No. _____

IN THE

# Supreme Court of the United States

CYRUS CAPITAL PARTNERS, L.P.,

*Petitioner*,

v.

SEARS HOLDINGS CORPORATION,

*Respondent*.

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

An essential element in almost every bankruptcy is determining the value of property serving as collateral for secured debt. That critical process is governed by § 506(a) of the Bankruptcy Code, 11 U.S.C. § 506(a). In *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997), this Court held that § 506(a) requires courts to apply a "replacement value" standard, rejecting multiple alternative standards lower courts had adopted, including a "case-by-case" approach that allowed for different valuation standards based on the "facts and circumstances of individual cases." *Id.* at 964 n.5, 965 (quotation omitted).

In this case, the courts below refused to apply a replacement-value standard to determine the value of retail inventory that served as collateral for secured debt held by petitioner. The courts instead held that under the specific facts and circumstances of the case—in particular, the debtors' professed plans to sell the inventory during the bankruptcy proceedings—the bankruptcy court had discretion to employ a different valuation standard that accounted for the debtors' hypothetical sales plans.

The question presented is:

Whether Bankruptcy Code § 506(a) authorizes a court to value collateral retained by the debtor under a standard other than "replacement value" when the debtor professes an intent to sell the collateral.

## PARTIES TO THE PROCEEDING

Petitioner is Cyrus Capital Partners, L.P., appellant below. Wilmington Trust, National Association, together with ESL Investments, Inc. and its affiliated entities JPP, LLC and JPP II, LLC, were also appellants below.

Respondent is Sears Holdings Corporation, debtor-appellee below. The other appellees below were Sears Home Improvement Products, Inc.; Kmart Holding Corporation; Sears, Roebuck and Co.; Sears Procurement Services, Inc.; Sears Protection Company (PR) Inc.; Sears Protection Company; Sears Roebuck Acceptance Corp.; SR-Rover de Puerto Rico, LLC; Big Beaver of Florida Development, LLC; California Builder Appliances, Inc.; Kmart of Washington LLC; Sears Brands Business Unit Corporation; Sears Holdings Publishing Company, LLC; Sears Protection Company (Florida), L.L.C.; SHC Desert Springs, LLC; A&E Home Delivery, LLC; Sears Operations LLC; A&E Lawn & Garden, LLC; A&E Signature Service, LLC; FBA Holdings Inc.; Innovel Solutions, Inc.; Sears Holdings Management Corporation; Sears Home & Business Franchises, Inc.; Sears Insurance Services, L.L.C.; Florida Building Appliances, Inc.; Kmart Stores of Texas LLC; Kmart of Michigan, Inc.; SHC Promotions LLC; SYW Relay LLC; A&E Factory Service LLC; Kmart.Com LLC; Kmart Operations LLC; SHC Licensed Business LLC; Servicelive Inc.; SRE Holding Corporation; Kmart Corporation; Maxserv, Inc.; Private Brands, Ltd.; Sears Development Co.; KBL Holding Inc.; Kmart Stores of Illinois LLC; KLC, Inc.; Wally Labs LLC; Mygofer LLC, Soe, Inc.; Troy Coolidge No. 13,

LLC; Sears Brands Management Corporation; Starwest, LLC; Bluelight.Com, Inc.; Sears Buying Services, Inc.; STI Merchandising, Inc.; Sears Brands, L.L.C.; Official Committee Of Unsecured Creditors of Sears Holdings Corporation, et al; Sears, Roebuck de Puerto Rico, Inc.; and Florida Builder Appliances, Inc.

## RELATED PROCEEDINGS

*MOAC Mall Holdings LLC v. Transform Holdco LLC*, No. 21-1270 (U.S.)

*In re Sears Holdings Corp.*, 51 F.4th 53 (2d Cir. 2022)

*In re Sears Holdings Corp.*, 2021 WL 5986997 (2d Cir. Dec. 17, 2021)

*Santa Rosa Mall, LLC v. Sears Holdings Corp.*, 2021 WL 4429507 (S.D.N.Y. Sept. 27, 2021)

*In re Sears Holdings Corp.*, 628 B.R. 402 (S.D.N.Y. 2021)

*In re Sears Holdings Corp*, 621 B.R. 563 (S.D.N.Y. 2020)

*In re: Sears Holdings Corp.*, No. 18-23538 (Bankr. S.D.N.Y.)

## RULE 29.6 DISCLOSURE

Petitioner Cyrus Capital Partners, L.P., is a non-governmental corporate party. Petitioner is a limited partnership with no stock and no parent corporation.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Cyrus Capital Partners, L.P., respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The Second Circuit's decision is reported at 51 F.4th 53 (2d Cir. 2022), and is reprinted in the Appendix to the Petition ("App.") at 1a-27a. The district court's opinion and order affirming the bankruptcy court's order is reported at 621 B.R. 563 (S.D.N.Y. 2020), and is reprinted at App. 28a-60a. The bankruptcy court's bench ruling and its subsequent order on collateral valuation are unreported and are reprinted at App. 61a-89a and App. 90a-96a, respectively.

## JURISDICTION

The Second Circuit issued its decision on October 14, 2022. App. 1a. On December 8, 2022, Justice Sotomayor extended the time within which to file a petition for certiorari to and including February 13, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

Section 506(a)(1) of the Bankruptcy Code provides, in relevant part:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an

> unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a)(1).

Section 361 of the Bankruptcy Code provides, in relevant part:

> When adequate protection is required . . . of an interest of an entity in property, such adequate protection may be provided by . . . requiring the trustee to make a cash payment or periodic cash payments to such entity . . . [or] providing to such entity an additional or replacement lien to the extent that [a] stay, use, sale, lease, or grant [of a lien] [under the Bankruptcy Code] results in a decrease in the value of such entity's interest in such property.

11 U.S.C. § 361(1)-(2).

## INTRODUCTION

A debtor availing itself of the protections of the Bankruptcy Code has two distinct options with respect to a secured creditor's collateral. The debtor may elect to surrender the collateral to the creditor. Or the debtor may instead choose to retain and use the collateral for its own benefit. If the debtor does not surrender the collateral to the secured creditor, it must provide the creditor with adequate protection

for the value of that claim, as determined under Bankruptcy Code § 506(a).

