No. 16-764

IN THE

Supreme Court of the United States

GENERAL MOTORS LLC,

Petitioners,

v.

CELESTINE ELLIOTT, et al.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Courts of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT WILMINGTON TRUST COMPANY

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QUESTION PRESENTED

With General Motors Corporation ("Old GM") on the brink of a disastrous collapse, the federal Government infused the company with $20 billion. Old GM failed anyway and entered bankruptcy in June 2009. Shortly thereafter, it proposed to sell substantially all of its assets to a government-controlled entity that became General Motors LLC ("New GM"). New GM was the only potential buyer and had all the leverage. Yet New GM agreed to take on some of Old GM's liabilities, and agreed to increase the sale price if claims against *Old* GM exceeded a certain threshold. The bankruptcy court approved the deal after a hearing and enjoined lawsuits against New GM premised on successor liability.

In 2014, New GM recalled millions of vehicles with an ignition-switch defect that the company had known about no later than when it acquired Old GM's books, records, and employees in 2009. Plaintiffs sued New GM for damages allegedly arising from the defect and its belated disclosure. The bankruptcy court found that Plaintiffs' claims were barred by the Sale Order's injunction. The Second Circuit reversed and remanded.

The question presented is:

> Whether the Second Circuit properly found that the Sale Order could not enjoin Plaintiffs from pursuing claims against New GM.

RULE 29.6 STATEMENT

Motors Liquidation Company General Unsecured Creditors Trust is a private entity that has no parent corporation, and there is no publicly held corporation that owns 10% or more of the Trust.

Wilmington Trust Company, Trustee for and Administrator of the Motors Liquidation Company General Unsecured Creditors Trust, is a wholly owned subsidiary of Wilmington Trust Corporation, which is not publicly traded. Wilmington Trust Corporation is a wholly owned subsidiary of M&T Bank Corporation, which is publicly traded on the New York Stock Exchange. No publicly held corporation owns more than 10% of the stock of M&T Bank Corporation.

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BRIEF IN OPPOSITION

Respondent Wilmington Trust Company, as trustee for and administrator of the Motors Liquidation Company General Unsecured Creditors Trust ("GUC Trust"), submits this brief in opposition to the petition for a writ of certiorari filed by General Motors LLC ("New GM").

STATEMENT OF THE CASE

New GM asks this Court to correct the supposed errors in what it admits is a one-of-a-kind decision by the Second Circuit, arising on facts and circumstances that the Second Circuit described as "peculiar" and "extraordinary." That decision was correct, does not conflict with the precedents of this Court or the circuit courts, and is unfit for this Court's review for many reasons.

Foremost among them, the decision below arises from a black swan event—the complex bankruptcy of one of "the largest corporations in the world," which "was responsible for a quarter-million American jobs, and hundreds of thousands more depended on its continuing vitality." Pet. 7. The decision below also presents a distinctive confluence of facts that had never occurred before and almost certainly will never occur again—the "unprecedented action" by the federal government to attempt to bailout GM "to save the domestic auto industry," and when the bailout failed to engineer an emergency Section 363 sale to a newly created government-controlled entity that agreed to acquire not only the assets but also significant liabilities of the failing company. Pet. 7-8.

Even looking past the thicket of facts standing in the way, there is no compelling legal reason to address

the questions presented. The Second Circuit's decision is not in conflict with a decision by this Court or a decision by another court of appeals. The best New GM can muster—a suggestion of tension with one nineteenth century decision from this Court, and with one circuit decision from twenty-five years ago—falls far below this Court's typical standard for certiorari.

Contrary to New GM's contentions, the decision below has no impact on the viability of Old GM's long-ago-confirmed bankruptcy. It does not preclude (or even discourage) debtors from utilizing Section 363 sales in future cases. And it does not actually hold a Section 363 purchaser liable for anything whatsoever. The sky is not falling; Section 363 remains alive and well. The petition should be denied.

1. With "the domestic auto industry … in extremis," the federal "government took unprecedented action" to give Old GM "billions of dollars in emergency loans." Pet. 7. When that bailout proved unsuccessful, Old GM filed for bankruptcy under Chapter 11 of the Bankruptcy Code. Old GM's bankruptcy was by far the largest of any manufacturer, and remains the fourth largest bankruptcy ever.

