolve. The current economic climate having led to a remarkable increase in bankruptcy filings, resolution of this conflict, and the efficient application of bankruptcy law in each circuit, is of exceptional importance.[2] Grant of this Petition, and adoption by this Court of the law of the Third and Eleventh Circuits that only non-core claims that were actually litigated in the federal bankruptcy courts are subsequently barred by claim preclusion, would prevent an unnecessary and yet inevitable tide of non-core co-creditor litigation from flooding the already overflowing dockets of federal bankruptcy courts.[3]

II. Factual And Procedural Background.

In the 1970's, Larry J. Winget ("Winget") formed a company called Venture Holdings Company, LLC ("Venture"). Venture, its subsidiaries, and certain affiliated companies quickly grew into successful suppliers to the automotive industry.[4] In the 1990's

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2. Citing the Administrative Office of the U.S. Courts, the New York Times recently reported that more than a million people filed for bankruptcy in the twelve months ending September 2008, "a staggering 30 percent increase over the period a year earlier." *Bankruptcy As A Step To Solvency*, M.P. Dunleavy, New York Times, January 23, 2009.

3. Petitioners note that while adversary bankruptcy proceedings fell nationally in the twelve month period ending March 2008 by one percent (-1%), such proceedings *increased* by thirteen point nine percent (+13.9%) in the Sixth Circuit during the same period. Administrative Office of U.S. Courts, U.S. Bankruptcy Courts, Table F-8.

4. The affiliates pertinent to this Petition are herein referred to as the "Deluxe" companies.

Winget expanded internationally, purchasing automotive parts suppliers in Australia and South Africa (the "International Companies").

In 1999, Venture entered into a Credit Agreement with a consortium of lenders ("Consortium") which eventually included Black Diamond Commercial Finance LLC and Black Diamond Capital Management, LLC (collectively, "Black Diamond"). Defendant JPMorgan Chase Bank, N.A. ("Chase") acted as the "Administrative Agent" for the Consortium.

On October 21, 2002, an Eighth Amendment to that Credit Agreement was executed under which Winget and the Larry J. Winget Trust ("Trust") conditionally guaranteed Venture's obligations to the Consortium (the "Winget Guaranty"). Specifically, the "last resort" conditions of the Winget Guaranty allowed Chase to satisfy the guaranty from the proceeds of the Trust's pledged stock in the International Companies only after Chase had exhausted all "reasonable efforts" to satisfy the obligations from other Venture collateral.[5]

In March 2003, Venture commenced a Chapter 11 bankruptcy proceeding. In September 2003, as part of the effort to restructure Venture, Winget, the Trust and Venture, with the participation of Chase, executed a "Contribution Agreement" that provided Winget, through the Trust, would contribute the International Companies to Venture on the satisfaction of certain

5. As the Sixth Circuit recognized, the guaranties of both the Winget Trust and Larry Winget individually were subject to the same "last resort" conditions. *See Winget*, 537 F.3d at 567, 569.

conditions.[6] When Winget and the Trust terminated the Contribution Agreement for the failure of those conditions, the Consortium launched a scheme in May 2004 to force Winget, through his Trust, to contribute the International Companies to Venture by seizing control of the Deluxe companies (which were already subject to the Venture bankruptcy as collateral) and promptly driving them into bankruptcy, thereby dramatically diminishing their market value.

Apparently unmindful of the adage that "a bird in the hand is worth two in the bush," the Consortium viewed the potential addition of the International Companies' $250 Million in assets to the collateral pool as worth the precipitous devaluation its scheme caused to the collateral already in its possession, i.e., the Venture Debtor and the Deluxe companies. The scheme ultimately failed, however. In January 2005, the bankruptcy court ruled that Winget and the Trust had rightfully terminated the Contribution Agreement, and had no obligation to contribute the International Companies to Venture and the Consortium's collateral pool.