In *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997), this Court held that § 506(a) requires that collateral retained by a debtor be valued at its *replacement value*. *Id.* at 954, 960-65. In so holding, the Court rejected a "ruleless approach" to bankruptcy valuation under which courts may apply "different valuation standards" depending on "the facts and circumstances of individual cases." *Id.* at 964 n.5 (abrogating *In re Valenti*, 105 F.3d 55, 62-63 (2d Cir. 1997)). The Court instead held, in categorical terms, that § 506(a) "directs application of the replacement-value standard" when a debtor retains and uses a creditor's collateral. 520 U.S. at 956. According to *Rash*, this "simple rule of valuation" was necessary "to serve the interests of predictability and uniformity" in the bankruptcy courts, *id.* at 965 (quotation omitted), and to account for the risks the creditor incurs when the debtor elects to retain its collateral, *id.* at 962-63.

In the decision below, the Second Circuit refused to employ the replacement-value standard mandated by *Rash* and instead adopted the kind of ad hoc approach that *Rash* specifically rejected. According to the Second Circuit, the appropriate standard depends on what the debtor plans to *do* with the retained property. Because the debtor here planned to sell the property as a going concern, the court held that the bankruptcy court properly rejected the replacement-value standard in favor of a different standard that accounted for the possibility that the debtor's going-concern sale plans may not fully suc-

ceed and that the company may have to liquidate its inventory. App. 21a.

That holding directly conflicts with *Rash* and with the decisions of two other courts of appeals that faithfully apply *Rash*'s categorical rule. It also reflects and exacerbates broader confusion among lower courts about the scope of *Rash*'s holding. In particular, courts are divided over whether *Rash*'s replacement-value standard is mandatory in all cases where a debtor retains a creditor's collateral, or whether a different standard may be used depending on the unique circumstances of a debtor's bankruptcy plan. This Court's intervention is necessary to restore *Rash*'s clear rule mandating the replacement-value standard where collateral is retained rather than surrendered.

The question presented is of utmost importance. Asset valuations are foundational to the bankruptcy process and carry enormous consequences for debtors and creditors. Widespread uncertainty in valuation standards obstructs the efficient resolution of bankruptcy cases. Certiorari is warranted to clarify the scope of *Rash* and to reaffirm that a replacement-value standard is required for all valuations under § 506(a).

## STATEMENT OF THE CASE

In October 2018, Sears Holdings Corporation and its affiliates ("Sears") petitioned for Chapter 11 bankruptcy protection. App. 5a. At the time of its petition, Sears carried approximately $2.68 billion in first- and second-lien debt. *Id.*

Sears's creditors were secured mainly by the in-

ventory in Sears's stores, which served as collateral. *Id.* at 7a. But when a debtor files for Chapter 11 bankruptcy, the Bankruptcy Code imposes an automatic stay that prevents secured creditors from foreclosing on the debtor's property. 11 U.S.C. § 362(a)(3). As a result, a debtor may—like Sears here—decide to retain and use a secured creditor's collateral during the course of the bankruptcy proceeding. App. 6a.

A debtor may retain collateral after the automatic stay, however, only if it provides the creditor with "adequate protection" in exchange. 11 U.S.C. § 363(e). Adequate protection is a "statutory right designed to preserve the Petition-Date value of a secured creditor's collateral"; it requires debtors to pay creditors—for example, in cash or extra liens—to protect against any loss in the value of the collateral while the debtor retains it. App. 6a-7a. Collateral value is determined in accordance with § 506(a)(1).

In this case, Sears's filing of a Chapter 11 petition triggered the automatic stay and prohibited Sears's first- and second-lien holders from foreclosing on the inventory-collateral. *Id.* Rather than surrender the inventory to the secured creditors, Sears elected to retain and use it during the proceedings by selling it in stores to attract customer traffic and generate revenue, which it would then use to buy new inventory and to pay operating expenses and case costs. *Id.* at 7a, 17a-18a; Joint Br. for Appellants at 19-20, *In re Sears Holdings Corp.*, 51 F.4th 53 (2d Cir. 2022). Meanwhile, as their "adequate protection," the second-lien holders received post-petition replacement liens over all of the debt-

ors' assets that would cover any decrease in the value of their collateral (the inventory) over the course of the proceedings. App. 7a. As part of the adequate protection mechanism, the second-lien holders were statutorily entitled to assert "super-priority" over all other creditors for payment if their collateral diminished in value. *Id.*; *see* 11 U.S.C. § 507(b).

Shortly after Sears filed for bankruptcy, one of the second-lien holders entered into negotiations with Sears to purchase substantially all the company's assets via a "credit bid" transaction. App. 7a. Sears agreed to transfer nearly all of Sears's assets to a new company owned and controlled by the second-lien holder. *Id.* In exchange, Sears received approximately $5.2 billion in value, consisting primarily of non-cash collateral including a $433.5 million "credit bid" forgiving debt that Sears owed to certain of the second-lien holders. *Id.* at 7a-8a.[1]

The credit-bid transaction allowed Sears to pay its first-tier creditors in full, but left the second-lien holders with approximately $718 million in debts still owed. Joint Br. for Appellants, *supra*, at 21-23. At the same time, the aggregate value of Sears's collateral substantially diminished as its inventory was depleted during the proceedings, leaving far less than necessary to satisfy the remainder of the second-lien holders' debt. *Id.* at 19-20. The second-lien holders (including petitioner here) asked the bankruptcy court to determine the value of their super-

[1] Petitioner and other second-lien creditors were required to participate under the terms of their credit documents. Joint Br. for Appellants, *supra*, at 22 n.6.

priority claims arising from this diminution in the value of their collateral and grant their proper super-priority standing ahead of other creditor claims. App. 8a.

The bankruptcy court held a hearing to determine the value of the second-lien holders' collateral under § 506(a)(1) as of the petition date. *Id.* at 9a. If the petition-date value of that collateral were found to exceed the value of the credit bid already recouped by the second-lien holders, then the second-lien holders would be entitled to "super-priority" payment of the outstanding debts owed up to the amount of such excess. *Id.* at 8a.

