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Nos. 13-1421, 14-163

IN THE

Supreme Court of the United States

BANK OF AMERICA, N.A.,
Petitioner,
v.

DAVID B. CAULKETT,
Respondent.

BANK OF AMERICA, N.A.,
Petitioner,
v.

EDELMIRO TOLEDO-CARDONA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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If respondents' and their amici's submissions make one thing clear, it is that respondents can prevail only if *Dewsnup* is overruled. Respondents' central contention is that this Court's decision in *Dewsnup* resolved only the fact-bound dispute presented by the parties to that case, and that this Court's *reasoning* in *Dewsnup* should be ignored. But no fair reading of *Dewsnup* can limit it to partially, rather than wholly, underwater liens—as every court of appeals to address the question, other than the Eleventh Circuit, has held.

Respondents' arguments for "distinguishing" *Dewsnup* are, in reality, arguments for overruling it *sub silentio*. Their reading of the statutory text was considered, and expressly rejected, in *Dewsnup* itself. And none of the features of wholly underwater junior liens respondents identify in any way undermines *Dewsnup*'s applicability to such liens.

Some amici are more forthright in asking this Court to overrule *Dewsnup*. But neither respondents nor amici offer any justification for casting aside statutory *stare decisis* here. They cannot dispute that, over the more than 20 years since *Dewsnup*, Congress has acquiesced in this Court's holding. Instead, they simply contend that *Dewsnup* was wrongly decided. And they argue that voiding underwater junior liens would be good policy. The first contention is both incorrect and insufficient to warrant overturning established precedent. The second is appropriately directed to Congress, not this Court.

I. *DEWSNUP* CONTROLS THIS CASE

A. *Dewsnup* Permits No Distinction Between Partially And Wholly Underwater Liens

1. Respondents contend (at 25) that *Dewsnup* resolved only "the case of the partially secured claim disputed by the parties before it," and has no broader application. In attempting to limit *Dewsnup* to its facts, they ignore *Dewsnup*'s *reasoning*, which dictates the outcome of this case. Like any decision of this Court, *Dewsnup* did not merely resolve the dispute of "the parties before it." Rather, it adopted a specific reading of §506(d). And—contrary to respondents' suggestion—that reading did *not* turn on the fact that the lien in question was only partially underwater. Rather, *Dewsnup* held that §506(d) voids only liens securing

claims *that have not been allowed*. That holding precludes respondents' argument here.

The Court first laid out the conflicting constructions of the statute advocated by the parties. Debtors contended that

> §§506(a) and 506(d) are complementary and to be read together. Because, under §506(a), a claim is secured only to the extent of the judicially determined value of the real property on which the lien is fixed, a debtor can void a lien on the property pursuant to §506(d) to the extent the claim is no longer secured and thus is not "an allowed secured claim." In other words, §506(a) bifurcates classes of claims allowed under §502 into secured claims and unsecured claims; any portion of an allowed claim deemed to be unsecured under §506(a) is not an "allowed secured claim" within the lien-voiding scope of §506(d).

502 U.S. 410, 414-415 (1992). That is, debtors made precisely the argument respondents make here (at 12-16): A claim's "secured" status under §506(d) turns on the value of the collateral as determined under §506(a).

The creditor respondents and the United States argued, on the other hand, that a claim is "secured" under §506(d) if it is "secured by a lien with recourse to the underlying collateral," regardless of the collateral's value:

> [T]he words "allowed secured claim" in §506(d) need not be read as an indivisible term of art defined by reference to §506(a).… Rather, the words should be read term-by-term to refer to any claim that is first, allowed, and, second, se-

> cured. *Because … the claim at issue here has been "allowed" pursuant to §502 of the Code and is secured by a lien with recourse to the underlying collateral, it does not come within the scope of §506(d) ….* This reading of §506(d) … gives the provision the simple and sensible function of voiding a lien whenever a claim secured by the lien itself has not been allowed.

502 U.S. at 415-416 (emphasis added).

After laying out these contrasting approaches, the Court unequivocally adopted the creditors' approach:

> We conclude that respondents' … position, … although not without its difficulty, generally is the better … approach[]. Therefore, we hold that §506(d) does not allow petitioner to strip down respondents' lien, because *respondents' claim is secured by a lien and has been fully allowed pursuant to §502.*

502 U.S. at 417 (emphasis added).[1]

The Court expressly rejected debtors' position that "the words 'allowed secured claim' must take the same meaning in §506(d) as in §506(a)." 502 U.S. at 417. And it therefore rejected debtors' claim that §506(d) permitted stripping liens securing allowed claims "to the extent that [the claims] become 'unsecured' for purposes of §506(a)." *Id.* at 420.