The Consortium's scheme not only failed to gain the International Companies for its collateral pool, it also provided Petitioners with cognizable defenses to any subsequent attempt by Chase to enforce the Winget Guaranty for the benefit of the Consortium.[7] Petitioners

6. The Trust controlled the International Companies through intermediate holding companies called P.I.M. Management Company and Venco #1 LLC.

7. Those defenses centered on the Consortium's breach of the "reasonable efforts" condition of the Winget Guaranty which occurred when it sacrificed the value of the Deluxe and Venture assets in its scheme to wrest control of the International Companies from Winget.

stood ready to assert those valid defensive claims should Chase attempt to enforce the guaranty in the Venture and Deluxe bankruptcies, in which Winget and the Consortium were co-creditors. Yet, no such attempt to enforce was made by Chase as a bankruptcy creditor and thus neither Chase's enforcement rights under the guaranty nor Petitioners' defenses to enforcement were ever litigated in the bankruptcy court. On April 19, 2005, the Bankruptcy court ordered the sale of substantially all of Venture and Deluxe's assets pursuant to Section 363 of the Bankruptcy Code (11 U.S.C. §363). The sale occurred in May 2005, and the proceeds of the sale were applied to Venture's outstanding balance under the Credit Agreement.[8]

In October 2005, after the §363 interim sale order but before entry of a confirmation order,[9] Chase filed an action in the United States District Court for the Eastern District of Michigan, Case No. 2:05-CV-74141 (the "'05 Case"), seeking declaratory and other relief under the Winget Guaranty. Petitioners answered and filed a counterclaim, which they timely amended, asserting for the first time their defensive claims related to Chase's breach of the Guaranty through its failure to properly marshal the assets of the Deluxe companies.

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8. However, as a result (at least in part) of Chase's scheme to devalue the Venture and Deluxe companies and thereby expose the International Companies to seizure, the sale proceeds failed to significantly diminish the debt outstanding under the Credit Agreement.

9. As of this writing, both the Venture and Deluxe bankruptcies remain open. No confirmation order has been entered.

On June 29, 2006, the district court entered an order dismissing the amended counterclaim without prejudice and directing Petitioners to file a new complaint in a separate, companion action so that their defenses could be independently litigated.[10]

Winget and the Trust then filed the action underlying this Petition, seeking for the first time a judicial ruling that Chase had breached the "all reasonable efforts" condition of the Winget Guaranty through its mishandling of the Deluxe company assets. On September 15, 2006, Defendants moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6), arguing in pertinent part that Petitioners' previously unlitigated defensive claims were nonetheless barred, under the doctrine of *res judicata*, by the bankruptcy court's April 2005 interim §363 Order approving the sale of the Venture and Deluxe companies' assets.

On March 7, 2007, the district court granted Defendants' motions to dismiss, holding that Petitioners' claims based on Chase's alleged intentional devaluation of the Venture and Deluxe companies' assets were barred by *res judicata*, despite the fact that neither those defensive claims nor Chase's enforcement rights

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10. The district court later granted Chase's motion in the '05 Case to strike Petitioners' affirmative defenses (which tracked precisely the defensive claims he was ordered by the court to bring in the separate action), granted judgment on the pleadings on Chase's claim for specific performance, and dismissed without prejudice its claim for declaratory relief.

under the Guaranty had been actually litigated in the bankruptcy court.[11] (App. B).

On August 11, 2008, the Sixth Circuit Court of Appeals affirmed the district court's ruling (App. A). Openly acknowledging its rejection of settled law in the Third and Eleventh Circuits, the Sixth Circuit held that all non-core claims between bankruptcy creditors, even those not actually litigated by the bankruptcy court, are barred under the doctrine of *res judicata* after the entry of interim § 363 sale orders.

