No. 13-700

IN THE

Supreme Court of the United States

BANK OF AMERICA, N.A.,

Petitioner,

v.

DAVID LAMAR SINKFIELD,

Respondent.

On Petition for Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether section 506(d) of the Bankruptcy Code permits a chapter 7 debtor to strip off a wholly unsecured ("underwater") junior mortgage lien.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

STATEMENT 1

BACKGROUND 1

REASONS FOR DENYING THE PETITION 3

I. The Decision Below Is Not Irreconcilable With *Dewsnup* And Is Correct 3

II. *Dewsnup*'s Reasoning Contravenes Established Rules Of Statutory Construction And Should Not Be Perpetuated Here 5

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street P'Ship, 526 U.S. 434, 119 S.Ct. 1411 (1999) 6, 12

Cunningham v. Homecomings Fin. Network (In re Cunningham), 246 B.R. 241 (Bankr. D. Md. 2000) 6

Dever v. IRS (In re Dever), 164 B.R. 132 (Bankr. C.D. Ca. 1994) 6

Dewsnup v. Timm, 502 U.S. 410 (1992) ..... passim

Folendore v. Small Bus. Admin., 862 F.2d 1537 (11th Cir. 1989) 2, 4

In re Talbert, 344 F.3d 555 (6th Cir. 2003) 1

In re Yi, 219 B.R. 394 (E.D. Va. 1998) 4

McNeal v. GMAC Mortgage, LLC, 735 F.3d 1263 (11th Cir. 2012) 2, 4

Palomar v. First American Bank, 722 F.3d 992 (7th Cir. 2013) 1

Payne v. Tennessee, 501 U.S. 808 (1991) 11

Ryan v. Homecomings Financial Network, 253 F.3d 778 (4th Cir. 2001) 1, 4

Smith v. Allwright, 321 U.S. 649 (1944) 11

Taffi v. United States (In re Taffi), 144 B.R. 105 (Bankr. C.D. Ca. 1992) 8

Woolsey v. Citibank, N.A. (In re Woolsey), 696 F.3d 1266 (10th Cir. 2012) 6, 7, 9, 10, 11

STATUTES

11 U.S.C. § 506 ..... 1, 10

11 U.S.C. § 506(a) ..... passim

11 U.S.C. § 506(d) ..... passim

LEGISLATIVE MATERIALS

H.R. Rep. No. 595, 95th Cong., 1st Sess. 180 (1978) 10

OTHER AUTHORITIES

David Gray Carlson, *Bifurcation of Undersecured Claims in Bankruptcy*, 70 AM. BANKR.L.J. 1 (1996). 11

Margaret Howard, *Dewsnupping the Bankruptcy Code*, 1 J. BANKR.L. & PRAC. 513 (1992) 5, 7, 8, 9

Margaret Howard, *Secured Claims in Bankruptcy: An Essay on Missing the Point*, 23 CAP. U. L. REV. 313 (1994) 8

Margaret Howard, *Stripping Down Liens: Section 506(d) and the Theory of Bankruptcy*, 65 AM. BANKR. L.J. 373 1

Lawrence Ponoroff and F. Stephen Kippenberg, *The Immovable Object Versus the Irresistible Force: Rethinking the Relationship Between Secured Credit and Bankruptcy Policy*, 95 MICH. L. REV. 2234 (June 1997) 6

STATEMENT

Respondent urges that this Court's decision in *Dewsnup v. Timm*, 502 U.S. 410 (1992), which prohibits the strip down of a partially secured lien in chapter 7, specifically recognized that it addressed a narrow issue. Respondent opposes the petition for writ of certiorari on the ground that the Eleventh Circuit below was correct in holding that section 506 permits the strip off of the wholly unsecured junior lien held by petitioner. Respondent contends that there are several grounds on which section 506(a) and (d) should be applied according to its plain text to require the strip off of an underwater junior lien, and that *Dewsnup* was properly not extended in this case to bar the strip off of petitioner's wholly unsecured lien.

BACKGROUND

The Fourth, Sixth, and Seventh Circuits all hold that the reasoning in *Dewsnup* prohibits a chapter 7 debtor from stripping off a junior lien when the debt owed to a senior lienholder exceeds the value of the property. *Palomar v. First American Bank*, 722 F.3d 992 (7th Cir. 2013); *In re Talbert*, 344 F.3d 555, 556 (6th Cir. 2003); *Ryan v. Homecomings Financial Network*, 253 F.3d 778 (4th Cir. 2001).

Before *Dewsnup*, the majority of courts held that a chapter 7 debtor could use section 506(a) and (d) to strip down or strip off liens unsupported by value. Margaret Howard, *Stripping Down Liens: Section 506(d) and the Theory of Bankruptcy*, 65 AM. BANKR.