At the valuation hearing, the secured creditors argued that under this Court's decision in *Rash*, the bankruptcy court was required to apply a replacement-value standard to determine the value of retained collateral. *See* 520 U.S. at 956 (§ 506(a) "directs application of the replacement-value standard" when debtor retains and uses collateral). The bankruptcy court, however, held that *Rash* and § 506(a) do not mandate a replacement-value standard under the particular facts and circumstances of this case. Instead, the court concluded, the facts here called for a lower value known as "net orderly liquidation value," or "NOLV," which represented a "point in the price range" between full retail value and foreclosure value of the collateral. App. 9a. Based on the NOLV valuation, the bankruptcy court found that the value of the inventory as of the petition date fell short of the value of the credit bid, and accordingly concluded that the second-lien holders' super-priority claims had no value. *Id.* at 12a.

On appeal, the district court and the Second Circuit affirmed. *Id.* at 27a. According to the Second Circuit, the bankruptcy court properly rejected the replacement-value standard urged by petitioner because the Sears debtors were planning to sell the inventory as a going concern. Because those plans might not have succeeded, thereby forcing a hypothetical liquidation at foreclosure prices, the court held that it was permissible to measure the value of the inventory as of the petition date under a standard lower than replacement value. *Id.* at 18a. Under § 506(a), the court observed, the value of retained collateral must be "determined in light of the purpose of the valuation and of *the proposed disposition or use*" of the property. *Id.* at 16a (emphasis added) (quoting 11 U.S.C. § 506(a)(1)). Drawing a distinction between the "use" of retained collateral and its "disposition," the Second Circuit held that the replacement-value standard mandated by *Rash* applies only when the debtor plans to "use" the property, not when the debtor plans to "dispose" of the property by selling it, even at fire-sale liquidation prices. *Id.* at 16a-17a. To distinguish *Rash*, the Second Circuit observed that the debtor there retained the collateral—a freight truck—for use in his freight-hauling business, whereas here the debtors planned to sell the collateral, which the court viewed as a "disposition" rather than a "use." *Id.*

Relying on this purported distinction between retaining and "using" collateral, on the one hand, and retaining and "selling" collateral, on the other, the Second Circuit deemed *Rash*'s replacement-value mandate inapplicable. *Id.* at 17a-18a. The court

instead held that because nobody "knew precisely how the collateral would be sold" on the date of valuation, it was "reasonabl[e]" and "sensible" to predict that Sears could be unable to sell the inventory at full retail and could instead eventually undergo an orderly liquidation of the inventory. *Id.* at 18a. The court accordingly deemed the NOLV standard an appropriate exercise of discretion, affirming the district court's decision and upholding the bankruptcy court's valuation. *Id.*

## REASONS FOR GRANTING THE PETITION

Certiorari is warranted in this case. The Second Circuit's decision conflicts directly with this Court's decision in *Rash* by reviving the "ruleless," "individual facts and circumstances" approach to collateral valuation that *Rash* explicitly rejected. The decision also conflicts with the decisions of other circuits correctly holding that *Rash* categorically mandates a replacement-value standard to measure the value of retained collateral. The conflict is even more widespread among bankruptcy courts and district courts. While many courts have correctly held that § 506(a) requires a replacement-value standard in all cases, some have held that a different standard may be justified depending on the individual facts of the case, just as the Second Circuit held here.

Resolving this widespread controversy is important for the efficient administration of bankruptcy proceedings, where clear and simple rules are essential. Because this case squarely and cleanly presents the question of the scope of *Rash*'s directive, it provides an ideal opportunity for the Court to restore

needed clarity to this area of the law. The petition for a writ of certiorari should be granted.

### A. The Second Circuit's Decision Directly Conflicts With *Rash*

In *Rash*, this Court held that whenever a debtor decides to retain and use collateral, rather than surrender it to the secured creditor, § 506(a) requires courts to determine the collateral's value—and hence the creditor's right to equivalent value—by a replacement-value standard. The Second Circuit here, however, upheld the use of an alternative standard that, in the bankruptcy court's view, was better suited to the facts and circumstances of this case. That holding cannot be reconciled with *Rash*'s categorical directive.

#### 1. Rash *Categorically Mandates The Use Of A Replacement-Value Standard When A Debtor Retains Collateral*

Section 506(a) of the Bankruptcy Code governs the valuation of secured claims. Under § 506(a)(1), a creditor's claim is secured "only to the extent of the value of the collateral." *Rash*, 520 U.S. at 956.[2] In

[2] Following 2005 amendments to the Bankruptcy Code, the language this Court construed in *Rash* is now codified at 11 U.S.C. § 506(a)(1). *See* Pub. L. No. 109-8, 119 Stat. 23 (2005). The amendments also added § 506(a)(2), which courts have characterized as "a codification of *Rash*" in a subset of cases under Chapters 7 and 13 of the Bankruptcy Code. *In re Brown*, 746 F.3d 1236, 1241 (11th Cir. 2014). With respect to such cases, § 506(a)(2) confirms *Rash*'s mandate to employ a replacement-value standard and provides additional direction for calculating replacement value. *See* 11 U.S.C. § 506(a)(2).

*Rash*, this Court resolved a multi-way split of authority among federal courts of appeals about how to determine the value of collateral under § 506. *Id.* at 959. Before *Rash*, several circuits had required a replacement-value standard; one circuit had mandated a "foreclosure value" standard; another circuit had applied a compromise standard based on the midpoint between the two; and one circuit had adopted a case-by-case approach that allowed bankruptcy courts discretion to apply different standards depending on the specific facts of the case. *Id.*

The lower courts in *Rash* itself had applied a foreclosure standard. The case involved a debtor in Chapter 13 bankruptcy who sought to retain and use a truck in his ongoing freight-hauling business during bankruptcy proceedings. Because the truck served as collateral for a creditor's loan, the debtor could retain the truck only if he provided the creditor with the "equivalent of the present value" of the truck. *Id.* at 961. To determine the truck's present value, the bankruptcy court applied a foreclosure-value standard, rather than the higher replacement value urged by the creditor. *Id.* at 956. The en banc Fifth Circuit ultimately affirmed, reasoning that because the truck's replacement value was higher than what the creditor could obtain by foreclosing, using replacement value would "produce a windfall to the creditor." *Matter of Rash*, 90 F.3d 1036, 1051-54 (5th Cir. 1996) (emphasis omitted).