REASONS FOR GRANTING THE PETITION

I. The *Winget* Decision Creates A Conflict among the Circuits.

The four elements of *res judicata*, or "claim preclusion", are: (1) a final decision on the merits, (2) between the same parties, (3) in which the plaintiff litigated or should have litigated the same issue, (4) involving the same cause of action. See *New Hampshire v. Maine*, 532 U.S. 742, 748-749; 121 S.Ct. 1808 (2001); *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797; 116 S.Ct. 1761 (1996); *Rawe v. Liberty Mut.*

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11. On March 12, 2007, Petitioners filed an Amended Complaint addressing the alleged deficiencies identified by the district court in its Order granting the 12(b)(6) motion, but the court ordered that pleading stricken and entered a judgment dismissing the case. On March 21, 2007, Petitioners moved for reconsideration of the dismissal. The district court denied that motion on April 12, 2007. Only the district court's March 7, 2007 dismissal of the unlitigated claims of Winget and the Trust on the basis of *res judicata* is at issue in this Petition (App. B).

Fire Ins. Co., 462 F.3d 521, 529 (6th Cir. 2006). This Petition addresses only the last two *res judicata* elements, and the pragmatic necessity of tailoring those "identity of claim" elements to the unique procedural and jurisdictional properties of bankruptcy litigation.

The Sixth Circuit decision in *Winget* expressly rejects Third and Eleventh Circuit Court of Appeals' claim preclusion jurisprudence on this same issue. Specifically, those Circuits have rationally articulated "identity of claims" tests for claim preclusion when applied to bankruptcy proceedings, holding that only non-core claims between creditors that were *actually* litigated or explicitly made part of the confirmation plan are precluded from subsequent litigation outside the bankruptcy context. *Eastern Minerals & Chemicals Co. v. Mahan*, 225 F.3d 330, 337-38 (3d Cir. 2000) (a co-creditor claim should not be subsequently barred unless it is "so close to a claim actually litigated in the bankruptcy that it would be unreasonable not to have brought them both at the same time in the bankruptcy forum."); *In Re Atlanta Retail*, 456 F.3d 1277, 1289 (11th Cir. 2006) (*Res judicata* does not bar non-core co-creditor claims not raised in the bankruptcy proceeding unless "the resolution of that claim explicitly becomes an essential part of the bankruptcy plan."); compare *Winget*, 537 F.3d at 581. In *Winget*, the Sixth Circuit first cites the Third and Eleventh Circuits' specifically tailored *res judicata* tests for identity of claims in bankruptcy proceedings, then expressly rejects those tests, holding "[a]doption of such tests would not, however, be in line with current res judicata jurisprudence in this circuit, which has adopted the traditional view of identity as a res judicata element." *Id.* at 580-81.

The Third and Eleventh Circuits rightly recognize that "traditional" *res judicata* jurisprudence on claim identity, as applied by the Sixth Circuit, is ill-suited to the prompt, informal, multi-party resolutions favored by and employed under the Bankruptcy Code. See *Katchen v. Landy*, 382 U.S. 323, 328; 86 S.Ct. 467 (1966) ("this Court has long recognized that a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period.'"), citing *Ex parte Christy*, 44 U.S. 292, 3 How. 292, 312 (1845); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490-491; 108 S.Ct. 1340 (1988) (recognizing the need for "prompt administration of claims" in bankruptcy); See also, Wright & Miller, 18 *Federal Prac. & Proc.* §4408, n. 35 ("the commonly multiparty nature of bankruptcy proceedings dictates that special care must be taken in defining the dimensions of a "claim" for purposes of precluding subsequent litigation outside the bankruptcy context.") As such, the already over-burdened federal bankruptcy system would be well served if this Court brought all circuits in line with the Third and Eleventh Circuits' reasoned rulings on identification of potentially precluded claims when the underlying litigation took place in the forum of bankruptcy. These rulings are discussed below.

