No. 13-

IN THE

Supreme Court of the United States

BANK OF AMERICA, N.A.,

Petitioner,

v.

DAVID B. CAULKETT,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 506(d) of the Bankruptcy Code provides in relevant part that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." In *Dewsnup* v. *Timm*, 502 U.S. 410 (1992), this Court held that section 506(d) does not permit a chapter 7 debtor to "strip down" a mortgage lien to the current value of the collateral. The question presented in this case, on which the courts of appeals are divided, is whether section 506(d) permits a chapter 7 debtor to "strip off" a junior mortgage lien in its entirety when the outstanding debt owed to a senior lienholder exceeds the current value of the collateral.

PARTIES TO THE PROCEEDINGS

Petitioner Bank of America, N.A. was the defendant in the adversary proceeding in the bankruptcy court and the appellant in the district court and court of appeals.

Respondent David B. Caulkett, the debtor in the bankruptcy case, was the plaintiff in the adversary proceeding in the bankruptcy court and the appellee in the district court and court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner Bank of America, N.A. is a wholly-owned subsidiary of Bank of America Corporation, a publicly-traded corporation (ticker symbol: BAC). Bank of America Corporation has no parent corporation, and no publicly held corporation holds 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bank of America, N.A. respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The court of appeals' order affirming the district court is unpublished and appears at App. 1a-2a. The district court's order affirming the bankruptcy court is unpublished and appears at App. 3a. The bankruptcy court's order granting respondent's motion to strip off Bank of America's junior lien on his house is unpublished and appears at App. 5a-7a. The Eleventh Circuit's decision in *McNeal* v. *GMAC Mortgage, LLC*, the basis for the holding in this case, is reported at 735

F.3d 1263. App. 9a-13a. On May 20, 2014, the Eleventh Circuit denied GMAC's petition to rehear *McNeal* en banc. App. 15a-16a.

JURISDICTION

The Eleventh Circuit entered its order affirming the district court on May 21, 2014. App. 1a-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 506 of the Bankruptcy Code provides in relevant part:

> (a)(1) 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.
>
> …
>
> (d) 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) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
>
> (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. § 506.

STATEMENT

This case presents a square circuit split on an important and frequently recurring question of bankruptcy law: Whether a chapter 7 debtor may "strip off"—that is, void—a valid junior lien on the debtor's house when the debt owed to a senior lienholder exceeds the house's current value. In *McNeal* v. *GMAC Mortgage, LLC*, 735 F.3d 1263 (11th Cir. 2012), the Eleventh Circuit held that a debtor may strip off such a junior lien. That conclusion disregarded the holding and reasoning of this Court's decision in *Dewsnup* v. *Timm*, 502 U.S. 410 (1992), and expressly rejected decisions from the Fourth, Sixth, and Seventh Circuits.

Earlier this year, this Court denied certiorari in a petition arising out of the Eleventh Circuit presenting the same issue. *See Bank of America, N.A.*, v. *Sinkfield*, 134 S. Ct. 1760 (Mar. 31, 2014). But at the time this Court denied certiorari in *Sinkfield*, a petition for rehearing *en banc* was still pending before the Eleventh Circuit in *McNeal*, so that it remained possible that the Eleventh Circuit might grant rehearing *en banc* and resolve the circuit split without requiring this Court's intervention.

On May 20, 2014, however, the Eleventh Circuit denied the rehearing petition in *McNeal*. App. 15a-16a. And the following day, it applied the *McNeal* decision to this case, holding that Bank of America's junior lien securing the loan it made to the respondent, David B. Caulkett, could be stripped off in his chapter 7 bankruptcy case. *Id.* 1a-2a. It is thus clear that the circuit split cannot and will not be resolved absent this Court's intervention. This case squarely presents the issue. The petition should be granted.

1. Chapter 7 of the Bankruptcy Code permits eligible individual debtors to obtain "a discharge of prepetition debts following the liquidation of the debtor's [non-exempt] assets by a bankruptcy trustee, who then distributes the proceeds to creditors." *Marrama* v. *Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007); *see also* 11 U.S.C. §§ 524, 704, 727. Importantly, however, a chapter 7 proceeding discharges only the debtor's *personal* liability on his debts; it does not typically void a secured creditor's right to foreclose on the property securing the creditor's claim. *See* 11 U.S.C. § 524(a)(1), (2) (providing that a discharge voids certain judgments and enjoins certain collection proceedings regarding debts that are the "personal liability of the debtor"); *see also, e.g.*, *Dewsnup*, 502 U.S. at 417 ("[T]he creditor's lien stays with the real property until the foreclosure. That is what was bargained for by the mortgagor and the mortgagee.").