When Old GM sought to sell its assets under 11 U.S.C. § 363, it found no private suitors. "The only entity willing and able to purchase those assets was the government." Pet. 7. So the government did what it had never done before (and has never done since): it formed and provided most of the financing for the government-controlled corporate entity that became New GM, "and used that entity to purchase" substantially all of Old GM's assets. Pet. 7-8.

After direct-mail and publication notice of the proposed Sale, the bankruptcy court held three days of

hearings. It then issued the Sale Order approving the Sale according to the terms in the Sale Agreement. Under those terms, New GM acquired substantially all of Old GM's assets, including Old GM's employees, management, real property, inventory of vehicles and spare parts, and books and records. *See In re Gen. Motors Corp.*, 407 B.R. 463, 481 (Bankr. S.D.N.Y. 2009). In exchange, Old GM received approximately $45 billion in publicly traded New GM stock, and warrants to purchase additional New GM stock. *Id.* at 482. New GM also agreed to provide up to 30 million additional shares of common stock—valued at over $1.1 billion as of February 15, 2017—if the amount of Allowed General Unsecured Claims against Old GM exceeded $35 billion. *See id.* at 483; Pet. App. 13. That so-called "accordion feature" tied the purchaser to the debtor, and to the quantum of post-sale claims against the debtor, in a way that few, if any, bankruptcies ever have.

Government-backed New GM initially insisted that it would only take on a narrow set of liabilities. Pet. App. 11-12; *see also* Pet. App. 89-91. In negotiating the Sale Agreement, however, New GM agreed that it would accept additional liability. For example, New GM assumed liability for post-Sale "accidents or other discrete incidents" involving Old GM manufactured vehicles, and for state lemon-law claims. Pet. App. 93. To the extent permitted by the constitution and bankruptcy law, New GM otherwise acquired Old GM's assets "free and clear of all liens, claims, encumbrances, and other interests," and obtained an injunction against successor liability claims. Pet. App. 96-97.

2. The bankruptcy court established November 30, 2009 as the Bar Date for filing claims against Old

GM. Old GM's Plan was confirmed on March 31, 2011. On that date, Old GM changed its name to Motors Liquidation Company, and transferred title to its GM securities to the GUC Trust, which was formed the same day.

The GUC Trust is a liquidating trust with the primary purpose of resolving disputed claims and distributing GUC Trust Assets and GUC Trust Units to the GUC Trust's defined beneficiaries. Dkt. 13031, Ex. 4 § F.[1] Those beneficiaries include holders of disputed claims as of March 31, 2011, that were later allowed, holders of Allowed General Unsecured Claims, and holders of freely traded Units in the GUC Trust. Plaintiffs are not GUC Trust beneficiaries. As of November 2016, the GUC Trust has distributed approximately 94% of its assets in the form of New GM stock, warrants, and cash, to holders of allowed claims and to unitholders. There are no remaining assets in the GUC Trust that have not already been allocated. *See* Pet. App. 210.[2]

3. In 2014, New GM recalled more than 30 million vehicles, including some that had been on the road for more than a decade. In particular, New GM recalled more than 2.1 million vehicles for a defective ignition switch, an additional 12 million vehicles for other defects related to the ignition switch, and another 16.5

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[1] References to "Dkt." are to docket entries in *In re Motors Liquidation Co.*, No. 09-50026 (Bankr. S.D.N.Y.).

[2] Under the GUC Trust Agreement, which is incorporated by reference into the Plan, the GUC Trust is not a general successor to Old GM. Rather, the GUC Trust is a successor solely within the meaning of Section 1145 of the Bankruptcy Code, for the limited purpose of exempting the GUC Trust from reporting requirements in connection with distributing its securities. *See* Dkt. 13031, Ex. 4 § E; *see also* Dkt. 9836 § 6.6; Dkt. 9941 ¶ 13.

million vehicles for other unrelated defects. New GM admitted to federal regulators that its belated ignition-switch-defect recalls violated federal law, and agreed to pay the maximum civil penalty of $35 million. Dkt. 13031, Ex. 7 ¶¶ 10-11. New GM also later agreed to forfeit $900 million when it entered into a deferred prosecution agreement with the Department of Justice. Pet. App. 53.