A. *Winget* Puts the Sixth Circuit In Conflict With the Third: *Eastern Minerals & Chemicals Co. v. Mahan.*

In *Eastern Minerals*, the Third Circuit denied preclusive effect to a bankruptcy confirmation order even though the plaintiff Eastern Minerals had asserted a claim of equitable subordination in the bankruptcy proceeding against the bankrupt's alter ego and had actively opposed the sale of the bankrupt's assets. 225 F.3d at 332. Recognizing that the "[c]laim preclusion doctrine must be properly tailored to the unique circumstances that arise when the previous litigation took place in the context of a bankruptcy case," the court approached the question of "identity of claims" as follows:

> A claim should not be barred unless the factual underpinnings, theory of the case, and relief sought against the parties to the proceeding are so close to a claim actually litigated in the bankruptcy that it would be unreasonable not to have brought them both at the same time in the bankruptcy forum.

225 F.3d at 337-38 (footnotes omitted.) Applying these narrowed parameters of claim identity to account for the bankruptcy context, the court found that the claims at issue were not identical because "the theory of the case and the relief sought are markedly different from those underlying the draft complaint to subordinate . . . that Eastern considered filing in the bankruptcy court." *Id.*

Had the Sixth Circuit adopted the "identity of claims" test tailored by the Third Circuit to fit the unique circumstances arising in bankruptcy litigation, it would have been required to reverse the district court because it is undisputed that Petitioners did not actually litigate their defensive claims against co-creditor Chase linked to the Winget Guaranty in the Venture/Deluxe bankruptcies, and the issues resolved by the § 363 sale order were not remotely similar to Petitioners' claims.[12] Instead, the Sixth Circuit ignored the bankruptcy context and expressly rejected the Third Circuit's test. *Winget*, supra at 581. In so doing, the Sixth Circuit unnecessarily exposed the bankruptcy courts in its Circuit to a wave of non-core claims by creditors—particularly in large, complex Chapter 11 adversary proceedings—seeking, justifiably, to protect themselves from future assertions of claim preclusion.

The Sixth Circuit's erroneous expansion of the scope of claim preclusion to the farthest boundaries of the bankruptcy courts' broad jurisdiction over non-core claims will significantly impede resolution of core proceedings necessary for final resolution or reorganization of the debtor's estate. Because the analytical errors of the *Winget* decision will have devastating practical consequences for federal bankruptcy administration, this Petition should be granted and the *Winget* decision reversed.

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12. Those defensive claims against Chase did not attack the terms, process or consequences of the bankruptcy sale of the Venture and Deluxe assets. Indeed, Petitioners agreed that the April 2005 sale price for the assets was fair. Rather, Petitioners claim is that Chase acted unreasonably by not selling the collateral in May 2004, when its value was higher.

B. *Winget* Puts The Sixth Circuit In Conflict With the Eleventh: *In Re Atlanta Retail.*

In *Atlanta Retail*, the Eleventh Circuit joined the Third Circuit in recognizing that the unique multi-party nature of bankruptcy proceedings requires a specialized approach to defining a "claim" for purposes of *res judicata* in subsequent non-bankruptcy litigation. Expressly holding that a bankruptcy §363 sale order does not bar a claim for fraud asserted in state court by one creditor against another creditor, the Eleventh Circuit held:

> [R]es judicata does not require a creditor to raise an independent state law claim against a co-creditor in an adversary bankruptcy proceeding unless the resolution of that claim explicitly becomes an essential part of the bankruptcy plan.

