No. 09-285

IN THE

Supreme Court of the United States

In re CHRYSLER LLC, Debtor

INDIANA STATE POLICE PENSION TRUST, *et al.*,

Petitioners,

v.

CHRYSLER LLC, *et al.*,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, THE CATO INSTITUTE, AND TODD J. ZYWICKI AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Date: October 5, 2009

MOTION OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, THE CATO INSTITUTE, AND TODD J. ZYWICKI FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF), Allied Educational Foundation (AEF), the Cato Institute, and Todd J. Zywicki respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners. Counsel for Petitioners signed a letter consenting to the filing of this brief. Counsel for Respondents the United States, Chrysler LLC, Chrysler Financial Services Americas LLC, and UAW signed letters consenting on behalf of their clients to the filing of this brief. Counsel for the remaining Respondents, Fiat S.p.A. and New CarCo Acquisition LLC, the Official Committee of Unsecured Creditors, Export Development of Canada, the Ad Hoc Committee of Consumer Victims of Chrysler, and Patricia Pascale, did not respond to requests for consent. Accordingly, this motion for leave to file is necessary.

WLF is a public interest law and policy center headquartered in Washington, DC, with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. WLF regularly publishes monographs and other publications on these and other related topics. WLF has appeared as *amicus curiae* in numerous cases before this Court involving issues of public importance, including other bankruptcy cases. *See, e.g.*, *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997); *Pennsylvania Dep't. Of Public Welfare v. Davenport*, 495 U.S. 552 (1990).

AEF is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, and has appeared as *amicus curiae* in this Court on a number of occasions.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, and files amicus briefs with the courts. Cato's amicus brief program is coordinated by Ilya Shapiro, a senior fellow in constitutional studies and editor-in-chief of the annual *Cato Supreme Court Review*. Cato's concern in this case is that the government violated property rights, subverted the bankruptcy process, and otherwise took actions that exceeded its constitutional authority.

Todd J. Zywicki is George Mason University Foundation Professor of Law at George Mason University School of Law, where he also serves as Senior Scholar of the Mercatus Center. He regularly teaches in the areas of bankruptcy law, consumer credit, and corporate lending. Editor of the *Supreme Court Economic Review*, Professor Zywicki is the author of more than 70 articles in leading law reviews and peer-reviewed economic journals, including *Is Forum-Shopping Corrupting America's Bankruptcy Courts?*, 94 GEORGETOWN L.J. 1141 (2006); *Institutions, Incentives, and Consumer Bankruptcy Reform*, 62 WASHINGTON & LEE L. REV. 1071 (2005); and *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NORTHWESTERN L. REV. 1071 (2005).

Amici agree with Petitioners that the extraordinary circumstances surrounding the Chyrsler bankruptcy warrant further review by this Court. Having itself become a creditor by lending millions of dollars in TARP funds to the debtors, the federal government, acting through the Treasury, orchestrated a Section 363 sale of Chrysler's assets and then foisted it upon the debtors, without regard to important and longstanding checks and balances typically found in bona fide reorganizations under Chapter 11. By affirming the decision of the bankruptcy court, the appeals court in effect condoned the Treasury's redistribution of value from senior, secured creditors such as Petitioners to junior, unsecured creditors. But the government should not be allowed, through its own self-dealing, to hand pick certain creditors for favorable treatment at the expense of others who would otherwise enjoy first lien priority. Importantly, EESA does not permit, and Congress has not authorized, the Treasury to use TARP to fund industries such as Chrysler that are not "financial institutions." In the absence of any such authority, *amici* believe it was improper for the Treasury to use TARP funds in this fashion.

Amici are also concerned that a lack of predictability and consistency with regard to secured creditors' expectations in bankruptcy will result in a destabilization of existing and future credit markets. By allowing debtors to use the expedient of a Section 363 sale to circumvent the important protections normally afforded secured creditors under Chapter 11, the decision below creates a powerful disincentive for investors to lend vital capital to troubled companies that might be in danger of insolvency.

Amici have no direct interest, financial or otherwise, in the outcome of this case. They seek to file their brief due solely to an interest in maintaining appropriate limits on government intrusion into the free market and to protect the investment expectations of secured creditors in the context of bankruptcy.

For the foregoing reasons, *amici* WLF, AEF, the Cato Institute, and Todd J. Zywicki respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Whether the U.S. Court of Appeals for the Second Circuit improperly affirmed the bankruptcy court's approval, under Section 363 of the Bankruptcy Code, of a transaction disposing of nearly all of Chrysler's assets entirely on the U.S. Treasury's terms without adherence to the important creditor protections provided by the Chapter 11 plan confirmation process?