This Court reversed, holding that when the debtor seeks to "retain and use" a creditor's collateral during bankruptcy, § 506(a) "directs application of the replacement-value standard" to determine the

collateral's value. 520 U.S. at 956.[3] Under § 506(a), the value of collateral property "shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. § 506(a). As the *Rash* Court explained, a debtor has only two options for the "disposition or use" of collateral: either surrender it to the creditor, or retain and use it for the debtor's benefit. *See* 520 U.S. at 962. And those two options, the Court emphasized, "are not equivalent acts." *Id.*

In particular, when the debtor chooses to retain the collateral rather than surrender it to the creditor, the debtor both avoids a "foreclosure sale" and enjoys an "economic benefit" from the collateral that is "equal to its replacement value." *Id.* at 963 (quoting *In re Winthrop Old Farm Nurseries, Inc.*, 50 F.3d 72, 75 (1st Cir. 1995) (alterations omitted)). The foreclosure standard thus improperly subjects the creditor to a valuation that is equivalent to "a foreclosure sale that will not take place." *Id.* The Court also explained that a foreclosure standard ignores the adverse consequences to the creditor of the debtor's decision not to surrender collateral. *Id.* at 962-63. The debtor's retention of collateral, the Court observed, exposes the creditor to "double risks": the

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[3] According to *Rash*, the replacement-value standard is essentially equivalent to a "fair market value" standard, *id.* at 959 n.2—it is the value of the "cost the debtor would incur to obtain a like asset for the same proposed use." *Id.* at 965 (quotation omitted); *see id.* at 959 n.2 ("by replacement value, we mean the price a willing buyer in the debtor's trade, business, or situation would pay a willing seller to obtain property of like age and condition").

risk of another default and the risk that the collateral will deteriorate over time in the debtor's hands. *See id.* at 962. In the *Rash* Court's view, the replacement-value standard—which typically results in higher value for the creditor—better accounts for the risks incurred by the creditor when it cannot take possession of the property and use it for the creditor's own benefit.

In explaining why only a replacement-value standard satisfies § 506(a)'s text and objectives, the Court also rejected a compromise standard endorsed by the Seventh Circuit that pegged valuation to the "midpoint" between replacement and foreclosure value. According to the *Rash* Court, a midpoint standard lacked any basis in the Bankruptcy Code's text, and identifying the midpoint made valuation unnecessarily "complex." *Id.* at 965. The Code calls for "a simple rule of valuation," the Court emphasized, "to serve the interests of predictability and uniformity" in bankruptcy administration. *Id.* at 965 (quotation omitted).

Worst of all, in the *Rash* Court's view, was the approach the Second Circuit had adopted in *In re Valenti*, 105 F.3d 55 (2d Cir. 1997), which held that "no fixed" valuation measure "should be imposed on every bankruptcy court conducting a § 506(a) valuation." *Id.* at 62. The Second Circuit instead construed § 506(a) as reflecting a "flexible standard" that vested "discretion in the hands of bankruptcy judges to shape proceedings in the way they see fit," so long as they "consider[ed]" the "purpose of the valuation" and the "proposed disposition and use of the collateral." *Id.* The *Rash* Court flatly dismissed

that "ruleless approach" as improperly authorizing bankruptcy courts to employ "different valuation standards based on the facts and circumstances of individual cases." 520 U.S. at 964 n.5.

The Court in *Rash* thus did not merely endorse a replacement-value standard over a foreclosure-value standard. The decision more broadly holds that *only* a replacement-value standard satisfies the text and objectives of § 506(a). To be sure, the *Rash* Court recognized that a "replacement value" standard may entail different calculations in different circumstances, "depend[ing] on the type of debtor and the nature of the property." *Id.* at 965 n.6. But the Court nonetheless held that the broader *category* of "replacement value" must be applied to measure the value of the collateral a debtor retains. *Id.* at 956.

2. *The Decision Below Expressly Rejects* Rash*'s Categorical Rule*

a. The Second Circuit's decision below acknowledges that *Rash* requires the use of a replacement-value standard for collateral a debtor chooses to retain and "use." But the decision declines to apply that rule given the individual facts and circumstances of this case. In particular, the Second Circuit's decision holds, a bankruptcy court may exercise discretion to adopt some different standard when the debtor decides to retain the property and *sell* it. App. 16a-17a. Under those circumstances, the decision asserts, the debtor does not "use" the property within the meaning of § 506(a), but instead "disposes" of it, thereby allowing for a different, discretionary valuation standard.

That holding and analysis cannot be reconciled with *Rash* or with the plain meaning of § 506(a) as *Rash* construed it. Under the Second Circuit's approach, the bankruptcy valuation standard can vary according to the particular choices each debtor makes about what to do with a creditor's collateral after retaining it. The decision makes the point clear in a hypothetical example it posits. According to the Second Circuit, if the Sears debtors had proposed to "use" the washer-and-dryer inventory in laundromats, that use could implicate the replacement-value standard. *See id.* But because the debtors proposed instead to *sell* the inventory in their retail stores in the normal course, the court reasoned, they would not be "using" it and a different standard could be applied. *Id.* And at the time of valuation, it was possible the debtors' retail-sales plan would fail and they eventually would undergo some form of liquidation. *Id.* at 17a-18a. Given that no one "knew precisely how the collateral would be sold," the Second Circuit held that it was "sensible" for the bankruptcy court to value the collateral "somewhere between a forced liquidation and its full retail price." *Id.* at 18a.

That approach is substantively identical to the "ruleless approach" of allowing "different valuation standards based on the facts and circumstances of individual cases" the Second Circuit previously adopted in *Valenti*, which the *Rash* Court expressly rejected. 520 U.S. at 964 n.5. Under *Rash*, a debtor either surrenders the property for the creditor's own use and benefit, in which case no valuation is needed, or the debtor retains the property for its own use

and benefit, in which case a replacement-value standard is mandatory. Nothing in *Rash* or § 506(a)'s text justifies application of a different valuation standard depending on *how* the debtor plans to use retained property. *Rash* makes clear that § 506(a) presupposes only two options for collateral property: surrender or retention. The Second Circuit's approach incorrectly reads in at least one additional option: surrender, retention to use, or retention to sell.