Id. at 1280. The court rejected the claim of defendant Wachovia Bank that four interim bankruptcy orders, including a § 363 sale order and a confirmation order, involved the same cause of action as plaintiff Kodak's state court claim for fraud and breach of an inter-creditor agreement because none of those orders *required* the court to evaluate Wachovia's alleged fraud. *Id.* at 1289-90. In other words, the court determined that it is not whether a bankruptcy court has jurisdiction, but whether the court *needs* to resolve a claim as an integral part of the bankruptcy plan that determines whether *res judicata* should apply. *Id.* at 1288-89. Further, the court held that the bankruptcy proceedings could not bar the later claim

because they could not have awarded the plaintiff the relief it sought. *Id.* at 1285.[13]

The Sixth Circuit also specifically rejected this Eleventh Circuit test, choosing instead to broadly identify "claims" which must be brought in the context of bankruptcy (or face subsequent preclusion) to include all non-core claims between creditors, regardless of whether those claims were essential to the bankruptcy plan, and regardless of whether the bankruptcy court could fully and completely adjudicate the parties' rights or defenses. 537 F.3d at 581-81. The practical result of the Sixth Circuit's decision is to improperly set the boundaries of claim preclusion at the "sweeping limits of [the bankruptcy court's] jurisdiction." *In re Atlantic*, 456 F.3d at 1288. Grant of this Petition and reversal of the *Winget* decision will avoid the indefinite stalling of potentially hundreds of bankruptcy cases while ancillary disputes between creditors are being resolved.

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13. Similarly, if Petitioners had pressed their objections to the sale order, they could not have received the relief sought in their wrongly dismissed defensive claims; namely, cancellation of the Winget Guaranty. The most they could have achieved by challenging the bankruptcy sale motion was either denial of that motion to sell or subordination of Chase's rights as a creditor in the proceeds of the sale. Under either scenario, however, the Winget Guaranty would have remained in place and Petitioners' exposure thereunder would have actually increased, either by further deterioration in the value of the Venture assets over time or by a decrease in the value of Chase's claims due to subordination.

II. The Sixth Circuit Decision In *Winget* Threatens the Efficient and Just Administration of Bankrupt Estates.

A. *Winget* Is Wrongly Decided Because It Expands Claim Preclusion To The Limits Of Bankruptcy Jurisdiction.

In *Celotex Corp. v. Edwards*, 514 U.S. 300; 115 S.Ct. 1493 (1995), this Court recognized the intent of Congress "to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Id.* at 307-08, citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984). By creating a corresponding expansion of the preclusive effect of *res judicata* to the outer limits of that comprehensive "related to" bankruptcy jurisdiction, the Sixth Circuit in *Winget* fundamentally undermines Congress' intent, turning all claims that a bankruptcy court *could* resolve into claims it *must* resolve. As the Third and Eleventh Circuits properly recognized, efficiency and expediency cannot survive in an environment requiring joinder and resolution of all third-party creditor claims conceivably within the bankruptcy courts' jurisdiction.

Sagely preserving the intent of Congress to promote the efficient resolution of bankruptcy proceedings in the face of broad jurisdictional powers, the Third and Eleventh Circuits have adopted "identity of claims" tests which limit subsequent preclusion of non-core claims between creditors to those actually litigated in the bankruptcy or which were expressly integral to the bankruptcy confirmation plan. These tests give

bankruptcy courts the leeway they need to promptly and effectually resolve matters central to reorganization and fair distribution of bankrupt estates, even if those claims do not directly involve the debtor, while not burdening those courts with resolution of *all* non-core co-creditor claims over which it arguably has jurisdiction simply because the creditors' rights in those tangential claims *must* be resolved in that forum or be subsequently barred.

In *Celotex*, this Court cited with favor the Third Circuit's attempt to "strike an appropriate balance" between the potentially conflicting traits Congress has bestowed upon bankruptcy courts of wide-reaching jurisdictional power and yet "limited authority." *Id.* at 308; citing *Pacor*, supra at 994; *Board of Governors, FRS v. MCorp Financial, Inc.*, 502 U.S. 32, 40; 112 S.Ct. 459 (1991). In a similar vein, the Third Circuit in *Eastern Minerals*, supra, again found an appropriate balance between the broad jurisdictional authority of bankruptcy courts and the harsh consequences of claim preclusion; this balance promotes thorough and prompt administration and resolution of bankrupt estates while preserving the rights of creditors to litigate non-core claims between themselves outside the bankruptcy forum. *Eastern Minerals & Chemicals Co.*, supra, 225 F.3d at 335-38. The Eleventh Circuit has struck a similar balance. *In re Atlantic Retail, Inc.*, 456 F.3d at 1284-89. The Sixth Circuit, in contrast, has expressly rejected such a balance. Its decision in *Winget* burdens the already swelling dockets of its bankruptcy courts with not just the authority, but the responsibility to resolve all non-core bankruptcy creditor claims arguably within its broad jurisdictional reach. *Winget*, 537 F.3d at 577-81.