Many chapter 7 debtors have no equity in their houses because the houses are worth less than the amount outstanding on the mortgage loans they secure—that is, the loans are undersecured or "underwater." In such cases, rather than selling the house, the chapter 7 trustee may "abandon" it to the debtor as being "of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a), (b). If the debtor is in default on the mortgage and lacks the means to cure the default, he or she may surrender the house to the mortgage-holder in satisfaction of its secured claim, and any deficiency claim the mortgage-holder may have against the debtor is discharged. Alternatively, if the debtor is current on the mortgage, he or she may stay in the house and continue to pay the mortgage following the chapter 7 proceeding. In that scenario, too, any personal liability the debtor may have under the terms of the mortgage loan

is discharged. In short, as this Court has explained, "the mortgage interest that passes through a Chapter 7 liquidation is enforceable only against the debtor's property" and "has the same properties as a nonrecourse loan." *Johnson* v. *Home State Bank*, 501 U.S. 78, 86 (1991).

This case presents the question whether, when a first mortgage on a chapter 7 debtor's house is undersecured, so that a second mortgage is completely "underwater," the debtor may not only discharge his or her personal liability for the second mortgage loan, but also "strip off" the lien itself, leaving the mortgage-holder without the right to foreclose on the property even if the value of the property subsequently increases. The answer to that question turns on the construction of section 506 of the Bankruptcy Code, which governs the treatment of undersecured claims.

Section 506(a) provides, as relevant here, that "[a]n allowed claim of a creditor secured by a lien on [estate] property … 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." 11 U.S.C. § 506(a). In essence, section 506(a) bifurcates a creditor's undersecured claim into a "secured claim" for the present value of the collateral and an "unsecured claim" for the remainder. Thus, a senior mortgage lender owed $150,000 on a loan secured by a house worth $100,000 would have a secured claim for $100,000 and an unsecured claim for $50,000, while a junior lender owed $25,000 on a loan secured by the same house would have only an unsecured claim for $25,000.

Section 506(d), the key provision at issue in this case, in turn provides—subject to exceptions not relevant here—that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." 11 U.S.C. § 506(d).

Before this Court's decision in *Dewsnup*, some courts, including the Eleventh Circuit, had held that section 506(d) permitted a debtor to strip a secured creditor's lien down to the value of the collateral securing the creditor's claim. *See, e.g.*, *Folendore* v. *Small Bus. Admin.*, 862 F.2d 1537 (11th Cir. 1989). In *Folendore*, the creditor held a junior mortgage on the debtors' property. The creditor's claim was conceded to be valid and had been allowed. *See id.* at 1538. But its lien was completely underwater because the property's value was less than the outstanding debt on the two senior mortgage loans. *See id.* The Eleventh Circuit reasoned that because section 506(a) treats the portion of a secured claim in excess of the value of the security as unsecured, the creditor had no "allowed secured claim" within the meaning of section 506(d), and its lien could thus be stripped off. *See id.* at 1539.

2. In 1992, however, this Court decided *Dewsnup*, which decisively rejected that construction of section 506. In *Dewsnup*, the creditor had issued a pre-bankruptcy loan to the debtor secured by a lien on the debtor's real property. When the debtor filed for bankruptcy, the lien was partially underwater because the outstanding balance on the loan exceeded the then-current value of the property. The debtor moved, pursuant to section 506(d), to void the portion of the lien that was underwater, making the same statutory argument that the Eleventh Circuit had accepted in *Folendore*. That is, the debtor "t[ook] the position 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.'" *Dewsnup*, 502 U.S. at 414. In support of this position, the debtor expressly relied on *Folendore*, noting that the Eleventh Circuit had "flatly rejected" the view that section 506(d) does not authorize lien-stripping. *See* Reply Br. 13, *Dewsnup*, No. 90-741 (U.S. July 26, 1991).

This Court rejected the debtor's reading of the statute—and, by extension, the Eleventh Circuit's reading—and held that section 506(d) does not permit a debtor to void a lien securing an allowed claim. Adopting the statutory construction advocated by the United States, the Court reasoned that "the words 'allowed secured claim' in § 506(d) need not be read as an indivisible term of art defined by reference to § 506(a)." *Dewsnup*, 502 U.S. at 415. "Rather, the words should be read term-by-term to refer to any claim that is, first, allowed, and, second, secured." *Id.* Where a claim "has been 'allowed' … and is secured by a lien with recourse to the underlying collateral, it does not come within the scope of § 506(d)." *Id.* That construction, the Court explained, gives section 506(d) "the simple and sensible function of voiding a lien whenever a claim secured by the lien itself has not been allowed" and "ensures that the Code's determination not to allow the underlying claim against the debtor personally is given full effect by preventing its assertion against the debtor's property." *Id.* at 415-416.

In reaching that conclusion, this Court emphasized the fundamental and longstanding principle that "liens pass through bankruptcy unaffected." *Dewsnup*, 502

U.S. at 417. As the Court explained, under well-established practice prior to the 1978 enactment of the Bankruptcy Code, "involuntary reduction of the amount of a creditor's lien" was not permitted "for any reason other than payment on the debt." *Id.* at 419. "Congress must have enacted [section 506(d)] with a full understanding of this practice." *Id.* Indeed, section 506(d)'s legislative history specified that the provision was intended to "permit[] liens to pass through the bankruptcy case unaffected." *Id.* (quoting H.R. Rep. No. 95-595, at 357 (1977)).