That issue necessarily encompasses an examination of the federal government's attempt, through the Treasury, to use its coercive power to favor certain junior, unsecured creditors over more senior, secured creditors who were otherwise entitled to lien priority. In particular, in the context of a government-backed "rescue" of the auto industry, may the government, which is itself a junior creditor, manipulate the bankruptcy process to single out private parties to bear a disproportionate share of the burden?

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INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* Washington Legal Foundation, Allied Educational Foundation, the Cato Institute, and Todd J. Zywicki are more fully set forth in the accompanying motion to file this brief.[1]

Amici are concerned that the appeals court's endorsement of the Section 363 sale ignores the federal government's self-interested role as a controlling creditor and will only further undermine the important protections Congress provided to secured creditors in bankruptcy under Chapter 11. *Amici* also believe it was improper for the Treasury to use TARP funds to fund the debtors' bankruptcy in the absence of express congressional authority. *Amici* are further concerned that a lack of predictability and consistency with regard to secured creditors' expectations in bankruptcy will result in a destabilization of existing and future credit markets.

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of their intent to file this brief.

STATEMENT OF THE CASE

This case raises important issues regarding the extent to which it is appropriate for the federal government to use the bankruptcy process in an attempt to "rescue" a national automobile company, where the United States Department of the Treasury orchestrates a sale under 11 U.S.C. § 363(b) to circumvent the important creditor protections provided by the absolute priority rule of the Bankruptcy Code, thereby stripping a senior class of secured creditors of their first priority lien interests.

In January 2009, in the midst of a national recession and declining car sales, Chrysler LLC stood on the brink of insolvency. Purporting to act under the Emergency Economic Stabilization Act (EESA), the Treasury extended Chrysler a $4 billion loan using funds from the Troubled Asset Relief Program (TARP). Although Chrysler initially proposed an out-of-court reorganization plan that would fully repay all of Chrysler's first lien secured debt, the Treasury rejected this plan and instead insisted on a plan that would completely eradicate Chrysler's first lien secured debt.

In exchange for Chrysler's acquiescence, the Treasury promised to loan Chrysler billions of dollars in additional TARP funding. When Chrysler's first lien lenders refused to waive their lien rights without full payment, the Treasury devised a scheme by which Chrysler, instead of reorganizing under a chapter 11 plan, would sell its assets free of all secured interests under Section 363. By utilizing Section 363 in this manner, Chrysler sought to avoid the "absolute priority rule," codified at 11 U.S.C. § 1129(b)(1), which provides that a court should not approve a bankruptcy plan unless it is "fair and equitable" to all classes of creditors, including dissenting classes of creditors.

Petitioners are comprised of the Indiana State Police Pension Trust and the Indiana State Teachers Retirement Fund, both of which are investment fiduciaries for billions of dollars of retirement assets for roughly 100,000 Indiana civil servants. Petitioners are among a group of senior holders of a first priority $6.9 billion lien, which was secured by substantially all of Chrysler's assets.

After Petitioners and other creditors refused to agree to a release of their secured liens, the debtors, consisting of Chrysler and certain of its affiliates, filed for bankruptcy on April 30, 2009. Pet. App. 8a. Three days later, the debtors moved the bankruptcy court for an order under Section 363 authorizing the sale of substantially all of the debtors' operating assets, free and clear of any liens, claims, interests, or encumbrances. By their motion, the debtors sought to transfer substantially all of Chrysler's assets to a newly-created shell entity (New Chrysler) to be owned by the United Auto Workers (UAW), the Treasury, and Fiat.

Petitioners formally objected to the sale. Following a three-day evidentiary hearing, the bankruptcy court granted the debtors' sale motion over Petitioners' objections and entered a final sale order authorizing the sale under Section 363. Pet. App. 116a. The sale order effectively stripped Chrysler's value away from Petitioners and other first lien creditors in favor of certain unsecured creditors chosen by the Treasury to receive payments from, and debt or equity in, New Chrysler. *Id.* Among other things, the bankruptcy court found that the debtors had exercised sound business judgment and good faith in proposing the Section 363 sale, that the debtors' assets could properly be transferred to New Chrysler free and clear of the secured creditors' first priority liens, and that the federal government had negotiated with the debtors in good faith and at arm's length so as not to exercise improper control of the debtors. *Id.*

Following Petitioners' filing of a notice of appeal, the parties immediately sought and obtained from the bankruptcy court a certified, expedited appeal directly to the United States Court of Appeals for the Second Circuit, which resulted in an oral argument before the Second Circuit on June 5, 2009. After only ten minutes of deliberation, the Second Circuit panel affirmed the bankruptcy court's order, but stayed its decision pending possible further review by this Court. Pet. App. 46a.