The wordplay distinction between "use" and "disposition" the Second Circuit used to justify that result is especially nonsensical in the context of retail-sales inventory. A retail business by definition *uses* its inventory by displaying it, attracting customers, and selling it, just like the *Rash* debtor used his truck by hauling freight in it. But the point is not limited to retail debtors—the Second Circuit's theory presumably would enable *any* debtor to escape the replacement-value standard simply by claiming an intent to sell retained collateral.

b. By rejecting *Rash*'s categorical approach and allowing valuation standards to differ depending on plans for retained property, the decision below exposes creditors to the very same risks that *Rash* sought to avoid. As described above, *supra* at 11, federal circuits were divided before *Rash* on whether a debtor who retained collateral would owe the creditor the replacement value, foreclosure (liquidation) value, a midpoint value, or some indeterminate amount selected in the bankruptcy court's discretion. *Rash*, 520 U.S. at 959. In resolving that disagreement in favor of replacement value, the *Rash* Court

recognized that a debtor who retains collateral derives an "economic benefit" from it "equal to" its replacement value. *Id.* at 963-64. The creditor, by contrast, loses its pre-bankruptcy right of foreclosure and incurs the risk that the collateral will deteriorate, leaving the creditor under-secured. *Id.*

*Rash* emphasizes that a debtor's choice to retain collateral forces the creditor into a precarious position. The "vast majority of reorganizations fail," and collateral in a debtor's hands can "depreciate[] rapidly," meaning a secured creditor "may receive far less in a failed reorganization than in a prompt foreclosure." *Id.* at 963 (quotation omitted). If § 506(a) fixed a valuation standard *below* replacement value, the standard would permit a debtor to both reorganize *and* "reap a windfall by stripping down the [creditors'] lien to the liquidation value and quickly selling the collateral at fair market value, thus pocketing equity that would have been completely beyond reach save for the filing of the bankruptcy petition." *Winthrop Old Farm Nurseries*, 50 F.3d at 76.

That impermissible windfall is exactly what debtors received here. They retained petitioner's collateral and used it to operate their businesses, selling the collateral in the ordinary course during the bankruptcy proceedings. App. 18a. Petitioner thus lost its right to foreclose immediately on that collateral and use the inventory for its own benefit. Under *Rash*, petitioner should have been compensated for that loss by receiving the full amount it would have cost to replace the collateral when the debtors chose to retain it. Instead, petitioner was subjected to the unfair bargain *Rash* sought to pre-

vent: no possession of its collateral, and only a fraction of the value that the collateral could have fetched in a fair market transaction.

The decision below thus ignores the inequitable "double risk[]" that concerned the Court in *Rash*. Under the Second Circuit's holding, debtors may now "retain and use" collateral to help them reorganize, while forcing creditors to bear the risk of future losses in the collateral's value, and thereby effectively converting secured claims into unsecured claims. That rule may seem "friendly to debtors," but "only in the short run; in the long run, the fewer rights that creditors have in the event of default, the higher interest rates will be to compensate creditors for the increased risk of loss." *In re River E. Plaza, LLC*, 669 F.3d 826, 833 (7th Cir. 2012). The only approach *Rash* permits is to ensure that when a debtor elects to retain collateral, the creditor receives in its stead the full value the collateral would obtain in a fair market transaction.

c. The Second Circuit's decision also conflicts with *Rash* by failing to respect its direction that a "simple rule of valuation" under § 506(a) is needed "to serve the interests of predictability and uniformity" in the bankruptcy courts. 520 U.S. at 965 (quotation omitted). The decision below instead holds that the applicable valuation standard depends on the facts and circumstances of the individual case—exactly the approach *Rash* rejects. *Id.* at 964 n.5. According to the Second Circuit, a fact-dependent standard is required because at the time of filing, "neither the Debtors nor the second-lien holders knew precisely how the collateral would be sold,"

and "two realistic scenarios" were possible: "a going-concern sale or a forced liquidation." App. 18a (quotation omitted). Given that uncertainty, the court held that the bankruptcy court permissibly exercised its discretion to employ a standard somewhere between replacement value and forced liquidation (i.e., foreclosure) value.

As noted, that approach obviously conflicts directly with *Rash*'s rejection of a substantively identical discretionary approach previously adopted by the Second Circuit. But it also conflicts with *Rash*'s emphasis on simplicity and clarity over discretion and indeterminacy. Under the decision below, the valuation standard will vary unpredictably depending on the many different options a debtor may have for exploiting retained collateral during a bankruptcy proceeding. That approach would undermine the interests in efficiency, predictability, and uniformity that lie at the heart of the effective operation of the bankruptcy system. *See infra* Part D.

### B. The Decision Below Conflicts With Decisions Of Other Circuits That Apply Replacement Value Under *Rash* As A Categorical Mandate

The petition should also be granted because the decision below conflicts with decisions of the Third and Ninth Circuits applying *Rash*'s categorical mandate. *See In re Sunnyslope Hous. LP*, 859 F.3d 637, 644-45 (9th Cir. 2017), *as amended* (June 23, 2017) (en banc); *In re Heritage Highgate, Inc.*, 679 F.3d 132, 141-42 (3d Cir. 2012).

1. In *Sunnyslope*, the en banc Ninth Circuit held that *Rash* mandates the use of replacement value under § 506(a)(1) whenever a debtor seeks to retain and use collateral in bankruptcy. *See* 859 F.3d at 637. The debtor there sought to retain and use an apartment complex that served as secured collateral for several creditors. *Id.* at 641. The apartment complex was subject to regulatory restrictions that required it to be used for low-income housing. *Id.* Because those restrictions would terminate if a creditor foreclosed on the property, the foreclosure value of the complex was higher than its replacement value. *Id.* at 640. Even though a foreclosure standard would have generated more value for creditors, the en banc Ninth Circuit held that property must be valued according to its replacement value: "[W]e take the Supreme Court at its word and hold, as *Rash* teaches, that § 506(a)(1) requires the use of replacement value rather than a hypothetical value derived from the very foreclosure that the reorganization is designed to avoid." *Id.* at 640, 644-45.

2. In *Highgate*, the Third Circuit likewise held that § 506(a)(1) mandates a replacement-value standard whenever a debtor "retain[s] and use[s] collateral to generate income with which to make payments to creditors." 679 F.3d at 141-42. The debtor in *Highgate* owned a housing development that served as collateral for secured creditors. *Id.* at 136. The debtor filed for bankruptcy protection and, as part of its reorganization plan, proposed to pay back lenders through the "development and sale" of housing lots "over the course of 47 months." *Id.* at 137. The Third Circuit valued the housing project

according to its fair-market value, which it equated with replacement value under *Rash*. *See id.* at 142; *see also supra* note 3.