As this Court explained, the debtor's reading of the statute would have contradicted that basic principle. The "practical effect" of the debtor's approach would have been "to freeze the creditor's secured interest at the judicially determined valuation," depriving the creditor of "the benefit of any increase in the value of the property by the time of the foreclosure sale," and giving the debtor a potential "windfall." *Dewsnup*, 502 U.S. at 417. But, the Court recognized, the basic bargain of a mortgage requires that "the creditor's lien stays with the real property until the foreclosure," and any appreciation in the property's value "rightly accrues to the benefit of the creditor, not to the benefit of the debtor and not to the benefit of other unsecured creditors." *Id.* Read against that backdrop, section 506 does not permit a debtor to strip a creditor's lien simply because it is undersecured in light of the current value of the collateral.

3. *Dewsnup* addressed what in bankruptcy jargon is called a "strip down"—that is, the creditor's mortgage was only partially, not completely, underwater. Every court of appeals to address the issue, other than the Eleventh Circuit, has nonetheless correctly concluded that *Dewsnup*'s reasoning is equally applicable

to "strip offs"—cases in which a mortgage is completely underwater, typically because a senior lienholder is undersecured. *See, e.g.*, *Ryan* v. *Homecomings Fin. Network*, 253 F.3d 778 (4th Cir. 2001); *In re Talbert*, 344 F.3d 555 (6th Cir. 2003); *Palomar* v. *First Am. Bank*, 722 F.3d 992 (7th Cir. 2013).

The Eleventh Circuit stands alone in holding that *Dewsnup*'s reasoning does not govern strip-offs. In *McNeal* v. *GMAC Mortgage, LLC*, 735 F.3d 1263 (11th Cir. 2012), the Eleventh Circuit held that its pre-*Dewsnup* decision in *Folendore*, which permitted a chapter 7 debtor to strip off a wholly underwater mortgage, is still binding circuit precedent, notwithstanding *Dewsnup*. App. 12a.

In *McNeal*, the Eleventh Circuit recognized that other courts of appeals had determined that *Dewsnup* precluded such a strip-off. App. 11a. It also acknowledged that *Dewsnup* "seems to reject the plain language analysis that we used in *Folendore*." *Id.* 12a. The court of appeals nonetheless concluded that, in light of its "prior panel precedent" rule (under which "a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is 'clearly on point'"), "*Folendore*—not *Dewsnup*—controls in this case." *Id.* (internal quotation marks omitted). The Eleventh Circuit reasoned that *Dewsnup* was not "'clearly on point'" because it "disallowed only a 'strip down' of a partially secured mortgage lien and did not address a 'strip off' of a wholly unsecured lien." *Id.*

The lienholder in *McNeal*, GMAC Mortgage, filed a petition for rehearing en banc in June 2012. On May 20,

2014—almost two years later—the court denied that petition. App. 15a-16a.[1]

4. The debtor in this case, David B. Caulkett, filed a chapter 7 petition in the U.S. Bankruptcy Court for the Middle District of Florida on May 2, 2013. Caulkett has two mortgages on his house, and the outstanding balance on the first mortgage exceeds the house's current market value. He filed a motion to strip off Bank of America's junior lien under section 506(d).

In light of *McNeal*'s conclusion that *Folendore* remained good law, Bank of America conceded that its junior lien could be stripped off under then-binding precedent, but noted that a petition for rehearing en banc in *McNeal* was pending and requested that the bankruptcy court hold Caulkett's motion in abeyance pending a final resolution of the issue by the en banc court of appeals or by this Court. The bankruptcy court denied that request and granted Caulkett's motion to strip off the junior lien. App. 5a-6a. Bank of America appealed to the district court, where—in light of *McNeal* and *Folendore*—the parties filed a joint motion for summary affirmance that expressly reserved the Bank's right to seek further appellate review. The district court entered an order summarily affirming the bankruptcy court and recognizing the Bank's appellate rights. *Id.* 3a.

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[1] Earlier this year, the Court denied a petition for certiorari arising out of the Eleventh Circuit and raising the identical legal issue, *see Bank of America, N.A.*, v. *Sinkfield*, 134 S. Ct. 1760 (Mar. 31, 2014), but at that time the petition for rehearing en banc in *McNeal* was still pending. Now that the court of appeals has denied that petition—indeed, "no Judge … requested that the Court be polled on rehearing en banc," App. 15a—any prudential considerations weighing against review of the issue have been eliminated.

Before the Eleventh Circuit, Bank of America acknowledged that it was futile to argue for overruling *Folendore* before a panel, but reserved its right to ask the en banc court to rehear the matter. Caulkett filed a responsive brief agreeing that *Folendore* was binding precedent but disagreeing with the Bank on the merits. On May 21, 2014—the day after the court of appeals declined to rehear *McNeal* en banc—the panel issued a brief per curiam decision holding that "a wholly unsecured junior lien—such as the one held here by Bank of America—is voidable under section 506(d)." App. 2a (citing *McNeal*).

With that decision, the Eleventh Circuit has made clear that it will not reconsider its reasoning in *McNeal* and *Folendore*—even while openly acknowledging that the ruling is in substantial tension with *Dewsnup* and splits with three other courts of appeals.