When Petitioners sought an immediate stay in this Court, Justice Ginsberg granted a temporary stay on June 8, 2009. Pet. App. 187a. The next day, the Court issued a per curiam opinion denying Petitioners' stay application and stating that Petitioners did not carry their burden of showing that a stay was justified. Pet. App. 185a. Notably, in exercising its discretion not to issue the stay, the Court emphasized that "[a] denial of a stay is not a decision on the merits of the underlying legal issues." *Id.* The sale transaction closed on June 10, 2009. Pet. App. 10a.

On August 5, 2009, the Second Circuit issued a written opinion in support of its June 5, 2009 judgment, in which it largely adopted the bankruptcy court's reasoning. While recognizing the "'apparent conflict' between the expedient of a § 363(b) sale and the otherwise applicable features and safeguards of Chapter 11," the court held that the debtors' Section 363 sale was not an improper debt reorganization plan because Chrysler had "good business reasons" for utilizing the Section 363 sale mechanism as it did here. Pet. App. 12a-13a, 24a. The appeals court conceded that the competing concerns between Section 363 and Chapter 11 had "become harder to manage" and that "[a] balance is not easy to achieve . . . ." Pet. App. 20a. Tellingly, while explaining that "[d]ebtors need flexibility and speed to preserve going concern value," the court also acknowledged that "one or more classes of creditors should not be able to nullify Chapter 11's requirements." *Id.*

REASONS FOR GRANTING THE PETITION

The Petition raises issues of great importance affecting the rights of secured creditors in bankruptcy proceedings–namely, whether and to what extent a Section 363 sale can be used to completely circumvent the longstanding protections afforded to secured creditors under Chapter 11 of the Bankruptcy Code. At a deeper level, however, there is a greater issue presented by this case: the fundamental unfairness inherent in an attempt by the United States government to exploit its unique governmental powers by saddling private parties (in this case, Petitioners) with the losses attributable to the federal government's own plan to "rescue" Chrysler from insolvency.

Amici urge review of the Second Circuit's decision because it sets a dangerous precedent for secured creditors in future bankruptcies, especially for those companies in which the federal government has, or will have, a vested political stake in the outcome.

Having devised a plan to effectively eliminate all of Chrysler's first priority lien debt, the federal government, through the Treasury, executed this plan by first becoming a creditor of Chrysler through the unprecedented (and unauthorized) use of TARP funds. As a junior creditor, the Treasury was able to exercise such an extraordinary level of control over the debtors that the debtors became a mere instrumentality of the federal government. Once in control, the Treasury then utilized the Section 363 sale mechanism to essentially redistribute value from senior, secured creditors such as Petitioners to select junior, unsecured creditors.

As a creditor effectively in control of the debtors, the Treasury owed a fiduciary duty to *all* of Chrysler's creditors, not just a select few. Having chosen to become a creditor, the government should not be allowed, through its own self-dealing, to hand pick certain creditors for favorable treatment at the expense of others who otherwise would enjoy first lien priority. Nor should it be permitted to shift the costs of accomplishing its own political agenda to private parties. Such governmental self-dealing has always raised constitutional concerns and invites heightened judicial scrutiny. Given the level of governmental overreach that occurred here, further review is especially warranted.

The federal government's improper self-dealing is even more evident given the fact that the Treasury completely lacked the authority to orchestrate and fund the Chrysler bankruptcy with TARP funds in the first place. Simply put, EESA does not authorize the Treasury to use TARP to loan money to automobile manufacturers. Rather, EESA expressly limits TARP's availability to *financial* institutions such as banks and credit unions, and historic canons of statutory interpretation will not allow the plain meaning of the statute to be disregarded. The Treasury itself has stated publicly on more than one occasion that TARP availability is strictly limited to financial institutions. And there is no indication that Congress ever contemplated under EESA that TARP monies would be made available to the automobile industry. By using EESA to effectuate a rescue of an automotive company, the Executive branch, acting through the Treasury, violated the unambiguous terms of EESA, in contravention of both Congress's clear intent and Treasury's own past interpretations.