Dewsnup's holding could hardly be clearer: §506(d) does not void liens if the underlying claim is "deemed to be unsecured under §506(a)" based on the collateral's

[1] In light of that holding, respondents' assertion (at 25) that the Court "specifically declined" to endorse the creditors' position, and their criticism of petitioner for quoting the Court's description of the creditors' position, are mystifying.

value. 502 U.S. at 415. Rather, §506(d) voids a lien only when the underlying claim "*has not been allowed*." *Id.* at 416 (emphasis added). Respondents' contention (at 25) that *Dewsnup* is limited to cases in which a mortgage-holder's claim is "partially secured" under §506(a) simply misrepresents this Court's decision: *Dewsnup* makes plain that a claim's "secured" status for purposes of distribution under §506(a) has *no bearing* on whether the creditor's lien is void under §506(d).

Respondents do not acknowledge *Dewsnup*'s actual holding because it is fatal to their case. *Dewsnup*'s construction of §506(d) permits no distinction between partially and wholly underwater liens. As Judge Posner put it for the Seventh Circuit, "*Dewsnup* … holds that section 506(d) does not allow the bankruptcy court to squeeze down a fully valid lien to the current value of the property to which it's attached." *Palomar* v. *First Am. Bank*, 722 F.3d 992, 994 (7th Cir. 2013). It makes no difference, he explained, that "[the] debtors want to reduce the value of the lien to zero"; valid liens cannot be reduced to the property's current value regardless of what that value is. *Id.; see In re Talbert*, 344 F.3d 555, 560 (6th Cir. 2003) ("[*Dewsnup*'s] reasoning for not permitting 'strip downs' in the Chapter 7 context applies with equal validity to … a Chapter 7 'strip off.'"); *Ryan* v. *Homecomings Fin. Network*, 253 F.3d 778, 782 (4th Cir. 2001) (same). Indeed, even the Eleventh Circuit admitted that *Dewsnup* "seems to reject" its reasoning. *Caulkett* Pet. App. 12a.

To be sure, this Court in *Dewsnup* employed the traditional common-law method of "focus[ing] upon the case before [it] and allow[ing] other facts to await their legal resolution on another day." 502 U.S. at 416-417;

see Resp. Br. 24.[2] But it does not follow that *Dewsnup*'s *reasoning* is not binding in a case coming within the scope of that reasoning. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to the result by which we are bound." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 67 (1996). Here, moreover, the portion of *Dewsnup* necessary to the result was an interpretation of specific statutory text. As this Court has repeatedly recognized, courts "can[not] give the same statutory text different meanings in different cases." *Clark* v. *Martinez*, 543 U.S. 371, 386 (2005). *Dewsnup* held that the phrase "secured claim" in §506(d) means any claim secured by a lien that is valid under nonbankruptcy law. Section 506(d) cannot have a different meaning here.

2. Respondents' textual argument (at 12-16) merely resurrects contentions *Dewsnup* expressly repudiated. Respondents' central premise is that, "[t]o determine whether a claim is 'secured'" for purposes of §506(d), one looks to §506(a), which provides that "if the value of the creditor's interest in the property is zero[,] … the creditor's claim 'is an unsecured claim.'" Resp. Br. 12, 13. But—as discussed above—that is precisely the argument debtors made, and this Court rejected, in *Dewsnup*. 502 U.S. at 415 (summarizing debtors' argument that "any portion of an allowed claim deemed to be unsecured under §506(a) is not an 'allowed secured claim'" under §506(d)); *id.* at 417, 420 (rejecting that ar-

[2] Respondents claim (at 8) that the Court "expressly declined to reach" the "hypothetical" question whether a wholly underwater junior lien could be stripped off. Not so. At oral argument, debtors' counsel stated that debtors' reading of §506(d) "allows the elimination of [a] junior lien." *Dewsnup* Tr. 8-9, *available at* 1991 WL 636262. The Court, however, rejected debtors' reading.

gument). Respondents cannot resurrect that argument now.