REASONS FOR GRANTING THE WRIT

This case presents a critical issue of bankruptcy law affecting a large number of chapter 7 cases: Whether a wholly underwater lien can be "stripped off" under the authority of section 506(d). Under the logic of this Court's decision in *Dewsnup*, the answer should be no. And the Fourth, Sixth, and Seventh Circuits—all the courts of appeals to consider the question save the Eleventh Circuit—have so held. In the Eleventh Circuit, however, the answer is yes. And debtors' counsel have taken notice: Hundreds, likely thousands, of motions to strip off underwater second liens have been filed in Alabama, Florida, and Georgia since the Eleventh Circuit endorsed the practice two years ago in *McNeal*. The Eleventh Circuit has refused to solve the problem itself. This Court should intervene, clarify that *Dewsnup* governs both "strip downs" and "strip

offs," and restore uniformity to the administration of chapter 7 cases across the country.

I. THE ELEVENTH CIRCUIT'S POSITION IS IRRECONCILABLE WITH *DEWSNUP*

In *Dewsnup* v. *Timm*, 502 U.S. 410 (1992), this Court squarely repudiated the interpretation of section 506(d) that the Eleventh Circuit had adopted in *Folendore* v. *Small Business Administration*, 862 F.2d 1537 (11th Cir. 1989), which held that section 506(d) permits a debtor to strip off a wholly underwater second lien. The Eleventh Circuit's resurrection of *Folendore* in *McNeal* v. *GMAC Mortgage, LLC*, 735 F.3d 1263 (11th Cir. 2012), cannot be reconciled with *Dewsnup*.

As discussed above, *see supra* p. 6, *Folendore* had reasoned that because section 506(a) bifurcates undersecured claims into a secured claim for the value of the collateral and an unsecured claim for the remainder, a claim secured by a lien that is wholly underwater is not an "allowed secured claim" within the meaning of section 506(d), and the lien may therefore be stripped off. *See* 862 F.2d at 1538-1539.

Dewsnup made clear, however, that *Folendore*'s reading of the phrase "allowed secured claim" was mistaken. As this Court explained in describing the argument made by the creditor and the United States—which the Court adopted, *see* 502 U.S. at 417—"the words 'allowed secured claim' in § 506(d) need not be read as an indivisible term of art defined by reference to § 506(a)," as *Folendore* had done, but instead "should be read term-by-term to refer to any claim that is, first, allowed, and, second, secured." *Id.* at 415. If a claim "has been 'allowed' … and is secured by a lien with recourse to the underlying collateral, it does not come within the scope of § 506(d)." *Id.* Read that way, sec-

tion 506(d) has "the simple and sensible function of voiding a lien whenever a claim secured by the lien itself has not been allowed." *Id.* at 415-416.

Folendore therefore could not have survived *Dewsnup*. Indeed, in *McNeal*, the Eleventh Circuit acknowledged that *Dewsnup*'s reasoning "seems to reject" the "analysis that we used in *Folendore*." App. 12a. *McNeal* opined, however, that "[b]ecause *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*," and therefore *Folendore* remained binding in the Eleventh Circuit. *Id.* The Eleventh Circuit's order in this case in turn relied on *McNeal* as the basis for stripping Bank of America's lien. *Id.* 2a.

Under the reasoning of *Dewsnup*, however, *McNeal*'s distinction between "strip downs" and "strip offs" is a distinction without a difference. *Dewsnup* interpreted section 506(d) to apply only "whenever a *claim* secured by the lien itself has not been allowed." 502 U.S. at 415 (emphasis added). In *Folendore*, *McNeal*, and this case, just as in *Dewsnup*, the creditor's *claim* was concededly valid: The debtor entered into a valid agreement with the mortgage-holder to borrow money, secured by a lien on the debtor's real property. Under *Dewsnup*'s logic, then, because Bank of America has a valid claim for the money it lent respondent, section 506(d) provides no basis for respondent to strip off Bank of America's lien.

To be sure, in *Folendore*, *McNeal*, and this case, just as in *Dewsnup*, the creditor's mortgage was underwater because the total amount the debtor borrowed exceeded the value of the debtor's property

when the debtor filed for bankruptcy. As *Dewsnup* made clear, however, that a mortgage is underwater matters only to the treatment of the creditor's *claim* under section 506(a)—the portion of the creditor's claim exceeding the value of the creditor's security interest is treated as unsecured. It has no effect on the treatment of the creditor's *lien* under section 506(d). Rather, consistent with well-established pre-Code practice, "liens pass through bankruptcy unaffected" unless the underlying claim is disallowed, and "[a]ny increase over the judicially determined valuation" of the collateral "during bankruptcy rightly accrues to the benefit of the creditor." *Dewsnup*, 502 U.S. at 417. As a logical matter, that is true regardless of whether, in light of the present value of the property, the lien is partially or wholly underwater. Had the Eleventh Circuit faithfully applied *Dewsnup*, it would have concluded that section 506(d), as this Court has interpreted it, does not permit respondent to strip off Bank of America's wholly underwater second lien.