Plaintiffs responded to the revelations by filing putative class actions against New GM seeking damages, under various theories, for alleged economic loss, personal injury, and wrongful death. New GM then moved to enforce the Sale Order to enjoin those claims in their entirety. New GM also brought the GUC Trust into the litigation, holding the GUC Trust out to Plaintiffs as a potential source of recovery even though Plaintiffs had not named the GUC Trust as a defendant nor sought any relief from the Trust. Pet. App. 59. Indeed Plaintiffs candidly admit that they are all but foreclosed from accessing past or present GUC Trust assets to satisfy their alleged claims. Econ. Loss Pls.' Br. in Opp. 21; *see also* Pet. App. 14, 210.

4. The bankruptcy court ordered the GUC Trust and other parties to address whether the Sale Order could enjoin Plaintiffs' claims consistent with due process, and whether (and against whom) a remedy could be fashioned. Proceeding on stipulated facts, the bankruptcy court found no due process violation because Plaintiffs could not show how they would have made different or additional arguments if they had contested the Sale in 2009. Pet. App. 79. The bankruptcy court also found that the Sale Order was over-

broad to the extent that it barred Plaintiffs from pursuing claims against New GM based on New GM's own post-closing wrongful conduct. *Ibid.*

The bankruptcy court also held that Plaintiffs could not recover against the GUC Trust. *See* Pet. App. 83-84. Applying the doctrine of equitable mootness, the bankruptcy court highlighted the profound prejudice that would result if Plaintiffs were allowed to tap the remaining GUC Trust assets:

> Allowing a potential $7 to $10 billion in claims against the GUC Trust now would be extraordinarily unjust for the purchasers of GUC Trust units after confirmation. With the Bar Date having already come and gone, they would have made their purchases based on the claims mix at the time—a then-known universe of claims that, by reason of then-pending and future objections to disputed and unliquidated claims, could *only go down*. … [T]hey could not be expected to foresee that the amount of claims would actually *go up*. They also could not foresee that future distributions would be delayed while additional claims were filed and litigated.

Pet. App. 213-14.

The Second Circuit affirmed in part, reversed in part, and vacated in part. Starting with the statute, the court held that the Sale Order could not bar independent claims based on New GM's post-Sale conduct, or claims by plaintiffs that purchased Old GM vehicles after the 363 sale ("Used Car Purchasers"), because neither qualified as a "claim" under 11 U.S.C. § 101(5)(A). Pet. App. 34-36. In the Second Circuit's

view, "[t]hese sorts of claims are based on New GM's *post*-petition conduct, and are not claims that are based on a right to payment that arose before the filing of petition or that are based on pre-petition conduct. Thus, these claims are outside the scope of the Sale Order's 'free and clear' provision." Pet. App. 34-35.

The Second Circuit then took up the due process question. Applying controlling precedents, the court held that "enforcing the Sale Order would violate procedural due process in *these* circumstances." Pet. App. 55 (emphasis added). In the court's view, "[t]he bankruptcy court failed to recognize that the terms of *this* § 363 sale were not within its exclusive control." Pet. App. 48 (emphasis added). "Under *these* circumstances," the court again emphasized, it "cannot be confident that the Sale Order would have been negotiated and approved exactly as it was" if the ignition-switch defect had been disclosed. Pet. App. 53. "The facts here were *peculiar* and *are no doubt colored*" by the specific circumstances of this specific case. *Ibid.* (emphases added). "Given the bankruptcy court's focus on consumer confidence, the involvement of Treasury, the financial stakes at the time, and all the business circumstances, there was a reasonable possibility that plaintiffs could have negotiated some relief from the Sale Order." *Ibid.*

Even on these highly "peculiar" facts, the Second Circuit did not find a due process violation lightly. It acknowledged that "[t]he § 363 sale context presents unique challenges for due process analysis" (Pet. App. 45), and considered "the real cost of disrupting the bankruptcy process" (Pet. App. 52). The court further recognized that "the GM bankruptcy was extraordi-

nary because a quick § 363 sale was required to preserve the value of the company and to save it from liquidation." Pet. App. 42 (citing New GM's brief). Nonetheless, the Second Circuit concluded that although "the desire to move through bankruptcy as expeditiously as possible was laudable, … the need for speed did not obviate basic constitutional principles. Due process applies even in a company's moment of crisis." *Ibid.*