Further, if the appeals court's decision stands, the federal split of authority exhaustively detailed in the Petition will only further erode confidence among investors in the nation's vital lending markets. If the Treasury can designate any "institution" as a recipient of TARP funds and use an accelerated Section 363 sale process to eliminate the priority rights of secured creditors, investors and lenders will no longer place their confidence in first priority liens. Absent clearly defined limits on the use of Section 363 sales to strip creditors of their security interests, the credit markets will dry up amidst investor uncertainty. Indeed, in the wake of the Chrysler bankruptcy, leading economic scholars have warned that the precedent established below will severely reduce the amount of investment capital available to troubled companies. Such negative long-term economic consequences in the midst of a recession warrant a further review of the decision below by this Court.

Finally, there is no merit to any contention by Respondents that Petitioners' requests for relief arising from the inequities of the Section 363 sale are somehow barred or rendered "moot" by 11 U.S.C. § 363(m). To the contrary, Section 363(m) expressly contemplates that, even though the sale has closed, an appellate court may nevertheless reverse or modify the bankruptcy court's order authorizing the sale, so long as such modification or reversal does not affect the *validity* of the sale. Petitioners do not challenge the validity of the sale; they seek only to correct the unfair and inequitable distribution of proceeds following the sale. And because the inequities of the sale can be remedied by this Court through the as-yet unresolved bankruptcy estate without disturbing the validity of the sale itself, the important issues raised by Petitioners are not barred from further review on appeal.

The goals of fairness, predictability, and an appropriate balancing of debtor and creditor interests were all injured in this case. *Amici* join with Petitioners in urging this Court to grant the petition for a writ of certiorari.

I. REVIEW IS WARRANTED BECAUSE ONLY THIS COURT CAN REMEDY THE LOSS TO PETITIONERS CAUSED BY THE GOVERNMENT'S SELF- DEALING

A. Governmental Self-Dealing

As the Petition well documents (at 5-10), the debtors' sale of assets to New Chrysler was not negotiated by independent parties at arm's length. Well before their formal bankruptcy filing, the debtors had ceased to function independently and had instead become a mere instrumentality of the federal government. Indeed, the federal government, acting through the Treasury, orchestrated the Section 363 sale entirely and then foisted it upon the debtors, without regard to important and longstanding checks and balances typically found in such sales.

This Court's longstanding rule in bankruptcy cases has been "that preferential treatment of a class of creditors is in order only when clearly authorized by Congress." *Howard Delivery Serv. Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006). Despite this rule, the Treasury, lacking any specific approval from Congress, used the Emergency Economic Stabilization Act (EESA) in conjunction with the bankruptcy process to re-order private property rights on an unprecedented scale. In effect, the Treasury manipulated the bankruptcy process to strip Chrysler's assets away from the senior lenders' liens, thereby impairing the right of senior lenders such as Petitioners to adequate and fair compensation. As a result, the bankruptcy court sanctioned the Treasury's redistribution of value from secured creditors such as Petitioners to unsecured creditors. This dramatic shifting of wealth violates the longstanding bankruptcy policy of preventing a party from receiving "a windfall merely by reason of the happenstance of bankruptcy." *Butner v. United States*, 440 U.S. 48, 55 (1979). Even the Second Circuit acknowledged the very real "fear that one class of creditors may strong arm the debtor-in-possession, and bypass the requirements of Chapter 11 to cash out quickly at the expense of other stakeholders, in a proceeding that amounts to a reorganization in all but name, achieved by stealth and momentum." Pet. App. 19a-20a. But as the Petition demonstrates, that is exactly what happened here.

Yet the federal government's role in the Chrysler bankruptcy becomes even more troubling in light of the fact that the federal government was *itself* a creditor. Despite its inferior status as a junior, unsecured creditor, the federal government was nevertheless able to exert extraordinary influence over the debtors and their constituencies for the primary benefit of certain hand-picked, unsecured creditors–all at the expense of senior creditors such as Petitioners. Given the undue pressure exerted on the debtors and other creditors in this case and the federal government's own vested interest in the outcome, it is incumbent upon this Court to fully examine the disturbing specter of governmental self-dealing that is raised here.