In requiring a replacement-value standard, the Third Circuit rejected one creditor's effort to tie the retained property's value to the income the property was likely to generate during the reorganization. 679 F.3d at 142. Because the debtor planned to sell units in the housing development over time, the creditor argued that the likely revenue justified a valuation higher than replacement value. *See id.* at 138. The Third Circuit condemned that proposal as an improper "wait-and-see approach . . . at odds with the Bankruptcy Code." *Id.* at 142. Disregarding the debtor's intent to sell the housing lots over an extended period, the court held that current fair market value was the "proper measure under § 506(a)." *Id.* Citing *Rash*, the court concluded that when "a debtor elects to use the collateral to generate an income stream," the fair-market value standard properly captures the "economic benefit" the debtor derives from the collateral. *Id.* at 141 (quotation omitted).

3. The Second Circuit's decision squarely conflicts with both *Highgate* and *Sunnyslope*. In those cases, the Third and Ninth Circuits considered and rejected efforts to apply valuation standards other than replacement value. Even though the alternative standards may have been better suited to the specific facts and circumstances of the case, both courts held that under *Rash*, only a replacement-value standard may be applied to determine the value of retained collateral.

The conflict with *Highgate* is especially acute. Just like the debtors here, the debtor there retained the collateral housing development units—called its "inventory," like the collateral here—and planned to sell them in normal business operations. Under the Second Circuit's holding in this case, the court could have rejected the replacement-value standard on the ground that by selling its inventory of housing units, the debtor was not "using" them but "disposing of" them, thereby rendering *Rash* inapplicable and requiring a fact-specific evaluation of their likely sales success. The Third Circuit, however, correctly held that the debtor's plan to sell its inventory over time was irrelevant to the valuation analysis. As the court recognized, what matters under *Rash* is only the objective value that could be obtained in a fair market sale of the property. This Court should grant review and reaffirm that clear directive.

### C. Bankruptcy Courts And District Courts Are Broadly Divided Over The Scope of *Rash* And § 506(a)

The circuit-level conflict created by the Second Circuit's decision in this case is emblematic of the broader conflict already rampant among bankruptcy courts and district courts over the scope of *Rash*'s replacement-value mandate. As explained in Part D, *infra*, clear and simple rules are uniquely important in bankruptcy, and valuations are a critical element of nearly all bankruptcies, but appellate review of valuation rulings is relatively difficult to obtain. For these reasons, the widespread disagreement among lower courts as to how and when *Rash* applies is a uniquely compelling reason this Court should inter-

vene now and provide courts the guidance they need to conduct valuations properly.

1. Many lower courts have correctly recognized that *Rash* prohibits any standard other than replacement value when collateral is retained, and that *Rash* thereby forecloses reliance on a debtor's unique plans for using collateral to justify alterative standards. As one court put it, *Rash* proceeded from the premise that there are "two alternatives—surrender or retain," making the decision incompatible with an approach that involves "setting a value that is based upon a use which might be unique to a particular debtor." *In re Bell*, 304 B.R. 878, 881 (Bankr. N.D. Ind. 2003). In other words, the "replacement-valuation method prescribed by *Rash* 'does not include any consideration of factors that are particularly unique to the debtor,'" *HSBC Bank USA v. United Airlines, Inc.*, 2008 WL 4367487, at *2 (N.D. Ill. Mar. 25, 2008) (quotation omitted), and thus a debtor's special plans for how to use the retained collateral "make[] no difference to the valuation under § 506(a)(1)," *In re Murray Metallurgical Coal Holdings, LLC*, 618 B.R. 220, 240 (Bankr. S.D. Ohio 2020); *see In re Nat'l Book Warehouse, Inc.*, 2007 WL 5595524, at *6 (Bankr. M.D. Tenn. May 23, 2007) (even where "debtors were already in partial liquidation mode" as of the petition date, "*Rash*'s mandate" was that "replacement cost is the appropriate standard for valuation"); *In re UAL Corp.*, 351 B.R. 916, 921 (Bankr. N.D. Ill. 2006) (*Rash*'s discussion of "valuing collateral according to the debtor's 'proposed . . . use'" was "distinguishing between retention and surrender, not requiring valuation based

on" particular future use by debtor, such as "a proposed suboptimal use"); *In re Arden Props., Inc.*, 248 B.R. 164, 172 (Bankr. D. Ariz. 2000) (*Rash*'s directive to use replacement value "does not include any consideration of factors that are particularly unique to the debtor"). These decisions all correctly recognize that under § 506(a), as construed in *Rash*, a debtor has only two relevant "options for dealing with secured claims—surrender the collateral to the creditor *or* retain it and pay the creditor the collateral's present value." *Bell*, 304 B.R. at 881 (emphasis added and quotation omitted). And when the debtor opts to retain the collateral, its present value must be determined according to an objective replacement-value standard.[4]

2. Other lower courts, by contrast, have adopted the same misreading of *Rash* as the Second Circuit, holding that § 506(a) contemplates different valuation standards depending on what the debtor plans to do with the collateral during bankruptcy. According to these decisions, § 506(a)'s reference to the debtor's "proposed disposition or use" of property implicates the debtor's specific plans for the property, even beyond the binary choice between surren-

[4] Likewise, many lower courts have correctly held that *Rash*'s underlying principle requires compensating creditors for the risks imposed by a debtor's choice to retain collateral. *See In re Scott*, 248 B.R. 786, 792 (Bankr. N.D. Ill. 2000) ("the Supreme Court explained that replacement value is required under § 506(a) precisely for the purpose of providing protection to the secured creditor"); *In re Goodyear*, 218 B.R. 718, 722 (Bankr. D. Vt. 1998) ("*Rash* requires that the [creditor's] risk premium be considered in connection with the valuation of collateral.").