Moreover, respondents' reading of §506 makes no sense even on its own terms. Section 506(a) provides that a claim "is a secured claim *to the extent of* the value" of the creditor's security interest (emphasis added). Because respondents purport to accept (at 10) that "*Dewsnup* is the law" as to partially underwater liens, however, their reading must ignore the phrase "to the extent of" and turn §506(a) into an on-off switch: If the collateral's value is $1, the creditor keeps its entire lien, but if the collateral's value is $0, it loses its entire lien. That interpretation has no basis in the statute's text, and again makes that text mean different things in different circumstances—when determining whether a claim is "secured" for distribution purposes, "to the extent that" has effect, but when determining whether a claim is "secured" for lien-stripping purposes, it does not.[3]

Respondents' interpretation also leads to absurd results. To be sure, the Code often requires line-drawing; to determine whether a debtor's income is too high to proceed in chapter 7, one must set a presumptive income cut-off. Resp. Br. 48. But respondents' reading of §506 does not merely draw a line; it creates a cliff. Respondents cannot explain why a creditor with a $1 million claim secured by collateral worth $1 on the

[3] Respondents fail to address the problems their interpretation creates for §506(a), but admit (at 16) that it requires reading "to the extent that" in §506(d) to modify the word "allowed"—but not "secured"—in the phrase "allowed secured claim." Even if that reading does not create surplusage (*cf. id.*), if the word "secured" is an independent basis for lien-voiding, as respondents contend, their reading is both ungrammatical and inexplicable.

valuation date should keep its entire $1 million lien, but that same creditor should lose its entire lien if the collateral's value on that date is $1 less.

3. Respondents' supporting arguments fare no better. Respondents contend (at 17-18) that *Dewsnup*'s reading renders the word "secured" in §506(d) surplusage. But that simply rips a page from the *Dewsnup* dissent. *See* 502 U.S. at 426 (Scalia, J.). Fully aware of this "difficulty," the Court chose a reading consistent with "the pre-Code rule that liens pass through [liquidation proceedings in] bankruptcy unaffected," given no evidence that Congress intended to abrogate that rule. *Id.* at 417.

Respondents similarly contend (at 17-19) that *Dewsnup*'s reading of "secured claim" in §506(d) gives the phrase a different meaning than it has elsewhere in the Code. The Court considered this argument as well, and found it insufficient to overcome other, more powerful indicia of Congress's intent. 502 U.S. at 417 & n.3 (reserving question whether "'allowed secured claim' ha[s] [a] different meaning in other provisions of the Bankruptcy Code"); *see id.* at 421-423 (Scalia, J., dissenting). In any event, where other evidence supports such a reading, "[i]dentical language" may "convey varying content … even in different provisions of the same statute." *Yates* v. *United States*, 135 S. Ct. 1074, 1082 (2015) (plurality).

Finally, respondents wrongly contend (at 20-22) that §506(d) must be read to void wholly underwater liens to avoid a supposed conflict with §1111(b). Section 1111(b) provides that where a chapter 11 debtor retains a partially underwater creditor's collateral under a plan of reorganization, the creditor may (unless its interest in the collateral is of "inconsequential value") exempt its claim from bifurcation under §506(a) and have the claim treated as fully secured. Under chapter 11's cram-down provisions, if the creditor makes that election, the plan must provide that the creditor retain its lien until its allowed claim is paid in full. 11 U.S.C. §1129(b)(2)(A)(i).

There is no conflict here. Reading §506(d) as *Dewsnup* did—to void only liens securing disallowed claims—would not "automatically treat *all* allowed underwater claims backed by liens as completely secured, regardless of any election" (Resp. Br. 21). Indeed, it would not affect the operation of §1111(b) or any of its limitations at all. Section 1111(b) is an express exception to the bifurcation of *claims* under §506(a). Section 506(d) has no effect on the treatment of creditors' *claims*; it governs only the disposition of *liens*. Accordingly, however §506*(d)* is read, §506*(a)*'s bifurcation of claims into secured and unsecured portions would still apply in any case in which a creditor does not or cannot make the §1111(b) election. In that case, chapter 11's cram-down provisions would permit a plan to pay the partially secured creditor only the value of its collateral, as long as the substantive and procedural protections chapter 11 provides in such circumstances are satisfied. 11 U.S.C. §1129(b)(2)(A).[4]

4. Finally, respondents wrongly contend (at 28-32) that *Nobelman* v. *American Savings Bank*, 508 U.S. 324 (1993), "made clear that while bankruptcy courts cannot void partially underwater mortgage liens, they can void liens that are completely underwater."