Having elected to act as a lender and then having effectively assumed control of the insolvent debtors, the Treasury owed fiduciary duties to Chrysler's creditors. *See, e.g., N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101-02 (Del. 2007) (holding that the fact of insolvency gives rise to fiduciary duties to creditors); *Geyer v. Ingersoll Publ'ns Co.*, 621 A.2d 784, 789 (Del. Ch. 1992) (same). Indeed, "a creditor will be held to an insider standard where it is found that it dominated and controlled the debtor." *In re KDI Holdings, Inc.*, 277 B.R. 493, 511 (Bankr. S.D.N.Y. 1999). Where such a creditor overwhelmingly dominates the debtor, a merger of identity occurs and the creditor will be held to a fiduciary standard. *Id.* at 512; *see also In re Winstar Commc'ns, Inc.*, 554 F.3d 382, 411-12 (3d Cir. 2008) (finding "egregious" conduct where the creditor had exerted such influence and control as to qualify as an "insider" acting to the detriment of other creditors). Indeed, the federal government's conduct in this case is identical to behavior that has given rise to lender liability claims in a conventional lending context. *See, e.g., Melamed v. Lake County Nat'l Bank*, 727 F.2d 1399, 1404 (6th Cir. 1984) (finding that a lender's actions to "salvage" the corporate borrower were sufficient to state a claim for tortious interference with the debtor's business relationships).

In a wide range of contexts, this Court has long expressed constitutional "concern with governmental self-interest." *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996). In *Winstar*, this Court confronted the "taint" of "a governmental object of self-relief," where the government "seeks to shift the costs of meeting its legitimate public responsibilities to private parties." *Id.; see also Armstrong v. United States*, 364 U.S. 40, 49 (1960) (declaring that the government may not "forc[e] some people alone to bear public burdens which . . . should be borne by the public as a whole"). That is precisely what occurred in this case, where the government, as a junior unsecured creditor, retained an equity interest in Chrysler at the expense of more senior secured creditors such as Petitioners. The fact that the Treasury purportedly took these unconscionable actions in an attempt to help the country address difficult circumstances during an economic recession is irrelevant. Petitioners should not be unfairly singled out to subsidize, through a loss of their investments, the Executive branch's political agenda.

The overall import of these decisions is that the federal government should never be able to force a private party to bear the costs attributable to the government's own conduct. Indeed, governmental self-dealing always raises constitutional red flags and triggers heightened judicial scrutiny. Here, the federal government's obvious self-interest in saddling

Petitioners, who were secured first-priority creditors, with a disproportionate share of the losses from the Chrysler bankruptcy should raise a strong presumption in favor of review. This case offers the Court an excellent vehicle to establish, once and for all, the acceptable parameters of governmental self-dealing in the bankruptcy context.

B. Improper Use of TARP

The government's improper self-dealing becomes even more transparent in light of the fact that the Treasury wholly lacked the authority to orchestrate and bankroll the Chrysler bankruptcy through the use of TARP funds as it did here. By using EESA to effectuate a rescue of an automotive company, the Executive branch, acting through the Treasury, not only violated the unambiguous terms of EESA, but ignored both Congress's clear purpose for the statute's enactment and Treasury's own past interpretations. That the government was willing to go to such lengths to strip Petitioners of their secured property interests in the debtors only highlights the exceptional importance of this case and the urgent need for review.

Unlike Article I of the Constitution, which carefully enumerates the powers vested in the legislative branch, Article II provides only that "the executive power shall be vested in a President of the United States" and that it is the president's duty to "ensure that the laws be faithfully executed." U.S. Const., Art. II, §§ 1, 3. With a few constitutionally enumerated exceptions, the Executive's authority to act in any particular instance must derive from statute. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (explaining that executive power "must stem either from an act of Congress of from the Constitution itself"). In this case, the relevant statute on point is EESA.

Congress enacted the Emergency Economic Stabilization Act (EESA) on October 3, 2008 "to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States . . . ." 12 U.S.C. § 5201(1). EESA expressly authorizes the Treasury Secretary "to establish the Troubled Asset Relief Program (or 'TARP') to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this Act." *Id.* § 5211(a)(1). EESA defines "financial institution" as "any bank, savings association, credit union, security broker or dealer, or insurance company." *Id.* § 5202(5). Likewise, a "troubled asset" is defined as "residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages that in each case originated or issued on or before March 14, 2008, the purchase of which the Secretary [of the Treasury] determines promotes financial market stability." *Id.* § 5202(9).

It is axiomatic that "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters.'" *United States v. Ron Pair Entm't, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). An automobile manufacturing company such as Chrysler is obviously not a "financial institution" as defined under EESA. Presumably, Congress had a clear purpose in listing those institutions that might fairly be considered "financial" institutions: banks, credit unions, broker dealers, and insurance companies. Any contrary interpretation is implausible and renders wholly superfluous Congress's deliberate selection of the term "*financial* institution." *See* 12 U.S.C. § 5211(a)(1).