L.J. 373 (citing cases). In *Folendore v. Small Bus. Admin.*, 862 F.2d 1537 (11th Cir. 1989), the lien at issue was completely underwater—the property's value being less than the debt owed to senior lienholders. Reasoning that section 506(a) treats the portion of a secured claim in excess of the value of the collateral as unsecured, the Eleventh Circuit held that the creditor had no "allowed secured claim" within the meaning of section 506(d). *See id.* at 1538–39. Therefore, the *Folendore* court held that the creditor's completely underwater lien could be stripped off. *Id.* at 1539.

Thirteen years later, in *McNeal v. GMAC Mortgage, LLC*, 735 F.3d 1263 (11th Cir. 2012), the Eleventh Circuit acknowledged that since *Dewsnup* was decided, numerous courts, including several other circuit courts of appeals, have held that stripping off a wholly unsecured junior lien is likewise proscribed under *Dewsnup*. *McNeal*, 735 F.3d at 1265. The court explained, however, that the controlling precedent in the Eleventh Circuit remained *Folendore*. "Because *Dewsnup* disallowed only a 'strip down' of a partially secured mortgage lien and did not address a 'strip off' of a wholly unsecured lien, it is not 'clearly on point' with the facts in *Folendore* or with the facts at issue in this appeal." *Id.* Noting the distinction between a holding in a case (especially one emphatically circumscribed) and the reasoning that supports it, the Eleventh Circuit determined that *Dewsnup* did not abrogate *Folendore*. *Id.* at 1265–66. Thus, the Eleventh

Circuit has ruled that post-*Dewsnup* strip offs remain viable in the Eleventh Circuit. *Id.*

REASONS FOR DENYING THE PETITION

I. The Decision Below Is Not Irreconcilable With *Dewsnup* And Is Correct.

Despite petitioner's argument that the reasoning of *Dewsnup* is equally applicable to both factual scenarios, there is a meaningful distinction between "strip down" and "strip off" cases.

In *Dewsnup*, the Court limited its holding to the specific factual situation before it. 502 U.S. at 416–17 ("We therefore focus upon the case before us and allow other facts to await their legal resolution on another day"). The mortgage at issue in *Dewsnup* was undersecured. *Id.* at 413. Although the value of the collateral was insufficient to cover the full amount of the claim, the mortgagee's lien did attach to some value in the collateral. *Id.* The debtor sought to bifurcate the claim into secured and unsecured portions under section 506(a), and to void the lien only to the extent of the unsecured portion under section 506(d). *Id.* Thus, the Court stated the issue as follows: "May a debtor 'strip down' a creditor's lien to the value of the collateral, as judicially determined, when that value is less than the amount of the claim secured by the lien?" *Id.* at 412–13.

Here, by contrast, Bank of America's lien is completely underwater. The full value of the

collateral has been pledged to another creditor. *See McLean,* 735 F.3d at 1265; *In re Yi*, 219 B.R. 394, 399 (E.D. Va. 1998), *overruled by Ryan v. Homecomings Financial Network*, 253 F.3d at 782–83. Unlike the mortgagee in *Dewsnup*, Bank of America does not hold a "secured claim" at all, as that term is defined in section 506(a). Whereas *Dewsnup* dealt with the reduction of an undersecured lien to the value of the collateral, this case deals with the elimination of a wholly unsecured lien.

Because *Dewsnup* is distinguishable and its holding was expressly limited to the specific factual situation before the Court, the analysis in this case should begin with the statutory language. *McNeal*, 735 F.3d at 1265; *Folendore*, 862 F.2d at 1538–39. By operation of section 506(a), Bank of America's claim is not a secured claim, because a claim can only be a secured claim "to the extent of the value of such creditor's interest in the estate's interest in such property." It is undisputed that the value of the debtor's property is less than the amount of the first mortgage. Thus, under section 506(d), Bank of America's junior lien "secures a claim against the debtor that is not an allowed secured claim," and hence it is void. The analysis should end there, because the language of the statute is plain. *McNeal*, 735 F.3d at 1265*; Folendore,* 862 F.2d at 1538–39.