[4] Respondents also contend (at 19-20) that §506(d) is not (like §1111(b)) an express exception to §506(a). But because §506(d) does not affect the treatment of claims under §506(a), such an exception would make no sense.

This argument distorts *Nobelman*, which does not address §506(d) at all, still less suggest that it is limiting *Dewsnup*'s holding.

Nobelman interpreted a different statutory provision altogether—§1322(b)(2). Chapter 13 permits debtors, under certain circumstances, to strip underwater liens. 11 U.S.C. §1325(a)(5)(B); Pet. Br. 38-39. However, §1322(b)(2) provides that a chapter 13 plan may not "modify the rights of [a] holder[] of … a claim secured only by a security interest in real property that is the debtor's principal residence." The question in *Nobelman* was whether, despite §1322(b)(2), a chapter 13 debtor could use §506(a) to bifurcate a mortgage lender's partially underwater claim and strip down its lien under §1325(a)(5)(B), thus paying the lender only the current value of the house. 508 U.S. at 325-326.

The debtors argued that because §1322(b)(2) protects holders of "claim[s] secured … by" a lien on a principal residence, it did not bar modification of the portion of a claim that would be deemed "unsecured" for distribution purposes under §506(a). *Nobelman*, 508 U.S. at 328. The Court *rejected* that argument. It explained that "[b]y virtue of its mortgage contract with petitioners, the bank is indisputably the holder of a claim secured by a lien on petitioners' home." *Id.* It noted that §506(a) provided for a judicial valuation of the bank's secured claim, but observed that "even if we accept petitioners' valuation, the bank is still the 'holder' of a 'secured claim,' because petitioners' home retains $23,500 of value as collateral." *Id.* at 328, 329. The Court concluded that the rights "'bargained for by the mortgagor and the mortgagee'" "are [not] limited by the valuation of its secured claim," and that the bank was entitled to retain its lien until paid in full. *Id.* at 329, 330 (quoting *Dewsnup*, 502 U.S. at 417).

Respondents' reliance on this discussion is puzzling, given that it nowhere discusses §506(d) or suggests that it is narrowing *Dewsnup*. *Nobelman* merely held that §1322(b)(2) does not permit a debtor to strip down a partially underwater home mortgage lien. Respondents read *Nobelman* to turn on the fact that the lien was supported by collateral with present value, but it is not at all clear that the collateral's value was necessary to *Nobelman*'s holding. Indeed, the Court observed that "the bank [was] indisputably the holder of a claim secured by a lien" on the debtors' house "[b]y virtue of its mortgage contract" with the debtors. 508 U.S. at 328.

In short, *Nobelman* did not require this Court to resolve the question whether §1322(b)(2) applies to wholly underwater mortgages. Nor should the Court address the question here, because §1322(b)(2) is not at issue in this case. And nothing in *Nobelman* remotely undermines *Dewsnup*'s holding regarding §506(d). *See Ryan*, 253 F.3d at 782 (*Nobelman* does not "contradict[] or modif[y] in any respect the clear holding of *Dewsnup*").

B. Pre-Code Practice And Creditors' Nonbankruptcy Rights Permit No Distinction Between Partially And Wholly Underwater Liens

1. *Dewsnup* explained that, "[a]part from reorganization proceedings, no provision of the pre-Code statute permitted involuntary reduction of the amount of a creditor's lien for any reason other than payment on the debt." 502 U.S. at 418-419. Respondents (at 32-36) contend that this discussion is inapplicable to wholly underwater junior liens because under pre-Code practice, such liens *were* stripped off. That is untrue. As *Dewsnup* stated, before the Code's enactment, provisions of the *reorganization* chapters permitted lien-

stripping in some circumstances. But bankruptcy law has never permitted a debtor to strip a valid lien in a liquidation proceeding while keeping the collateral.[5] Neither respondents nor amici have identified a single such case.