B. *Winget* Expands the Much-Criticized Sixth Circuit Decision in *Browning v. Levy*, Applying Preclusive Effect to Interim Bankruptcy Sale Orders.

The adverse impact of the *Winget* opinion on the administration and resolution of bankrupt estates in the Sixth Circuit (and potentially other circuits where the law is unsettled) is most clearly signaled by its expansion of the holding of a prior Sixth Circuit Opinion, *Browning v. Levy*, 283 F.2d 761 (6th Cir. 2002).[14] *Browning* has been severely criticized for creating a *Catch 22* situation by broadly interpreting "identity of claims" in the context of a bankruptcy confirmation order while drastically limiting the ability of parties to reserve the right to litigate claims outside the bankruptcy courts.[15] Prior to

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14. See *Winget*, 537 F.3d at 578-79. The Sixth Circuit expressly expanded its prior ruling in *Browning* that the effect of bankruptcy confirmation orders is to "bar relitigation of any issues raised or that could have been raised in the confirmation proceeding," to include interim §363 sale orders.

15. *See, e.g.*, Wright, Miller & Cooper, *supra*, § 4470.3 (describing *Browning's* "breathtaking sweep for the claim preclusion effects of plan confirmation"); Goldstein, *Res Judicata Strikes Twice*, Am. Bankrtcy. Inst. J., Oct. 2002 at 16, 41 (court's reasoning will prevent many claimants from even getting a "first bite at the apple"); Klein, Ponoroff & Borrey, *Principals of Preclusion in Bankruptcy*, 79 Am. Bkrtcy. L. J. 839, 891 (2005) (concluding that *Browning* ignores the fundamental proposition that an *in rem* confirmation order "does not bind anyone with respect to a personal liability" except as provided in the plan; it "ignores the fact that confirmation proceedings [and, *a fortiori*, *in rem* proceedings such as § 363 sale orders] are not an efficient mechanism for resolving two-party disputes, and it "ignores the logic of the flexible bankruptcy process.")

Winget, application of *Browning* was confined to the narrow context of a final confirmation order. *Winget*, however, expands the criticized mandate of *Browning*,[16] holding that even an interim §363 bankruptcy sale order bars all subsequent attempts by creditors to bring non-core claims against other creditors outside the bankruptcy forum. *Winget*, supra at 578-579.

Thus, if *Winget* stands, all parties in Sixth Circuit bankruptcies, including creditors of the estate otherwise indifferent to such proposed interim orders, will be forced to immediately pursue all conceivable non-core claims against other creditors in accelerated interim bankruptcy proceedings, or face the risk of being held to have waived such claims in subsequent non-bankruptcy litigation. Petitioners respectfully request that this Court resolve the conflict among the circuit courts of appeal by reversing the Sixth Circuit's holding in *Winget* and adopting the Third and Eleventh Circuits' *res judicata* tests for identity of claims in the context of bankruptcy proceedings.

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16. *Browning* itself conflicts with the Third and Eleventh Circuits' decisions in *Eastern Mineral*, supra, and *In re Atlantic*, supra (respectively), both of which apply the narrowed test for identity of claims in bankruptcy to *all* bankruptcy orders, including final confirmation orders. *Eastern Minerals*, 225 F.3d at 339; *In re Atlantic*, 456 F.3d at 1290.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: January 27, 2009

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