II. *Dewsnup*'s Reasoning Contravenes Established Rules of Statutory Construction And Should Not Be Perpetuated Here.

In reaching the conclusion that section 506(d) does not allow a debtor to strip down a lien to the value of the collateral, the Court in *Dewsnup* "adopted reasoning that no bankruptcy court or scholar [had] ever advanced in the strip down context." Margaret Howard, *Dewsnupping the Bankruptcy Code*, 1 J. BANKR.L. & PRAC. 513, 530 (1992). The Court held that "secured claim" in section 506(d) does not carry the meaning plainly ascribed to that term in section 506(a). Despite the fact that section 506(a) defines "secured claim" by reference to the value of the collateral, the Court held that "secured claim" in section 506(d) means something completely different, defining the term by reference to state law rather than applying the applicable Bankruptcy Code provision. 502 U.S. at 415–417. Thus, as long as a claim is secured by a lien under state law, it is a "secured claim" protected from avoidance under section 506(d), regardless of what section 506(a) sets forth as the meaning of a "secured claim." *Id.*

Moreover, the Court acknowledged, "[w]ere we writing on a clean slate, we might be inclined to agree with petitioner that the words 'allowed secured claim' must take the same meaning in section 506(d) as in section 506(a)." *Id.* at 417. However, in a "distinctly unusual step," the Court went beyond the plain text of the statute because it determined that

the text was ambiguous—based solely on the parties' disagreement about the meaning of the statute. *Id.* at 416–417; *Woolsey v. Citibank, N.A. (In re Woolsey)*, 696 F.3d 1266, 1273 (10th Cir. 2012). Accordingly, the Court brushed aside the text of the statute, turning instead to historical practice and observing that prior to the enactment of the Bankruptcy Code, liens passed through bankruptcy unaffected. *Dewsnup*, 502 U.S. at 418. The Court also observed that congressional intent to effect a change from prior law should not be found if the change was "not the subject of at least some discussion in the legislative history." *Id.* at 419. The Court opined that any post-filing increase in value should benefit the creditor, not the debtor. *Id.* at 417. Thus, the Court concluded that liens should continue to pass through bankruptcy unaffected, despite the seemingly contrary language in section 506(a) and (d).

This reasoning has been widely criticized by judges and scholars alike. *See Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street P'Ship*, 526 U.S. 434, 461 (1999) (Thomas, J., concurring in the judgment); *Dewsnup*, 502 U.S. at 420 (Scalia, J., dissenting); *Woolsey*, 696 F.3d at 1272–74; *Cunningham v. Homecomings Fin. Network (In re Cunningham)*, 246 B.R. 241, 245–46 (Bankr. D. Md. 2000); *Dever v. IRS (In re Dever)*, 164 B.R. 132, 138 (Bankr. C.D. Ca. 1994); Lawrence Ponoroff and F. Stephen Kippenberg, *The Immovable Object Versus the Irresistible Force: Rethinking the Relationship Between Secured Credit and*

Bankruptcy Policy, 95 MICH. L. REV. 2234, 2249 (June 1997); Howard, *Dewsnupping the Bankruptcy Code*, *supra*. The Court's decision has been termed "astonishing, novel and directly contradicted by the legislative history." Howard, *Dewsnupping the Bankruptcy Code*, *supra*, at 516–17. It has been called an "historical anomaly" and an "untenable exception in the ever-more-clearly emerging course of bankruptcy jurisprudence under the Code." Ponoroff & Kippenberg, *supra*, at 2249. Recently, the United States Court of Appeals for the Tenth Circuit called the result "topsy-turvy," bemoaning that it "defies the Supreme Court's own 'normal rule of statutory construction that identical words used in different parts of the same act are presumed to have the same meaning." *Woolsey*, 696 F.3d at 1273.[1]

The first step in the Court's analysis—the conclusion that there is ambiguity in the statute simply because the parties disagreed about its meaning—has been fiercely criticized. *Dewsnup,* 502 U.S. at 432–33 (Scalia, J., dissenting); *Bank of America Nat. Trust and Sav. Ass'n*, 526 U.S. at 461, 119 S.Ct. at 1425 (Thomas, J., concurring in the judgment) ("A mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong"); *Woolsey*, 696 F.3d at 1266 (such disagreement is "an ailment surely afflicting most

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[1] In his *Dewsnup* dissent Justice Scalia cited this same rule of construction, opining, "That rule must surely apply, *a fortiori*, to use of identical words *in the same section of the same enactment*." 502 U.S. at 422 (Scalia, J., dissenting).

every statutory interpretation question in our adversarial legal system"). In his dissent in *Dewsnup*, Justice Scalia chastised the majority for making "no attempt to establish a textual or structural basis for overriding the plain language of § 506(d), but resting its decision upon policy intuitions of a legislative character, and upon the principle that a text which is 'ambiguous' (a status apparently achieved by being the subject of disagreement between self-interested litigants) cannot change pre-Code law without the *imprimatur* of 'legislative history.'" *Dewsnup,* 502 U.S. at 422–23 (Scalia, J., dissenting). Taken to its logical extreme, this mode of analysis would make every litigated statute ambiguous. *Id.* at 435.