The Second Circuit closed by addressing equitable mootness. It noted that the "GUC Trust became involved at New GM's behest," "has protested its involvement in the case," and that "the parties have expended considerable time arguing about equitable mootness." Pet. App. 59-61. Nonetheless, the Second Circuit found that the bankruptcy court's equitable-mootness holding was premature because Plaintiffs "have not filed any proofs of claim with GUC Trust, nor have they even asked the bankruptcy court for permission to file late proofs of claim or to lift the bar date." *Ibid*. The Second Circuit otherwise expressed no view on the merits of the issue.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS UNFIT FOR CERTIORARI

New GM and its *amici* attempt to cast the questions presented as arising in a typical bankruptcy and Section 363 sale, and the Second Circuit's decision as unleashing a parade of horribles. Both are gross distortions. New GM asserts, for example, that the Second Circuit "essentially holds Section 363 unconstitutional as applied." Pet. 16. But New GM fails to recognize that the extraordinary nature of the GM bankruptcy and Section 363 sale created unique pressures

that the Second Circuit concluded, based on the particular facts before it, exceed constitutional bounds. That holding, however, is of little moment to the mine run of bankruptcy sales; Section 363 sales are, of course, continuing to occur with regularity after the Second Circuit's decision.[3]

In reality, the Second Circuit's decision arises on "peculiar facts" that "no doubt colored" the outcome (Pet. App. 53), and involves unique circumstances that are not implicated in any other Section 363 sale. The decision below was no game-changing event in the history of the law of bankruptcy. It has been cited by only a handful of district courts, and never for a proposition even approaching New GM's breathless supposition that the decision "eviscerates … well-established" rules of post-sale liability or "deprive[s]" debtors of the use of Section 363. *See* Pet. 16.

In addition, the decision below does not conflict with any decisions of this Court or a court of appeals, and presents no "important federal question" for this Court to settle. S. Ct. R. 10. As Plaintiffs ably explain, the two cases on which New GM principally relies—*Factors' & Traders' Ins. Co. v. Murphy*, 111 U.S. 738 (1884), and *In re Edwards*, 962 F.2d 641 (7th Cir. 1992)—are legally inapposite and factually distinct from this case. *See, e.g.*, Econ. Loss Pls.' Br. in Opp. 23-24. The GUC Trust joins Plaintiffs' arguments on those points rather than repeating them. *See* S. Ct. R. 15.2. There are plainly no "compelling reasons" to

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[3] *See, e.g.*, Lillian Rizzo, *Aéropostale Sale Wins Court Approval*, WALL ST. J. (Sept. 12, 2016); Lukas I. Alpert, *Univision Wins Bankruptcy Auction for Gawker Media for $135 Million*, WALL ST. J. (Aug. 16, 2016); Lillian Rizzo, *Creditors Nudge Cosi Bid Higher*, WALL ST. J. (Oct. 20, 2016).

grant New GM's petition. S. Ct. R. 10. The petition should be denied.

A. The Second Circuit's Conclusion That Due Process Was Violated Is Based On "Peculiar Facts" And "Extraordinary" Circumstances That Are Exceedingly Unlikely To Recur.

Even in acknowledging that this was "one of the largest and most highly publicized bankruptcies in history," New GM understates the uniqueness of this bankruptcy. *See* Pet. 1. Almost a decade later, the GM bankruptcy still stands out as by far the largest bankruptcy of any manufacturer ever—American or otherwise—and the fourth-largest bankruptcy of all time. "Few (if any) bankruptcy reorganizations in our history have been as important to the U.S. economy or have attracted as much notoriety." Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of Chrysler and GM*, 2010 U. ILL. L. REV. 1375, 1377 (2010).