Further, none of the transactions associated with the use of TARP funds in the Chrysler bankruptcy involve "residential or commercial mortgages" or real-estate related securities as required by § 5202(9) of EESA. Well-settled canons of statutory construction demand that every word in a statute be given a meaning, and that no word in a statute be rendered superfluous. *Knight v. C.I.R.*, 128 S.Ct. 782, 789 (2008) (rejecting petitioner's interpretation because it "would render part of the statute entirely superfluous, something we are loath to do.") (quoting *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004)); *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) ("[W]e must give effect to every word of a statute wherever possible."). This longstanding rule assumes that, because legislatures generally mean what they say, the inclusion of particular words and phrases is no mere accident. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (acknowledging "the cardinal rule that statutory language must be read in context [because] a phrase gathers meaning from the words around it."). Nowhere does EESA provide that TARP is available to provide assistance to the automotive industry as the Treasury did here.

Nor is there any evidence that Congress contemplated that TARP monies would be used to help "bail out" the automotive industry. Though not dispositive, it is often useful to consult the Congressional Record to determine the goals articulated by members of Congress while debating the proposed statute. Here, the Congressional Record makes clear that those members of Congress who debated the EESA legislation in late 2008 believed they were enacting a bill aimed solely at banks and the financial sector. Specifically, members of the United States Senate repeatedly emphasized the need to unfreeze the nation's credit markets and expressed their view that EESA would address that need. *See, e.g.,* Congressional Record, Statement of Senator Mitch McConnell, S10190-S10191 (Oct. 1, 2008) ("Right now . . . the credit markets are frozen, so the circulatory system is not working as it should. With the step we take tonight, we are confident we will be able to restore the circulatory system, if you will, and regain health for the economy . . . ."); Congressional Record, Statement of Senator Hillary Clinton, S10215 (Oct. 1, 2008) ("We are already seeing the consequences of a freezing credit market that will only worsen . . . . Our economy runs on credit. Underlying that credit is trust. Both the credit and the trust is running out. Essentially, what we are doing in an intangible way is restoring trust and confidence, and in a very tangible way helping to restore credit."). Nothing in EESA's pre-enactment history provides any support for the proposition that TARP was intended to apply to the automotive industry.

The House's understanding of EESA's purpose was exactly the same, as illustrated by the floor remarks of Representative Barney Frank, chairman of the House Financial Services Committee: "In implementing the powers provided for in the Emergency Economic Stabilization Act of 2008, it is the intent of Congress that Treasury should use Troubled Asset Relief program

(TARP) resources to fund capital infusion and asset approaches alone or in conjunction with each other to enable financial institutions to begin providing credit again." Congressional Record, Statement of Representative Barney Frank, H10763 (Oct. 3, 2008).[2] Ironically, as further detailed below, the Treasury's unprecedented conduct in this case actually threatens to *undermine*, rather than restore, investor confidence, which is in direct contravention of EESA's stated purpose.

The government's blatant disregard of the Congressional limits placed on the use of TARP funds also conflicts with the Treasury's own public pronouncements. Shortly after EESA was enacted, then Treasury Secretary Henry Paulson was called to testify at a hearing before the House Financial Services Committee, where he was pointedly asked whether TARP funds might be used to rescue the automotive companies. His answer was clear:

> Now, look at the autos. Again, you haven't seen any lack of consistency on my part with regard to the autos. The TARP was aimed at the financial system. That is what the purpose is. That is what we talked about with the TARP. . . . I don't

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[2] Tellingly, in response to the Treasury's obvious lack of authority under EESA, the House passed the so-called "Auto Act," which would have provided $14 billion in loans for restructuring the automotive industry. *See* Auto Industry Financing and Restructuring Act, H.R. 7321, 110th Cong. § 10 (2008). One day later, however, the Senate rejected the Auto Act and Congress abandoned any further efforts to rescue the automotive industry. *See Auto Bailout Collapses in Senate*, available at http://money.cnn.com/2008/12/11/news/companies/auto_bailout_senate/index.htm.

> see [rescuing an automotive company] as the purpose of TARP.

Oversight of Implementation of the Emergency Economic Stabilization Act of 2008 and of Government Lending and Insurance Facilities: Impact on Economy and Credit Availability, Hearing Before the H. Comm. on Fin. Servs., 110th Cong. 19 (Nov. 18, 2008).