II. THE ELEVENTH CIRCUIT'S POSITION CONFLICTS WITH RULINGS FROM THE FOURTH, SIXTH, AND SEVENTH CIRCUITS

The Eleventh Circuit stands alone in refusing to apply *Dewsnup* in strip-off cases. The Fourth, Sixth, and Seventh Circuits—all of the other courts of appeals to consider the issue—have concluded that *Dewsnup*'s interpretation of section 506(d) bars a chapter 7 debtor from stripping off a wholly underwater lien securing a valid mortgage loan.

The Fourth Circuit so held in *Ryan* v. *Homecomings Financial Network*, 253 F.3d 778 (4th Cir. 2001). The debtor in *Ryan* contended that the creditor's wholly underwater lien could be stripped off under section

506(d) because "*Dewsnup* controls only a 'strip down' of a partially secured lien, not a 'strip off' of a wholly unsecured lien." *Id.* at 781. The Fourth Circuit rejected that argument, explaining:

> "Whether the lien is wholly unsecured or merely undersecured, the reasons articulated by the Supreme Court for its holding in *Dewsnup*—that liens pass through bankruptcy unaffected, that mortgagee and mortgagor bargained for a consensual lien which would stay with real property until foreclosure, and that any increase in value of the real property should accrue to the benefit of the creditor, not the debtor or other unsecured creditors—are equally pertinent."

Id. at 783 (quoting *In re Laskin*, 222 B.R. 872, 876 (B.A.P. 9th Cir. 1998) (brackets omitted)). Concluding that "[t]he Court's reasoning in *Dewsnup* is equally relevant and convincing in a case like ours where a debtor attempts to strip off, rather than merely strip down, an approved but unsecured lien," the Fourth Circuit held that a debtor may not strip off a lien securing an allowed claim under section 506(d) even if the lien is wholly underwater. *Id.* at 782.

The Sixth Circuit subsequently reached the same conclusion, holding that *Dewsnup* "applies with equal force and logic" to strip-offs. *In re Talbert*, 344 F.3d 555, 556 (6th Cir. 2003). As in *Ryan*, the debtors in *Talbert* argued that "the secured status of a claim is determined by the security-reducing provision of § 506(a), and that pursuant to this provision, their junior lien is completely unsecured, and, thus, according to § 506(d), may be 'stripped off.'" *Id.* at 558 (footnotes omitted). The Sixth Circuit noted that a "similar argument was

rejected [by *Dewsnup*] in the analogous context of a debtor's attempt to 'strip down' an under-collateralized creditor's lien in a Chapter 7 case" and explained that *Dewsnup*'s reasoning "applie[d] with equal validity to a debtor's attempt to effectuate a Chapter 7 'strip off'":

> As in the case of a "strip down," to permit a "strip off" would mark a departure from the pre-Code rule that real property liens emerge from bankruptcy unaffected. Also, as in the case of a "strip down," a "strip off" would rob the mortgagee of the bargain it struck with the mortgagor, i.e., that the consensual lien would remain with the property until foreclosure. … Finally, as was true in the context of "strip downs," Chapter 7 "strip offs" also carry the risk of a "windfall" to the debtors should the value of the encumbered property increase by the time of the foreclosure sale.

Id. at 561.

The Seventh Circuit recently reached the same conclusion in *Palomar* v. *First American Bank*, 722 F.3d 992 (7th Cir. 2013) (Posner, J.). The Seventh Circuit first explained that section 506(d) is "best interpreted as confirming the venerable principle … that bankruptcy law permits a lien to pass through bankruptcy unaffected, provided that it's a valid lien and secures a valid claim." *Id.* at 993. It then concluded that *Dewsnup* defeated the debtor's attempt to strip off the creditor's wholly underwater lien: "*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. That's the relief the debtor in this case is seeking. The only difference between this case and *Dewsnup* is that our debtors

want to reduce the value of the lien to zero"—a difference, the Seventh Circuit determined, that is immaterial in light of *Dewsnup*'s reasoning. *Id.* at 994 (citation omitted).[2]

The Fourth, Sixth, and Seventh Circuits are not alone. Every lower court outside the Eleventh Circuit to have addressed the issue of which Bank of America is aware has also held that *Dewsnup*'s reasoning forbids both strip-downs and strip-offs in chapter 7. *See, e.g.*, *Laskin*, 222 B.R. 872; *Wachovia Mortg.* v. *Smoot*, 478 B.R. 555 (E.D.N.Y. 2012); *In re Cook*, 449 B.R. 664 (D.N.J. 2011); *In re Richins*, 469 B.R. 375 (Bankr. D. Utah 2012); *In re Bowman*, 304 B.R. 166 (Bankr. M.D. Pa. 2003); *In re Fitzmaurice*, 248 B.R. 356 (Bankr. W.D. Mo. 2000). Like the Fourth, Sixth, and Seventh Circuits, these courts reject the superficial distinction between strip-offs and strip-downs. "Rather, what is controlling is the Supreme Court's construction of § 506(d)." *Smoot*, 478 B.R. at 568.[3]

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[2] Notably, *Palomar* was briefed and argued after *McNeal* was issued, and the debtor asked the Seventh Circuit to follow this Court's reasoning in *McNeal*. *See* Appellants' Br. 33, *Palomar*, No. 12-3492 (7th Cir. Dec. 10, 2012) ("Clearly, the courts that have chosen to extend the holding of *Dewsnup* did so although it was not warranted. As the Eleventh Circuit stated, '[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court … is another thing.'" (quoting *McNeal*, 735 F.3d at 1265-1266 (App. 13a))). The Seventh Circuit declined to adopt *McNeal*'s reasoning.