The sheer size of GM's bankruptcy is only part of the story. The bankruptcy essentially lasted only forty days, which was "quick for bankruptcy and previously unthinkable for one of this scale." Pet. App. 42; *see also* Pet. App. 12 & n.12. As the Second Circuit recognized, "the GM bankruptcy was extraordinary because a quick § 363 sale was required to preserve the value of the company and to save it from liquidation." Pet. App. 42. And even the possibility of liquidation was alarming: "Old GM employed roughly 240,000 workers and provided pensions to another 500,000 retirees. The company also purchased parts from over eleven thousand suppliers and marketed

through roughly six thousand dealerships. A disorderly collapse of Old GM would have far-reaching consequences." Pet. App. 5 (citation omitted).

The importance of GM to the economy spurred "unprecedented action" by the government (Pet. App. 7), and "unprecedented levels of U.S. Government involvement in a corporate reorganization." Edward J. Estrada, *The Immediate and Lasting Impacts of the 2008 Economic Collapse—Lehman Brothers, General Motors, and the Secured Credit Markets*, 45 U. RICH. L. REV. 1111, 1126 (2011). Unlike a typical troubled company, GM received nearly $20 billion in government bailouts. *See* Pet. App. 5-6. It also won the backing of the President of the United States, who "stood behind the reliability of GM cars, pledging another $600 million to back all warranty coverage." Pet. App. 7. And when even those extraordinary efforts were insufficient, the governments of the United States and Canada took over the company. "New GM was not a truly private corporation. Instead, the President and Treasury oversaw its affairs during the bailout and Treasury owned a majority stake following the bankruptcy." Pet. App. 51.

The Section 363 sale of Old GM's assets to New GM was similarly unique. The transaction "extended the domain of section 363 far beyond anything that had ever previously been attempted." David A. Skeel, Jr., *From Chrysler and General Motors to Detroit*, 24 WIDENER L. J. 121, 136 (2015). *Cf.* Pet. App. 23 (noting that the "use of a section 363 sale probably reached its zenith with the GM bankruptcy" (internal quotation marks omitted)). The sole bidder (government-controlled New GM) "asked for qualified bidder requirements that went far beyond any that a previous court had ever approved," Skeel, *supra* at 135, and did not

"necessarily share the same profit motive" that would animate a standard private purchaser, Pet. App. 51. Indeed, the inclusion of an accordion feature—which required New GM to provide additional consideration for the deal if Old GM's liabilities exceeded a certain threshold—tied the seller and purchaser together post-Sale in a way that few, if any, Section 363 sales ever have. For all intents and purposes, through the accordion, New GM *agreed* that it could effectively be liable for some amount of claims against Old GM.

All this to say the GM bankruptcy and Section 363 sale—and the due process concerns they raised—are obviously nothing like those found in run-of-the-mill Section 363 sales. Whatever New GM believes the Second Circuit's decision "essentially holds" (Pet. 16; *see id.* at 21, 32-33 (qualifying the description of the holdings below), the Second Circuit's *actual* holdings very likely have no application to any other Section 363 sale.[4] The decision below will neither "threaten[] the viability of Section 363," nor "vitiate the very provisions that make Section 363 sales viable." Pet. 2-3. The decision below thus does not warrant this Court's review.

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[4] This Court previously opted against reviewing the one other Section 363 sale engineered during the auto-industry bailout. *See Ind. State Police Pension Trust v. Chrysler LLC*, 558 U.S. 1087 (2009) (granting certiorari, vacating decision below, and remanding "with instructions to dismiss the [Chrysler Section 363 sale] appeal as moot"); *accord Giddens v. Barclays Capital Inc.*, 135 S. Ct. 2048 (2015) (denying certiorari to review the emergency sale of Lehman Brothers, which precipitated the "Great Recession" that contributed to the need for the auto bailout).

B. Lower Courts Are Working Through Dispositive Issues Affecting The Petition

1. Certiorari is inappropriate because the Second Circuit's decision is interlocutory. Lower courts are actively engaged in sorting out whether and to what extent Plaintiffs may be able to recover directly against New GM on the claims that the Second Circuit held could not be barred by the Sale Order. Because New GM may defeat liability on those claims, this Court should not address them at this juncture (if ever).