Similarly, current Treasury Secretary Timothy Geithner appeared earlier this year before the House Appropriations Committee's Financial Services subcommittee. Asked specifically whether TARP money should be used to stabilize bond ratings for States with severe budgetary problems, Geithner responded: "We do not believe that TARP as currently legislated provides a viable solution to this specific challenge. . . . We are restricted to giving to financial institutions." *See Highlights: Geithner Testifies to House Appropriations Panel*, *available at* http://www.reuters.com/article/asiaregulatorynews/idusn2052531520090521?sp=true. For the same reason, TARP funds should never have been utilized in this case. The statute must mean the same thing regardless of the government's self-interest or the political expediencies in any particular case.

In sum, the government's conduct in this case goes well beyond what Congress contemplated when authorizing the limited use of TARP monies to assist America's financial institutions. By financing a deal that eroded first-priority liens in Chrysler, the Treasury exceeded the scope of its statutory authority in a way that significantly injured Petitioners. Under these circumstances, the Executive's blatant disregard of the limits of its statutory authority smacks of improper self-dealing. *Youngstown Sheet & Tube Co.*, 343 U.S. at 585 ("There is no statute that expressly authorizes the President to take possession of property as he did here."). Review is warranted to determine whether, in this case, the government's self-dealing impermissibly exceeded the important protections of the Bankruptcy Code in violation of Petitioners' vested property rights.

II. REVIEW IS WARRANTED BECAUSE OF THE TREMENDOUS CHILLING EFFECT ON THE NATION'S INVESTMENT AND LENDING MARKETS

As the Petition ably demonstrates, the federal courts of appeals are hopelessly split on the issue of whether, and to what extent, debtors should be allowed to use a Section 363 sale to evade the creditor protections of Chapter 11. Pet. at 24-28. As a result, a great deal of uncertainty exists among investors and lenders as to what their rights might be as future creditors in bankruptcy. This uncertainty has only increased in the wake of the Chrysler bankruptcy, especially in those cases involving debtors in whom the federal government is likely to have a keen interest.

Allowing the federal government to disrupt the absolute priority rule in bankruptcy proceedings will significantly destabilize the investor market. If the Treasury can designate any "institution" as a recipient of TARP funds and use an accelerated Section 363 sale process to eliminate the priority rights of secured creditors, investors and lenders will no longer place their faith in first priority liens. In light of these negative, long-term economic consequences, further review of the decision below is warranted by this Court.

Following the Chrysler bankruptcy, noted economists, legal scholars, and other commentators have warned repeatedly that the precedent established by the bankruptcy proceeding below, and subsequently affirmed by the circuit court, threatens to destabilize the nations' vital investment markets. *See, e.g.,* Mark J. Roe & David A. Skeel, *Assessing the Chrysler Bankruptcy*, Institute for Law & Econ., U. Of Penn. Law School, Research Paper No. 09-22 at 4 (Aug. 12, 2009) ("[I]f [the Chrysler bankruptcy] becomes the pattern, *Chrysler* could displace the traditional chapter 11 process, potentially affecting lending markets and vulnerable nonfinancial creditors adversely."); Mark J. Roe, *Stress-Testing Washington's Chrysler Bankruptcy Plan*, Forbes.com, May 13, 2009 ("This is not a good economic time to disrupt lending to troubled companies."); Todd J. Zywicki, *Chrysler and the Rule of Law*, Wall Street Journal Online, May 13, 2009 ("[B]usinesses that might have received financing before . . . now will not, since lenders face the potential of future Government confiscation."); Richard A. Epstein, *The Deadly Sins of Chrysler Bankruptcy*, Forbes.com, May 12, 2009 ("It is absolutely critical to follow these priority rules inside bankruptcy in order to allow creditors to price risk outside of bankruptcy.").

Congress itself has on previous occasions considered the detrimental effect that curtailing the rights of secured creditors in bankruptcy would have on the availability of secured credit. *See, e.g., Bankruptcy Reform Act of 1978: Hearings on S. 2266 and H.R. 8200 Before the Subcomm. On Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 707, 714 (1977) (statement of Edward J. Kulik, Senior Vice President, Real Est. Div., Mass. Mut. Life Ins. Co.), 715 (statement of Robert E. O'Malley, attorney, Covington & Burling) (expressing concern that permitting modification of home mortgage loans in Chapter 13 would have a negative impact on the availability of home mortgage credit); Conference Report, June 18, 1934, 73rd Cong. 2d Sess., 78 Cong. Rec. 12,074 (statement of Senator Bankhead), 12,075 (Statement of Senator Fess), 12,137 (statement of Representative Peyser) (evidencing concern that a law providing Depression-era farmers with a bankruptcy mechanism for obtaining a release on mortgages would make it impossible for farmers to borrow in the future).