The Court's next level of analysis, concerning historical bankruptcy practice, has similarly been challenged as unsound. *See Taffi v. United States (In re Taffi)*, 144 B.R. 105, 112–13 (Bankr. C.D. Ca. 1992), *rev'd on other grounds*, 1993 WL 55884 (C.D. Ca. 1993); Margaret Howard, *Secured Claims in Bankruptcy: An Essay on Missing the Point*, 23 CAP. U. L. REV. 313 (1994); Howard, *Dewsnupping the Bankruptcy Code*, *supra*, at 524–30. Pre-Code bankruptcy law was not as depicted by the *Dewsnup* majority—*i.e.* that "a lien on real property passed through bankruptcy unaffected." *Dewsnup*, 502 U.S. at 417. Instead, "the history of bankruptcy law shows a steady alteration of the rights of secured creditors, undertaken for the purposes of equality of distribution and assuring the debtor a fresh start."

Howard, *Dewsnupping the Bankruptcy Code, supra*, at 527.

Moreover, even if the Court's historical reading of pre-Code bankruptcy law was accurate, it is clear that enactment of the Bankruptcy Code was intended to implement a major shift in that law. *Woolsey*, 696 F.3d at 1274. Indeed, the House Report accompanying the enactment of the Bankruptcy Code provides:

> One of the more significant changes from current law in proposed title 11 is the treatment of secured creditors and secured claims. Unlike current law, H.R. 8200 distinguishes between secured and unsecured claims, rather than between secured and unsecured creditors. The distinction becomes important in the handling of creditors with a lien on property that is worth less that the amount of their claim, that is, those creditors that are undersecured. Current law is ambiguous and vague, especially under chapter XIII, on whether an undersecured creditor is to be treated as a secured creditor, or as a partially secured and partially unsecured creditor. By addressing the problem in terms of claims, the bill makes clear that an undersecured creditor is to be treated as having a secured claim to the extent of the value of the collateral, and an unsecured claim for the balance of his claim against the debtor.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 180, 180–81 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6141.

The House Report specifically addresses section 506 as follows: "Subsection (a) of [section 506] separates an undersecured creditor's claim into two parts – he has a secured claim to the extent of the value of his collateral; he has an unsecured claim for the balance of his claim… *Throughout the bill*, references to secured claims are *only* to the claim determined to be secured under this subsection, and not to the full amount of the creditor's claim." H.R. Rep. No. 595 at 356, reprinted in 1978 U.S.C.C.A.N. at 6312 (emphasis added).[2]

Thus, even if historical practice provided greater protections for creditors' liens, the Code implemented substantial changes in relevant pre-Code law, based on the legislative history as well as the plain text of the statute. *Woolsey*, 696 F.3d at 1274 ("Whatever pre-Code practice looked like, it would seem to have (at best) limited interpretive significance today, given that Chapter 7 indubitably permits liens to be removed in many situations").

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[2] The House Report also states, in discussing a landlord's claim under § 502(b)(7), "[b]y virtue of proposed 11 U.S.C. § 506(a) *and 506(d)*, the claim will be divided into a secured portion and an unsecured portion in those cases in which the deposit that the landlord holds in [sic] less than his damages." H.R. Rep. No. 595, at 354 (emphasis added).

Moreover, the Court's policy-based rationale, that any increase in value should accrue to the creditor's benefit, may be a reasonable policy choice in a vacuum, but it is not an obvious conclusion in light of the policy choices of the Bankruptcy Code, and clearly one that Congress did not enact. One of the Code's central policy concerns is the "fresh start." Fresh start policy draws a clear separation between a debtor's pre-bankruptcy past and post-bankruptcy future. Ponoroff & Knippenberg, *supra*, at 2245. Indeed, the Code "freeze[s] a secured creditor's claims and entitlements as of the time of filing or plan confirmation." *Id.* at 2249. Thus, it is not absurd that the secured creditor should receive the present value of its collateral with any subsequent increase benefitting the debtor. Moreover, "it's far from clear how much we have to worry about the debtor winning a windfall: in most Chapter 7 cases it will be the remaining unsecured creditors rather than the debtor who will reap any appreciation in the property's value." *Woolsey*, 696 F.3d at 1274 (citing *Dewsnup*, 502 U.S. at 422 n. 1 (Scalia, J., dissenting)).[3]

"[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citing *Smith v. Allwright*, 321 U.S. 649 (1944)). The *Dewsnup*

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[3] Under section 551, "any lien void under § 506(d) of this title, is preserved for the benefit of the estate." *See* David Gray Carlson, *Bifurcation of Undersecured Claims in Bankruptcy*, 70 AM. BANKR.L.J. 1, 10–11 (1996).

majority abandoned clearly established rules of statutory construction designed to ensure that Congress's plain statutory text is applied as written, resulting in "methodological confusion" among lower courts. *Bank of Am. Nat'l Trust,* 526 U.S. at 463 (Thomas, J., concurring in the judgment). Thus, *Dewsnup*'s flawed statutory analysis should not be perpetuated here and the Court is not constrained to follow it.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

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