Respondents' discussion of pre-Code cases is thus irrelevant. Respondents rely primarily on *In re 620 Church Street Building Corp.*, 299 U.S. 24 (1936). At the outset, *Church Street* did not even address lien-stripping in the sense relevant here—it did not involve the strip-off of an underwater junior lien on property *being retained by the debtor*. Rather, *Church Street* was a garden-variety application of the absolute priority rule. There, the first lienholders' claim exceeded the value of the debtor's assets. Under the plan of reorganization, all the debtor's assets were transferred to the first lienholders; the debtor's old owners received nothing; and junior lienholders likewise received no distribution.

This Court affirmed, noting that junior lienholders' entitlement to a distribution from the estate was limited to the value of their security interests—zero. *Church Street*, 299 U.S. at 26-27 (relying on Pub. L. No. 73-296, §77B(b)(5), 48 Stat. 911, 914 (1934)). There is nothing surprising, or contrary to *Dewsnup*, in that.

[5] Respondents criticize (at 36) *Dewsnup*'s citation of *Long* v. *Bullard*, 117 U.S. 617 (1886), for this proposition, arguing that *Long* states only that a secured creditor can stay out of the bankruptcy. But that is the point. A secured creditor must participate in liquidation proceedings only if it wants a distribution from the estate; otherwise, it can rely on its lien, because valid liens survive bankruptcy. That remains true today. *See In re Tarnow*, 749 F.2d 464, 466 (7th Cir. 1984) (Posner, J.) ("One purpose of section 506(d)(1) is simply to codify the rule of *Long* v. *Bullard* … permitting liens to pass through bankruptcy unaffected.").

Then as now, in reorganization proceedings, if a senior class of creditors is not paid in full, junior creditors and equity-holders receive no payment from the estate, and the transfer of assets to senior creditors can extinguish junior creditors' liens on those assets. *See Bank of Am. Nat'l Trust & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 444-445 (1999) (discussing history of absolute priority rule).[6] But that is irrelevant to this case: Petitioner here is not seeking any payment from the bankruptcy estates, or to retain a lien on assets that are being transferred to senior creditors or sold to a third party, but only to retain its liens while the debtors retain their houses.

As a rule, the principle of absolute priority prevented debtors from retaining property for themselves while stripping off creditors' liens. But to the extent that the 1898 Act provided authority for lien-stripping on property retained by the debtor, it did so *only* in the reorganization chapters. For example, the Frazier-Lemke Act, as amended, provided such authority in the context of farmer relief. *See* Pub. L. No. 73-486, §75(s), 48 Stat. 1289, 1289-1291 (1934); *Wright* v. *Union Central Life Ins. Co.*, 311 U.S. 273 (1940).[7] And later, some

[6] Respondents' other cases (also reorganizations) similarly involved application of the absolute priority rule. *Wayne United Gas Co.* v. *Owens-Ill. Glass Co.*, 91 F.2d 827, 832 (4th Cir. 1937); *In re Witherbee Ct. Corp.*, 88 F.2d 251, 252-253 (2d Cir. 1937).

[7] *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935), held an earlier version of the Act to be a taking. Respondents criticize (at 51-52) *Dewsnup*'s citation of *Radford*. But *Dewsnup* (and petitioner) cited *Radford* not primarily for its constitutional holding, but for its recognition that pre-Code practice, outside certain reorganization provisions, did not permit lien-stripping. Petitioner is not contending here that Congress cannot constitutionally strip underwater liens, merely that it did not do so in §506(d).

courts interpreted the reorganization provisions of chapter XII of the Bankruptcy Act to permit a debtor to keep its property and extinguish a mortgagee's lien by paying it the property's appraised value. *See, e.g.*, *In re Pine Gate Assocs.*, 1976 WL 359641 (N.D. Ga. Oct. 20, 1976).[8] Notably, neither statutory provision distinguished between strip-downs and strip-offs.

By contrast, in pre-Code liquidation proceedings, the only liens valid under nonbankruptcy law that could be voided were preferences, fraudulent transfers, and certain judicial and statutory liens obtained within the four months before the bankruptcy filing. Act of July 1, 1898, §§60, 67, 30 Stat. 544, 562, 564-565. Pre-Code liquidation practice simply did not permit voiding or otherwise modifying liens solely because they were underwater—even if they were completely underwater. *Dewsnup*, 502 U.S. at 418-419.