By elevating the interests of unsecured over secured creditors, the Chrysler bankruptcy has established a dangerous precedent. In the credit market context, risk-taking relies entirely on predictability. Secured creditors lend money to troubled companies on the understanding that they have a right to a company's assets as collateral for the substantial loans and investments made to the company before it filed for bankruptcy. This concept of priority is crucial during bankruptcy, because it ensures that creditors will be compensated for leaving the debtor company's assets with the debtor company during the bankruptcy proceeding. Obviously, if creditors cannot rely on the belief that they will be properly compensated by the debtor company for the use of their collateral, creditors will have no incentive to leave the collateral assets with the company. And even in those cases where creditors do still lend money, they will be forced to do so at extremely high rates to compensate for their increased risk.

It is difficult to overestimate the chilling effect that the Chrysler bankruptcy will have on the investment incentives that our free market system is intended to foster. If the investor community loses faith in the willingness of courts to uphold the rights of secured creditors, they are unlikely to be willing to continue to invest the hundreds of millions of dollars typically required to keep a large company solvent during troubled financial times. Review is warranted to prevent the Second Circuit's decision from further eroding confidence in this nation's financial investment sector.

III. PETITIONERS' REQUEST FOR RELIEF IS NEITHER "MOOT" NOR BARRED FROM REVIEW UNDER 11 U.S.C. § 363

Amici anticipate that Respondents will likely argue that, because the Section 363 sale has closed and no stay was issued by this Court, Petitioners' claims for relief are "moot" and any further review of the Second Circuit's opinion is barred per se by operation of 11 U.S.C. § 363(m). Not so.

Simply put, nothing in 11 U.S.C. § 363(m) precludes a party from appealing a sale order absent a stay. In fact, by its very terms, section 363(m) contemplates that a sale order may be reversed or modified on appeal: "[t]he *reversal or modification on appeal* of an authorization under [Section 363] of a sale . . . of property does not affect the validity of a sale, unless . . . such sale . . . were stayed pending appeal." 11 U.S.C. § 363(m) (emphasis added). In other words, so long as a remedy is available that will not "affect the validity of the sale," review and even reversal on appeal is entirely appropriate. *See, e.g., Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 499 (3d Cir. 1998) (rejecting a per se rule and acknowledging that "section 363(m) would not moot every appeal not accompanied by a stay"); *In re Osborn*, 24 F.3d 1199, 1204 (10th Cir. 1994) (rejecting an identical mootness argument and concluding that "where state law or the Bankruptcy Code provides remedies that do not affect the validity of the sale, 363(m) does not moot the appeal").

Even the Second Circuit has observed that, notwithstanding the language of Section 363(m), "it is not entirely clear why an appellate court, considering an appeal from an unstayed but unwarranted order of sale to a good faith purchaser, could not order some form of relief other than invalidation of the sale." *In re Gucci*, 105 F.3d 837, 840 n.1 (2d Cir. 1997); *see also In re Enron Corp.*, 291 B.R. 39, 41 (S.D.N.Y. 2003) ("[I]nherent in the fact that § 363(m) provides only that the *validity* of an unstayed sale cannot be disturbed on appeal is the corollary that other relief may be available.") (emphasis in original).

Importantly, Petitioners do not challenge the validity of the sale itself, but seek only equitable relief to correct the unfair and improper distribution of proceeds following the sale. As the Petition explains, "although the sale has closed, the Indiana Petitioners would still benefit from reversal through redistribution of sales proceeds through the as-yet unresolved bankruptcy estate." Pet. at 31. For example, the Court could compel the redistribution of certain proceeds from the sale under a Chapter 11 plan of reorganization, but all fixed assets would remain with New Chrysler. Such relief obviously would not affect the validity of the sale.

Because the inequities of the sale can be remedied without disturbing the validity of the sale itself, the important issues raised by the Petition are not moot.

Indeed, an appeal should be dismissed as moot only when there is *no* possibility of relief. *See, e.g., Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (vacating dismissal of an appeal as moot because it was not impossible to grant "any effectual relief whatever"). This is not such a case.

In sum, nothing in 11 U.S.C. § 363(m) renders moot the important legal issues raised by Petitioners here, and review is warranted because only this Court can now remedy the bankruptcy court's inequitable distribution of sale proceeds.

CONCLUSION

Amici curiae request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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