[3] Although a handful of lower courts outside the Eleventh Circuit initially ruled that *Dewsnup* did not apply to strip-offs, those decisions have been overruled or reversed. *See, e.g.*, *In re Farha*, 246 B.R. 547 (Bankr. E.D. Mich. 2000), *overruled by Talbert*, 344 F.3d 555; *In re Zempel*, 244 B.R. 625 (Bankr. W.D. Ky. 1999), *overruled by Talbert*, 344 F.3d 555; *In re Yi*, 219 B.R. 394 (E.D. Va.

III. THIS CASE PRESENTS AN IDEAL OPPORTUNITY TO ADDRESS A QUESTION THAT IS CENTRAL TO THE ADMINISTRATION OF CHAPTER 7 BANKRUPTCIES

The question presented here is of central importance to the administration of chapter 7 cases and to the treatment of home mortgages in particular. Following the housing crash, the decline in value of many houses across the country left many second mortgages completely underwater. While chapter 7 debtors can eliminate their personal liability for such mortgage loans through a discharge, until the Eleventh Circuit's decision in *McNeal*, it was settled law that a mortgageholder remained entitled to exercise its security interest in its collateral. As this Court put it, "the creditor's lien stays with the real property until foreclosure. That is what was bargained for by the mortgagor and the mortgagee." *Dewsnup*, 502 U.S. at 417.

As this case reflects, *McNeal* significantly altered the landscape in the Eleventh Circuit. As two local practitioners put it, "[t]he significance of *McNeal* can hardly be [over]stated, especially in this depressed real estate market," because "numerous properties subject to multiple mortgage liens are worth less than the amount of the first-priority mortgage." Bruce & Popowitz, *Get Busy Stripping Until The Eleventh Circuit Says Otherwise*, 2 S.D. Fla. Bankr. Bar Ass'n J. 9 (2013).

Indeed, since *McNeal*, chapter 7 debtors have filed a flood of motions and complaints to strip off wholly underwater junior liens. In the Northern District of Georgia alone—which is where *McNeal* originated—

1998), *overruled by Ryan*, 253 F.3d 778; *In re Smoot*, 465 B.R. 730 (Bankr. E.D.N.Y. 2011), *rev'd*, 478 B.R. 555 (E.D.N.Y. 2012).

debtors had filed more than 500 such motions by March 31, 2013. *See* Certification of Direct Appeal of Order 4, *In re Malone*, No. 12-61289, Dkt. 54 (Bankr. N.D. Ga. Apr. 25, 2013). And the flood has not abated one bit: In the Middle District of Florida, where Caulkett's case originates, more than 50 such motions were docketed last month alone.[4] And Bank of America itself is currently litigating 55 other strip-off proceedings within the Eleventh Circuit, 23 of which were filed in the last six months.[5] What is more, in many of these proceed-

[4] Counsel for Bank of America reviewed all motions listed on PACER that were filed in April 2014 in the U.S. Bankruptcy Court for the Middle District of Florida and found 55 such motions.

[5] *Bank of Am., N.A.* v. *Banks*, No. 13-13867 (11th Cir.); *Bank of Am., N.A.* v. *Bello*, No. 14-10062 (11th Cir.); *Bank of Am., N.A.* v. *Belotserkovsky*, No. 14-11012 (11th Cir.); *Bank of Am., N.A.* v. *Boykins*, No. 13-14908 (11th Cir.); *Bank of Am., N.A.* v. *Braswell*, No. 13-15777 (11th Cir.); *Bank of Am., N.A.* v. *Brown*, No. 13-14298 (11th Cir.); *Bank of Am., N.A.* v. *Buenaseda*, No. 13-15037 (11th Cir.); *Bank of Am., N.A.* v. *Garro*, No. 14-11676 (11th Cir.); *Bank of Am., N.A.* v. *Hamilton-Presha*, No. 14-10137 (11th Cir.); *Bank of Am., N.A.* v. *Johnson*, No. 14-11387 (11th Cir.); *Bank of N.Y. Mellon* v. *Lang*, No. 14-11373 (11th Cir.); *Bank of Am, N.A.* v. *Lee*, No. 14-11353 (11th Cir.); *Bank of Am., N.A.* v. *Lopez*, No. 14-10518 (11th Cir.); *Bank of Am., N.A.* v. *Madden*, No. 13-14438 (11th Cir.); *Bank of Am., N.A.* v. *Nemcik*, No. 14-11290 (11th Cir.); *Bank of Am., N.A.* v. *Peele*, No. 13-15839 (11th Cir.); *Bank of Am., N.A.* v. *Toledo-Cardona*, No. 13-15855 (11th Cir.); *Bank of Am., N.A.* v. *Waits*, No. 14-11408 (11th Cir.); *Bank of Am., N.A.* v. *Lakhani*, No. 14-461 (N.D. Ga.); *Bank of Am., N.A.* v. *Glaspie*, No. 14-743 (N.D. Ga.); *Bank of Am., N.A.* v. *Hall*, No. 14-67 (M.D. Fla.); *Bank of Am., N.A.* v. *Sardina*, No. 14-21153 (S.D. Fla.); *In re Auriemmo*, No. 13-69444 (Bankr. N.D. Ga.); *In re Bogdan*, No. 13-75050 (Bankr. N.D. Ga.); *In re Copeland*, No. 13-74750 (Bankr. N.D. Ga.); *In re Cumpson*, No. 12-53106 (Bankr. N.D. Ga.); *In re Langford*, No. 13-74530 (Bankr. N.D. Ga.); *In re Lomax*, No. 13-62584 (Bankr. N.D. Ga.); *In re Maclin*, No. 13-76374 (Bankr. N.D. Ga.); *In re McDonald*, No. 13-11522 (Bankr. N.D. Ga.); *In re Pampalon*, No. 13-74418 (Bankr. N.D. Ga.); *In re Phillips*, No. 13-23492