Because their only authority for lien-stripping is reorganization cases, respondents are forced to argue that there is no meaningful distinction between reorganizations and liquidations. But the distinction is perhaps the most basic in bankruptcy law. In a liquidation, the debtor's assets are sold or abandoned; the funds realized go to pay creditors, and the debtor receives a discharge. Pet. Br. 6-10. In a reorganization, by contrast, the debtor's assets are not liquidated. In chapter 11, the debtor may reorganize as a new going concern owned by the creditors, in which case the assets can generate a reorganization surplus for creditors' benefit.

[8] *Pine Gate* prompted the enactment of §1111(b) of the Code, which permits a partially secured creditor to avoid that result by electing to have its claim treated as fully secured. *In re B.R. Brookfield Commons No. 1 LLC*, 735 F.3d 596, 599-600 (7th Cir. 2013); *supra* Part I.A.3.

In chapter 13, the debtor similarly keeps his assets, but is required to commit all his disposable income during the plan period to pay creditors. 11 U.S.C. §1325(b)(1). Chapter 11 and 13 plans cannot be confirmed unless creditors will receive at least as much as they would in a liquidation. *Id.* §§1129(a)(7), 1325(a)(4). The ability to strip liens, under certain circumstances, in reorganizations is part of that very different bargain between debtor and creditor, and is balanced against the creditor's ability to share in the reorganization surplus. *Palomar*, 722 F.3d at 995.

Respondents also claim (at 33-34) that the distinction between reorganizations and liquidations is irrelevant because §506 applies to all chapters of the Bankruptcy Code. That misses the point. It is not §506 that enables lien-stripping in chapters 11 or 13, but the provisions specific to those chapters, which expressly authorize lien-stripping subject to carefully delineated limitations. 11 U.S.C. §§1129(b), 1325(a)(5). Likewise, as discussed above, where lien-stripping was permitted under the Bankruptcy Act, it was accomplished by provisions of the Act specific to reorganization. There are no such provisions, then or now, for liquidation proceedings.

2. Respondents next contend (at 36-42) that what they call *Dewsnup*'s "policy considerations"—really, *Dewsnup*'s explanation of secured creditors' basic rights—do not apply to wholly underwater junior liens. This is also wrong.

In rejecting debtors' argument for lien-stripping, *Dewsnup* explained that "[t]he practical effect of [that] argument is to freeze the creditor's secured interest at the judicially determined valuation," depriving the creditor of "any increase in the value of the property by the time of the foreclosure sale." 502 U.S. at 417. Outside bankruptcy, however, "the creditor's lien stays with the real property until the foreclosure"; "[t]hat is what was bargained for by the mortgagor and the mortgagee." *Id.*

That reasoning applies with equal force to senior and junior liens, regardless of the value of the collateral securing them. Contrary to respondents' assertions, junior liens are not "valueless" simply because they are wholly underwater. The value of real property generally increases over time. And as senior mortgages are paid down, more equity is created for a junior lienholder. A junior lien that is wholly underwater today thus may not be so tomorrow.[9]

It is true, as respondents emphasize, that if a house with a wholly underwater junior lien were sold in foreclosure today, the junior lienholder would not recover anything. But what respondents ignore is that the houses here are *not being sold*. The debtors are keeping the houses, but want to do so free of their mortgages. Just as in *Dewsnup*, that would deprive the creditor of any increase in the value of the property before it is sold. The junior creditor, like the senior creditor, has a nonbankruptcy right to have its lien stay with the real property until a sale. Permitting the junior lienholder to retain its lien in this situation thus does not give the lienholder better treatment than it would receive outside bankruptcy, but merely the *same* treatment to which it is entitled outside bankruptcy.

[9] Respondents speculate (at 40) that because the two liens at issue here are deeply underwater, the Bank will likely never realize anything on the loans. But the Bank has hundreds of thousands of junior loans in its portfolio, and some of those that are underwater will almost certainly regain equity in the near term, just as millions of underwater loans have done in the last few years. Pet. Br. 16-17.

Similarly, it is irrelevant that "[s]econd mortgagees bargained for their … position beneath first mortgagees." Resp. Br. 40. To be sure, junior lienholders are subordinate to senior lienholders. But it does not follow that junior lienholders' interests should also be subordinate to the *debtor's*. As the Sixth Circuit put it: "[A]s in the case of a 'strip down,' a 'strip off' would rob the mortgagee of the bargain it struck with the mortgagor" and would "carry the risk of a 'windfall' to the debtors should the value of the encumbered property increase" prior to sale. *Talbert*, 344 F.3d at 561. *Dewsnup*'s reasoning thus "applies with equal validity to a debtor's attempt to effectuate a Chapter 7 'strip off.'" *Id.* at 560.