dering or retaining it. While acknowledging that "courts have not been uniform" in their analyses, one court rejected as "excessively restrictive" the premise that "consideration of a debtor's 'proposed disposition or use' is solely based upon whether the debtor intends to surrender or retain the collateral." *In re Bishop*, 339 B.R. 595, 598, 600 (Bankr. D.S.C. 2005). Other courts have also "found uncompelling the argument that 'proposed disposition or use' refers only to whether the debtor intends to surrender the collateral or retain it." *In re Museum of Am. Jewish Hist.*, 2020 WL 7786925, at *18 (Bankr. E.D. Pa. Dec. 4, 2020) (citing cases), *aff'd*, 2021 WL 1264160 (E.D. Pa. Apr. 6, 2021); *see Farmers & Merchs. Bank v. Southall*, 475 B.R. 274, 278 (M.D. Ga. 2012) ("There is no indication in the plain text of § 506 or in the text of the *Rash* decision that the phrase 'proposed disposition or use' should be interpreted only in the context of the debtor's ultimate decision about retaining or surrendering the collateral in question."). These courts construe *Rash* and § 506(a) to mandate a flexible, fact-dependent standard even for the threshold question of whether replacement value applies, where "consideration must be given to the actual use proposed by Debtor." *Bishop*, 339 B.R. at 600; *see In re Riverstreet Ventures, LLC*, 2021 WL 4296167, at *5 (Bankr. E.D. La. Sept. 20, 2021) (valuation must be based on debtor's specific "proposed disposition or use," *i.e.*, "to develop [a] 167-unit multi-family housing project"); *In re Residential Cap., LLC*, 501 B.R. 549, 594 (Bankr. S.D.N.Y. 2013) ("proper valuation methodology must account for the proposed disposition of the collateral," meaning the specific "stated purpose" set forth by the debtors in

that particular case); *In re SK Foods, L.P.*, 487 B.R. 257, 262 (E.D. Cal. 2013) (*Rash* requires looking to debtor's "proposed disposition or use" of such property, meaning the particular way in which the debtors used the collateral after retaining it—namely, "a going-concern sale"); *In re Donato*, 253 B.R. 151, 155 (M.D. Pa. 2000) (*Rash* requires a "determination of what the proposed use of the property is," including "examining" whether it is the "'highest and best' use" or some other particular use); *cf. In re Adam Aircraft Indus., Inc.*, 2013 WL 773044, at *6 (D. Colo. Feb. 28, 2013) (affirming bankruptcy court valuation that matched with actual specific use of the collateral and holding that "*Rash* does not dictate the use of a replacement value standard in all § 506(a) valuations"); *In re Motors Liquidation Co.*, 482 B.R. 485, 491-92 (Bankr. S.D.N.Y. 2012) (limiting *Rash* to its facts and reasoning that the specific "proposed disposition or use" of property must be examined in valuation).

3. Courts have also splintered over various other aspects of *Rash*, further underscoring the need for certiorari to clarify the decision's scope and meaning. For example, some courts have refused to apply *Rash*'s analysis of § 506(a) beyond its immediate factual and procedural context, erroneously reading the decision as limited to Chapter 13 cram-down cases. *See In re Stembridge*, 394 F.3d 383, 386 n.5 (5th Cir. 2004) (*Rash*'s interpretation of § 506(a) is limited to "cram-downs only"); *In re Washington*, 2003 WL 22119519, at *4 (Bankr. E.D. Ark. Aug. 25, 2003) ("the *Rash* replacement valuation standard is limited to Chapter 13 cramdowns"). But as other deci-

sions recognize, § 506(a) is a "'utility' provision" that "applies *throughout* the various chapters of the Bankruptcy Code," *Rash*, 520 U.S. at 967 (Stevens, J., dissenting), and thus *Rash*'s analysis and holding apply "with equal force in the Chapter 11 reorganization context," *Highgate*, 679 F.3d at 141; *see In re TennOhio Transp. Co.*, 247 B.R. 715, 720 (Bankr. S.D. Ohio 2000) (applying *Rash* to adequate-protection valuation).[5]

4. As the foregoing discussion shows, courts are too often misreading *Rash* as requiring a replacement-value standard only in narrow situations strictly defined by the facts of *Rash* itself. But *Rash* was construing the text of § 506(a), which applies broadly to *all* valuations of property serving as collateral for secured claims. Nothing in that text suggests that a different valuation standard applies depending on the Code provision at issue or the debtor's specific plans for the retained property. To the

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[5] Likewise, before the 2005 amendments clarified a subset of cases under Chapters 7 and 13, lower courts disagreed over whether *Rash* applied in the Chapter 7 redemption context. *Compare, e.g.*, *In re Tripplett*, 256 B.R. 594 (Bankr. N.D. Ill. 2000) (adopting foreclosure standard in redemption context), *with In re Smith*, 307 B.R. 912, 921 (Bankr. N.D. Ill.) (applying "*Rash*'s replacement value" standard to Chapter 7 redemptions), *rev'd*, 313 B.R. 267 (N.D. Ill. 2004), *and In re Stark*, 311 B.R. 750, 755 (Bankr. N.D. Ill. 2004) ("declin[ing] to follow the approaches taken in *Tripplett* and *Smith*" and adopting midpoint approach). While the addition of § 502(a)(2) resolved that particular conflict by reaffirming the applicability of replacement value in such cases, *see supra* note 1, similar questions about *Rash*'s scope and application continue to vex courts and litigants, *see supra* at 20-26.

contrary, *Rash* expressly rejects the position that the standard can vary depending on "the facts and circumstances of individual cases," 520 U.S. at 964 n.5, not least because a "simple rule of valuation" better serves the interests of "predictability and uniformity" that underlie the Code, *id.* at 965 (quotation omitted); *see* Jean Braucher, *Getting It for You Wholesale: Making Sense of Bankruptcy Valuation of Collateral After Rash*, 102 Dick. L. Rev. 763, 764-65 (1998) (noting *Rash*'s aim of safeguarding "predictability, uniformity and simplicity" in valuations).

This Court's guidance is necessary to clarify that the Bankruptcy Code, as interpreted by *Rash*, requires courts to apply a replacement-value standard when measuring the value of collateral retained by a debtor.

### D. The Question Presented Is Important And Cleanly Presented In This Case

Resolving the conflict in the circuits and alleviating the widespread confusion among lower courts is exceptionally important for the sound administration of bankruptcy law. Valuation is at the heart of the bankruptcy process, and lower courts often have the final word on these critical issues. Clear, administrable rules are thus critical to ensuring the efficient functioning of the bankruptcy system. Because the issue is squarely presented in this case and lower court confusion will persist absent this Court's intervention, certiorari is warranted.