ings, the debtor is attempting to reopen a chapter 7 case that was closed months or even years ago in order to strip off a junior lien on the debtor's property. *See, e.g.*, *In re Davis*, No. 12-21148 (Bankr. N.D. Ga.) (bankruptcy case was closed in July 2012, but debtor filed strip-off motion in October 2013).

Faced with this onslaught of motions, bankruptcy courts within the Eleventh Circuit have repeatedly expressed the need for guidance from a higher court. As one bankruptcy judge recently put it, "I really think the Eleventh Circuit did not correctly decide *McNeal*, but … I'm bound by that …. [T]here is a conflict in the circuits …. So something needs to happen somewhere." Transcript at 6, *In re Langford*, No. 13-74530 (Bankr. N.D. Ga. Mar. 6, 2014); *see also, e.g.*, *In re Valone*, 500 B.R. 645, 650 n.23 (Bankr. M.D. Fla. 2013) (noting that "[t]he ability of chapter 7 debtors to strip off junior mortgages is questionable" but that *McNeal* so held); Transcript at 2, *In re Tower*, No. 13-10941 (Bankr. M.D.

(Bankr. N.D. Ga.); *In re Rayoni*, No. 13-77556 (Bankr. N.D. Ga.); *In re Reid*, No. 13-68943 (Bankr. N.D. Ga.); *In re Rubio*, No. 13-43150 (Bankr. N.D. Ga.); *In re Smart*, No. 13-13053 (Bankr. N.D. Ga.); *In re Williams*, No. 13-61816 (Bankr. N.D. Ga.); *In re Vander Iest*, No. 13-23101 (Bankr. N.D. Ga.); *In re Vander Iest*, No. 13-23099 (Bankr. N.D. Ga.); *In re Evans*, No. 13-12946 (Bankr. N.D. Ga.); *In re Miller*, No. 13-77194 (Bankr. N.D. Ga.); *Allen* v. *Bank of Am., N.A.*, No. 13-216 (Bankr. M.D. Fla.); *In re Beursken*, No. 13-3686 (Bankr. M.D. Fla.); *Brantley* v. *Bank of N.Y. Mellon*, No. 13-500 (Bankr. M.D. Fla.); *In re Colon*, No. 13-13430 (Bankr. M.D. Fla.); *In re Corrad*, No. 13-14410 (Bankr. M.D. Fla.); *In re Farmer*, No. 13-10595 (Bankr. M.D. Fla.); *In re Gnerre*, No. 13-8158 (Bankr. M.D. Fla.); *In re Hackbart*, No. 13-16027 (Bankr. M.D. Fla.); *In re Hawkins*, No. 13-14555 (Bankr. M.D. Fla.); *In re Scharboneau*, No. 13-6751 (Bankr. M.D. Fla.); *In re Tower*, No. 13-10941 (Bankr. M.D. Fla.); *In re Wilda*, 13-14578 (Bankr. M.D. Fla.); *Million* v. *Bank of Am., N.A.*, No. 13-435 (Bankr. M.D. Fla.); *In re Corriveau*, No. 13-40717 (Bankr. N.D. Fla.).

Fla. Feb. 13, 2014) (noting that the court has "been granting these strip-offs because [*McNeal*] is the circuit precedent," although the court "frankly agree[d] with [Bank of America]").

Were the practice of voiding wholly underwater junior liens to spread beyond the Eleventh Circuit, it could have unexpected and undesirable consequences. As Judge Posner has noted, "bankruptcy provisions 'friendly to debtors' are so 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). Secured loans, including home mortgages, provide borrowers with lower interest rates precisely because the creditor can look to its lien for repayment if the debtor defaults. *See* Mann, *Explaining the Pattern of Secured Credit*, 110 Harv. L. Rev. 625, 683 (1997). And a lien has value to a creditor even if it is currently underwater because the property securing the lien may appreciate in the future, causing the lien to regain value as well. *Dewsnup* explained that this appreciation in value "rightly accrues to the benefit of the creditor." 502 U.S. at 417. But the Eleventh Circuit's rule changes that equation, depriving junior lenders of their bargained-for rights and potentially leading to costlier mortgages.