New GM and its *amici* repeatedly sound the (false) alarm that the Second Circuit's decision punishes New GM and holds it liable for Old GM's failure to provide notice of the ignition-switch defect during the GM Bankruptcy. *See, e.g.*, Pet. 18. Those assertions are patently untrue. No court at any level has yet determined whether Plaintiffs may bring successor liability claims against New GM, whether any group of Plaintiffs may recover on their alleged claims under any theory, or whether New GM will be responsible for that recovery (if allowed). Far from it, and consistent with the Second Circuit's decision, those issues are being actively litigated in the consolidated multi-district litigation pending in the district court.

The Second Circuit's decision does not adjudicate Plaintiffs' entitlement to any remedy. Instead, it allows Plaintiffs to continue to *pursue* their claims that New GM should be liable for Plaintiffs' alleged damages, either as a successor to Old GM or on some other theory. But contrary to New GM's repeated, unsourced, unsupported assertion that Section 363 purchasers rely on "free and clear" protection as being absolutely "inviolable" (Pet. 5, 27; *see also id.* at 2, 11), this type of post-363-sale litigation related to the

scope of a "free and clear" provision is commonplace. *See, e.g.*, Bruce Grohsgal and Peter J. Keane, 2016 ANN. SURV. BANKR. L. 17 ("Section 363 sales frequently generate litigation over successor liability issues between asset purchasers and other parties in interest … such as contract counterparties or consumers who may have been injured by a debtor's products."). And purchasers can hardly claim surprise at the prospect that they *might possibly* be responsible for additional liabilities post-sale, when numerous courts have set aside "free and clear" provisions as to particular classes of claims.[5]

In other words, whether Plaintiffs may ultimately recover against New GM one day—and on what theory, whether as a class or individually, and with what measure of damages—all remain the subject of hard-fought litigation that is proceeding on an expeditious schedule in the lower courts. If those questions are answered as New GM hopes, this Court's views on the questions presented would be fascinating but entirely unnecessary.

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[5] *See, e.g.*, *W. Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714, 721-22 (1st Cir. 1994); *Zerand-Bernal Grp., Inc. v. Cox*, 23 F.3d 159 (7th Cir. 1994); *Morgan Olson, LLC v. Frederico (In re Grumman Olson Indus., Inc.)*, 467 B.R. 694 (S.D.N.Y. 2012); *In re Ritchie Risk-Linked Strategies Trading (Ir.) Ltd.*, 471 B.R. 331, 338-39 (Bankr. S.D.N.Y. 2012); *Compak Cos., LLC v. Johnson*, 415 B.R. 334, 343 (N.D. Ill. 2009); *In re Polycel Liquidation, Inc.*, 2006 WL 4452982, at *9-*11 (Bankr. D.N.J. Apr. 18, 2006); *Doolittle v. Cnty. of Santa Cruz (In re Metzger)*, 346 B.R. 806, 819 (Bankr. N.D. Cal. 2006). *Cf. In re Chateaugay Corp.*, 944 F.2d 997, 1005 (2d Cir. 1991) (construing definition of "claim" under 11 U.S.C. § 101(5)(A) to avoid "enormous practical and perhaps constitutional problems" from barring suits by future tort claimants); *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1276-77 (5th Cir. 1994) (same).

2. Whether Plaintiffs may recover against New GM in some fashion by filing late claims against the GUC Trust—which could occur in spite of the "free and clear" provision and irrespective of the Second Circuit's decision—similarly remains an open and disputed question that the parties are actively litigating in the bankruptcy court.

New GM is wrong to suggest that the GUC Trust is the general successor to Old GM (which has no bearing on the cert-worthiness of the questions presented, in any event). *See* Pet. 11, 12, 32 n.6. Rather, the GUC Trust Agreement, which is incorporated by reference into the Plan, establishes the GUC Trust as the successor to Old GM *solely* within the meaning of Section 1145 of the Bankruptcy Code for the limited purpose of exempting the GUC Trust from reporting requirements in connection with distributing its securities. *See* Dkt. 13031, Ex. 4 ¶ E; *see also* Dkt. 9836 § 6.6; Dkt. 9941 ¶ 13. The GUC Trust's primary role is to resolve disputed claims, and to distribute the Trust's assets to GUC Trust beneficiaries—holders of disputed claims as of March 31, 2011, that were later allowed, holders of Allowed General Unsecured Claims, and holders of freely traded Units in the GUC Trust. Plaintiffs are not GUC Trust beneficiaries, and therefore are not entitled to recover from the GUC Trust.