II. RESPONDENTS' AND AMICI'S INVITATION TO OVERRULE *DEWSNUP* SHOULD BE REJECTED

As demonstrated above, *Dewsnup*'s interpretation of §506(d) permits no legal or logical distinction between partially and wholly underwater liens. This Court's analysis can and should end there.

Although respondents claim (at 10, 43) that they are not asking the Court to revisit *Dewsnup*, the vast majority of their arguments for "distinguishing" the decision are—as also demonstrated above—thinly disguised arguments for overruling it. Some amici are more forthright and openly call for overturning *Dewsnup*. Both the tacit and the explicit invitations to overrule *Dewsnup* should be rejected.

A. Respondents And Amici Offer No Reason To Abandon Statutory *Stare Decisis*

Neither respondents nor amici offer any reason why this Court should abandon the long-standing principle of statutory *stare decisis* here. *Dewsnup* has been the law for nearly a quarter century. Respondents do not dispute that, by preserving §506(d) over that period—while making extensive alterations to the Bankruptcy Code as a whole and §506 in particular—Congress has acquiesced in *Dewsnup*'s interpretation of the statute. Pet. Br. 40-45. Overruling that interpretation now would improperly do what Congress has chosen not to do.

Nor do respondents meaningfully contest that millions of loans have been made, and priced, in reliance on *Dewsnup*'s holding—an additional reason, if one were needed, not to change course now. Secured debt, including home mortgages, provides borrowers with credit at lower cost than unsecured debt precisely because the creditor can look to its lien for repayment if the debtor defaults. Mann, *Explaining the Pattern of Secured Credit*, 110 Harv. L. Rev. 625, 683 (1997).[10]

Rather, respondents and amici simply contend—expressly or implicitly—that *Dewsnup* was wrongly decided. Even if that were so—and it is not—"mere demonstration that the overruled opinion was wrong" is no basis for overturning precedent. *Hubbard* v. *United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring). "[O]therwise the doctrine [of stare decisis] would be no doctrine at all." *Id.*

In any event, *Dewsnup* was correctly decided—as Congress's acquiescence in the decision suggests. *First*, the language of §506(d) as originally enacted in

[10] Respondents claim (at 42) that lien-stripping in chapter 7 would not raise the cost of credit "substantially." But the study they cite concluded that lien-stripping in chapter 13 *did* increase the cost of credit. Goodman & Levitin, *Bankruptcy Law and the Cost of Credit*, 57 J. L. & Econ. 139, 156 (2014).

1978 confirms *Dewsnup*'s interpretation. Pet. Br. 33-34. It provided:

> To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, *unless (1) a party in interest has not requested that the court determine and allow or disallow such claim* under section 502 of this title; or (2) such claim was disallowed only under section 502(e) of this title.

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §506(d), 92 Stat. 2549, 2583 (emphasis added). Although respondents ignore the italicized language (at 49-50), it is significant. Under §502(a) of the Code, then and now, a claim is "deemed allowed" unless a party in interest objects. The italicized language provides that liens securing such "deemed allowed" claims cannot be voided. It would make no sense if liens securing claims that are "deemed allowed" because no party objected to them could not be voided at all, but liens securing claims that are *affirmatively allowed* because a party objected and was overruled could be voided based on the value of the collateral. The *only* way to make sense of the italicized provision is to read §506(d) as *Dewsnup* did, to void only liens securing disallowed claims.[11] Respondents have no answer to this point.

The legislative history bolsters that interpretation. The House Report stated unequivocally that "if a party in interest requests the court to determine and allow or

[11] Although Congress amended the exceptions to §506(d) in 1984, those "[t]echnical and clarifying" amendments do not alter the basic point—as respondents do not dispute. *See* Pet. Br. 34 n.16. The current exceptions are worded differently, but still pertain only to claims that have not been "allowed." 11 U.S.C. §506(d)(1), (2).

disallow the claim secured by the lien under section 502 and the claim is not allowed, then the lien is void *to the extent the claim is not allowed*." H.R. Rep. No. 95-595, at 357 (1978) (emphasis added). Otherwise, "[s]ubsection (d) permits liens to pass through the bankruptcy case unaffected." *Id.*; *see also Tarnow*, 749 F.2d at 466. Respondents' answer (at 50)—that the word "permits" is permissive—is no answer at all. The House Report explained the specific circumstances under which §506(d) voids liens; it did not, as respondents would have it, make the meaningless statement that §506(d) permits liens to pass through bankruptcy unaffected except where it does not.