1. The question presented arises frequently because valuations are critical to the resolution of bankruptcy cases. "Issues involving the valuation of

property arise in almost every bankruptcy case, consumer or business." National Bankruptcy Review Commission Final Report, ch. 1.2, *reprinted in* Collier on Bankruptcy, App. Pt. 44 (16th ed. 2022) ("Commission Report"). For example, in Chapter 13 cases alone, valuation "probably arises in more than a hundred thousand cases a year." Braucher*, supra*, at 765. And valuations carry important consequences for both debtors and creditors: they can determine whether a debtor's reorganization plan is approved; whether a creditor may immediately foreclose; or whether a creditor is fully secured by the debtor's property. *See, e.g.*, *In re Howard*, 597 F.3d 852, 854 (7th Cir. 2010) (Posner, J.) (noting significant "consequences of misvaluation" in bankruptcy courts). In circumstances like those here, applying an erroneously low valuation impermissibly converts secured interests into unsecured interests, to the significant detriment of secured creditors.

2. Despite the critical nature of these determinations, the valuation question often is decided quickly and ultimately evades consideration by an appellate court. As evidenced by the bankruptcy court's ruling in this case—which was driven in part by the court's understanding "that the parties in this case would benefit considerably from getting the result promptly," App. 62a—valuation determinations may be subject to expedited timelines due to the exigencies of quickly-evolving developments in the bankruptcy process. Those same exigencies mean that, even though bankruptcy courts contend with a "technical, complex body of law," Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 Am.

Bankr. Inst. L. Rev. 183, 183 (2007), and with rulings that have enormous implications for all parties, many critical valuation decisions are issued in unpublished determinations that are not ultimately further appealed. *See, e.g.*, *HSBC Bank USA*, 2008 WL 4367487, at *2 (valuation of property in United Airlines bankruptcy).

Even when parties do seek to appeal bankruptcy court determinations, their efforts may be thwarted by the doctrine of "equitable mootness." Because appeals from confirmation orders can prevent the "quick and collective relief of debtors' financial problems," "federal courts have long reserved to themselves the prudential and discretionary ability to decline to rule on the appeal." 7 Collier on Bankruptcy ¶ 1129.09 (16th ed. 2022). Under that "equitable mootness" doctrine, courts refuse to exercise their jurisdiction if they believe a bankruptcy appeal is "almost certain to produce a perverse outcome" such as "injury to third parties and/or chaos in the bankruptcy court." *In re One2One Commc'ns, LLC*, 805 F.3d 428, 434 (3d Cir. 2015) (quotation omitted). As a result, courts will "sometimes refrain from reviewing certain types of final orders" in bankruptcy, "particularly orders confirming chapter 11 plans of reorganization." 1 Collier, *supra*, ¶ 5.08.

3. Against that backdrop, it is apparent that the bankruptcy context uniquely necessitates clear, administrable rules to maximize the interests of "efficiency, fairness, predictability, and uniformity," *In re Cardelucci*, 285 F.3d 1231, 1236 (9th Cir. 2002), without relying heavily upon appellate courts to correct error. This Court recognized as much in *Rash*,

where it emphasized that "a simple rule of valuation is needed to serve the interests of predictability and uniformity" and rejected inappropriately "complex" interpretations of § 506(a), including an unpredictable "case-by-case" approach. 520 U.S. at 964 n.5, 965 (quotation omitted). That holding comports with the Court's longstanding recognition "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." *Katchen v. Landy*, 382 U.S. 323, 328 (1966) (quotation omitted).

Bankruptcy judges, too, have recognized the need for clear rules and guidance, especially for valuations. In one judge's words, the aid of "starting points and guides" in valuation proceedings "promotes efficiency and economy for debtors and creditors alike." *In re Spraggins*, 316 B.R. 317, 320-21 (Bankr. E.D. Wis. 2004); *see generally In re Adams*, 275 B.R. 274, 280 (Bankr. N.D. Ill. 2002) (noting the importance of "fair and efficient administration of Chapter 13 cases"). And an independent commission tasked with studying the Bankruptcy Code called for a "clear[] standard that does not change from one factual setting to another" when performing valuations of collateral. Commission Report, *supra*, at ch. 1.2.

4. The Second Circuit's rejection of *Rash*'s clear and consistent rule in favor of a malleable approach to § 506(a) valuations that differs across cases will have far-reaching consequences. Second Circuit precedents effectively make the law for more than a third of all bankruptcy cases nationwide: in the

twelve-month period ending September 30, 2022, 37% of new bankruptcy appeals were filed with the Second Circuit. *See* Admin. Office of the U.S. Courts, Caseload Statistics Data Tables, tbl. B-1 (2022), https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables. Courts in those cases are now free to disregard *Rash* and apply whatever valuation standard they deem appropriate based on the debtor's stated plans for retained collateral.

Meanwhile, circuits on the other side of the conflict—the Third and Ninth—together account for another 29% of circuit-level appeals filed in the same time period. *Id.* Valuations in all those cases will be subject to the replacement-value standard, no matter what unique intentions or circumstances the debtor claims.

Given that appellate courts handling roughly two-thirds of all bankruptcy appeals have already opined on the scope of *Rash*'s mandate, little is to be gained by awaiting further appellate percolation of the issue. Rather, much is to be lost, as courts endure needless litigation over threshold valuation issues already settled by *Rash* and reach vastly different collateral valuations depending solely on where debtors file their bankruptcy cases.

5. This case presents an ideal opportunity for this Court to avoid such inefficiency and unfairness by ruling conclusively that § 506(a) requires a replacement-value standard in all cases where a debtor chooses to retain collateral. Under that standard, the collateral here indisputably would have been valued much higher, entitling petitioner and its two co-appellants below to a super-priority lien and ap-

proximately $718 million more than they received under the confirmed plan and the NOLV standard on which it was based. Joint Br. for Appellants, *supra*, at 7. Further, the equitable mootness concerns that often frustrate review have no bearing here because the confirmed plan both expressly carved out petitioner's right to challenge the valuation and established a separate reserve fund to pay for any recovery. *See* Modified Second Am. Joint Ch. 11 Plan §§ 2.5, 11.4, *In re Sears Holdings Corp.*, No. 18-23538 (Bankr. S.D.N.Y. Oct. 15, 2019), ECF No. 5370-1. In short, the decision whether to "take [*Rash*] at its word," *Sunnyslope*, 859 F.3d at 640, and apply a replacement-value standard will make a decisive difference to petitioner's recovery in this case, just as it will in the great many bankruptcies that depend on the proper valuation of property serving as collateral for secured claims.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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