And even if Plaintiffs *could* recover against the GUC Trust, they have been crystal clear that they view *New GM* as the ultimate source of funds for that recovery—regardless of any "free and clear" protection. A "remedy for the Plaintiffs may be fashioned," Plaintiffs recently told the bankruptcy court, "by granting them exclusive access to any value generated under the accordion feature," which "requires New

GM to issue additional shares of New GM common stock to the GUC Trust if and when the aggregate amount of allowed unsecured claims against Old GM exceeds $35 billion." Dkt. 13806 ¶¶ 55-56. And Plaintiffs have all but conceded in the multi-district litigation that "to recover anything on their late claims," if those claims are eventually allowed, Plaintiffs would need to prove sufficient damages to trigger the accordion feature and invoke New GM's obligation to transfer additional funds to the GUC Trust. Mem., *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (S.D.N.Y. Jan. 6, 2017), ECF 3617 at 7-8.

But lest there be any doubt on the subject, the GUC Trust's position is that Plaintiffs should not be permitted to file late claims or to recover anything from the GUC Trust or its unitholders.

First, Plaintiffs' delay in filing claims is inexcusable. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *see also In re Drexel Burnham Lambert Grp., Inc.*, 151 B.R. 674, 680-82 (Bankr. S.D.N.Y. 1993) (applying laches principles to deny late claims). As the Second Circuit has admonished, "a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test," especially when the putative late claimant has made calculated strategic decisions to not diligently pursue its supposed claim. *Midland Cogeneration Venture Ltd. P'ship v. Enron Corp. (In re Enron Corp.),* 419 F.3d 115, 121-23 (2d Cir. 2005) (describing reason for delay as "the most important single factor" in the *Pioneer* analysis). Plaintiffs have done exactly that here. *See* Pet. App. 219-22 (cataloging Plaintiffs' strategic decisions to not pursue the GUC Trust); *accord* Pet. 12, 14.

Second, Plaintiffs' claims against the GUC Trust are equitably moot. The bankruptcy court previously found Plaintiffs' claims equitably moot because they had not "pursued with diligence all available remedies" against the Trust, and because permitting late claims would be manifestly unjust to the Trust's unitholders. Pet. App. 213-14, 219-23. Although the Second Circuit vacated that holding on jurisdictional grounds because Plaintiffs had not yet moved for permission to file late claims (Pet. App. 62), the issue is now ripe for decision because Plaintiffs have so moved. And subsequent factual developments—including Plaintiffs' strategic decision not to stop two separate distributions totaling $247 million—have only strengthened the case for finding equitable mootness now.

What matters for purposes of New GM's petition for certiorari, however, is not how this complex case will shake out. What matters is that the lower courts are actively grappling with whether and to what extent New GM will be liable (if at all) for which of Plaintiffs' claims. Either way, the Second Circuit's decision did not "remedy the seller's mistake by punishing the good-faith purchaser." Pet. 26. The Second Circuit simply remanded for further proceedings after holding that the Sale Order's injunction could not bar some of Plaintiffs claims, and that it was too early to determine whether equitable mootness barred Plaintiffs from recovering against the GUC Trust or its unitholders. In these circumstances, review is not warranted.[6]

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[6] The Second Circuit held that the Economic Loss Plaintiffs and Pre-Closing Accident Plaintiffs had claims, as defined by 11

CONCLUSION

For the reasons above, the writ of certiorari should be denied.

Respectfully submitted,

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U.S.C. § 101(5)(A), and therefore could be bound by the Sale Order. In so holding, the Second Circuit weighed in on the subject of an active four-way split among the Courts of Appeals. *See* Alisha J. Turak, *Why Wright Was Wrong: How the Third Circuit Misinterpreted the Bankruptcy Code ... Again*, 113 COLUM. L. REV. 2191, 2204-05 (2013) (discussing how circuits apply four different tests for determining what constitutes a claim under the Bankruptcy Code). New GM has not sought review on that statutory-interpretation question, which would provide the Court with a basis for entirely avoiding the constitutional questions presented. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936). That alone warrants denying the petition.