Second, reading §506(d) to strip all liens to the current value of the collateral would render the provisions of the Bankruptcy Code that *do* address lien-stripping nonsensical. Pet. Br. 35-39.

As petitioner explained (at 35-37), on that reading of §506(d), §722, which permits lien-stripping in narrow circumstances on exempt or abandoned personal property, would be superfluous. Respondents argue (at 43) that §722 differs from §506(d) because it is a "[r]edemption" provision, but a lien-stripping reading of §506(d) would permit a debtor to redeem all liened-up property—not just the narrow category in §722—by paying the lender the property's current value. *See* Pet. Br. 36 n.18. And while it is true that §722 includes a prohibition on waiver and §506(d) does not (Resp. Br. 43), that does not explain why Congress would have crafted an elaborate lien-stripping provision for certain personal property when §506(d) already automatically stripped all liens to the value of the property. Finally, that §722 does not apply to real property (Resp. Br. 44) merely underscores that it is a narrow provision whose existence would make no sense in a world in which §506(d) itself stripped liens.

Likewise, §1325(a)(5)(B)'s careful limitations on lien-stripping under a chapter 13 plan would be rendered meaningless if §506(d) stripped liens. Pet. Br. 38-39. And §1322(b)(2)'s provision exempting holders of mortgages on principal residences from such lien-stripping would similarly be gutted. Pet. Br. 39. Again, respondents have no answer to these points. They argue (at 44) that §1322(b)(2) "applies broadly to modifying rights in chapter 13 plans," including rights of holders of unsecured claims, but that misses the point; it is §1322(b)(2)'s *exception* protecting mortgagees from such modification that would be rendered useless if §506(d) itself stripped liens.[12]

B. Respondents' And Amici's Policy Arguments Provide No Basis To Depart From *Dewsnup*

Finally, respondents (at 37-40) and amici resort to a variety of attacks on second mortgages as a product and on the banking industry generally, inviting this Court to overturn its precedent and rewrite the Bankruptcy Code in the interest of what they believe to be good housing or financial policy.

For example, they contend that voiding wholly underwater junior liens would benefit senior lienholders, and thus the housing market, because it would smooth the path to consensual modifications of senior mortgages. Other amici argue that stripping off underwater

[12] Although §1322(b)(2)'s exception also protects mortgagees with liens on principal residences from modification of other ancillary rights, its central objective is to ensure that such mortgagees retain their most important right—the right to enforce their liens. That objective would be thwarted if §506(d) took that right away.

junior liens might require financial institutions to change the way they account for their mortgage portfolios, which in turn might affect applicable capital requirements. Some go so far as to suggest that this Court should read §506(d) to void underwater junior liens to punish the Bank and other lenders for purported misconduct leading to the housing crisis.

These arguments do not warrant extended discussion. As an initial matter, the suggestion that preservation of junior liens does nothing more than permit junior lenders to "hold up" senior lenders attempting to modify loans is wrong. As discussed above, preserving junior liens enables unpaid junior lenders to access the value of their collateral if it increases in the future. That, in turn, helps to ensure the continued availability of consumer credit. *See, e.g.*, *Nobelman*, 508 U.S. at 332 (Stevens, J., concurring) (noting that "favorable treatment of residential mortgages was intended to encourage the flow of capital into the home lending market"). It is also worth noting that Bank of America has a substantial portfolio of senior mortgages and regularly negotiates modifications with borrowers. Its decision to contest the stripping of its junior liens should demonstrate that preserving such liens is not unduly harmful to senior lenders.

Far more importantly, however, whether preserving junior mortgages is good or bad policy is not a question for this Court. Nor does the economic disruption caused by the financial crisis provide a basis for the Court to curtail the rights of mortgage-holders in bankruptcy. In the last several years, Congress has considered, and declined to enact, many proposals for permitting debtors to strip underwater mortgages in bankruptcy. Pet. Br. 43-44. Congress has also delegated the authority to regulate financial institutions to the appropriate agencies. Respondents' and amici's invitations to this Court to appoint itself the arbiter of such questions should be rejected.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted.

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