Given the practical and economic importance of the question presented and the need for uniformity among the circuits in this central aspect of chapter 7 practice, the Eleventh Circuit's wrong-headed approach warrants immediate review. This case, decided on the heels of the Eleventh Circuit's refusal to hear *McNeal* en banc, presents an ideal opportunity. Because there are no facts in dispute, the case is a particularly clean

vehicle for reaching and deciding the question presented. There is no need for further percolation in the lower courts; the question has been fully aired over the twenty years since *Dewsnup*, and thoroughly discussed in decisions by four different courts of appeals. And the Eleventh Circuit has made clear that it will not reconsider its position. In short, there is no reason for delay. This Court should grant review now and reverse the Eleventh Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2014

APPENDIX

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-10803
Non-Argument Calendar

D.C. Docket No. 6:14-cv-00078-GAP;
6:13-bk-05337-KSJ

IN RE: DAVID B. CAULKETT,
Debtor.

BANK OF AMERICA, N.A.,
Plaintiff-Appellant,
versus

DAVID B. CAULKETT,
Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Florida

(May 21, 2014)

BEFORE: MARCUS, PRYOR, and EDMONDSON, Circuit Judges.

PER CURIAM:

Bank of America, N.A. appeals the district court's affirmance of the bankruptcy court's order voiding a wholly unsecured second priority lien on residential property owned by a Chapter 7 debtor. The issue on

appeal is whether a Chapter 7 debtor is allowed to "strip off" a second priority lien on his home, pursuant to 11 U.S.C. § 506(a) and (d), when the first priority lien exceeds the value of the property.

We addressed recently this issue and concluded that a wholly unsecured junior lien—such as the one held here by Bank of America—is voidable under section 506(d). *See McNeal v. GMAC Mortg., LLC* (*In re McNeal*), 735 F.3d 1263 (11th Cir. 2012) (citing *Folendore v. United States Small Bus. Admin.*, 862 F.2d 1537 (11th Cir. 1989)). Bank of America acknowledges that this panel is bound by the Court's decisions in *McNeal* and *Folendore*, but reserves the right to seek reconsideration of the issue by the *en banc* Court. *Cf. United States v. Smith*, 122 F.3d 1355, 1359 (11th Cir. 1997) ("Under the prior panel precedent rule, we are bound by earlier panel holdings … unless and until they are overruled *en banc* or by the Supreme Court.").

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No: 6:14-cv-78-Orl-31
Filed: February 14, 2014

BANK OF AMERICA, N.A.,
Appellant,

v.

DAVID B. CAULKETT,
Appellee.

ORDER

For the reasons set forth in the Motion for Summary Affirmance (Doc. 11) filed by Bank of America, N.A., the Order Granting Motion to Strip Lien of David B. Caulkett entered by the United States Bankruptcy Court for the Middle District of Florida (Jennemann, J.) on December 11, 2013 is hereby AFFIRMED. Bank of America retains its right to appeal this Court's order and judgment. The Clerk is directed to close the file.

DONE and ORDERED in Chambers, Orlando, Florida on February 14, 2014

/s/ Gregory A. Presnell
GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

APPENDIX C

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Chapter 7
Case No. 6:13-bk-05537-KSJ

IN RE: DAVID B. CAULKETT,

Debtor.

ORDER GRANTING MOTION TO STRIP LIEN OF DAVID B. CAULKETT

This case was considered on Debtor's Amended Motion to Determine Secured Status of Claim and to Strip Mortgage Lien of Bank of America, N.A. (the "Creditor") on the Debtor's real property located at 2490 Grand Teton Blvd., Melbourne FL 32935 (the "Property") (Doc. No. 26) (the "Motion"). The Motion was filed on September 24, 2013, with thirty (30) days negative notice. Creditor filed its Response and Motion to Hold Debtor's Amended Motion to Determine Secured Status of Claim and to Strip Mortgage Lien (ECF 26) in Abeyance (Doc. No. 29) (the "Response"). A Hearing on the Motion and the Response was held on December 5, 2013.

The legal description of the Property is as follows:

> Lot 31, Block E, LANSING RIDGE PHASE TWO, according to the plat thereof, recorded in Plat Book 38, Page(s) 19 & 20, of the Public Records of Brevard County, Fl.

Because a senior mortgage lien exceeds the value of the Property, the Creditor's junior mortgage is unsecured. The Creditor's claim shall be treated as a general unsecured claim in this case. Accordingly, it is

ORDERED:

1. The Debtor's Motion (Doc. No. 26) is granted.

2. The Creditor's Motion to Hold Debtor's Amended Motion to Determine Secured Status of Claim and to Strip Mortgage Lien (ECF 26) in Abeyance (Doc. No. 29) is denied.

3. As to Debtor's Motion for Summary Judgment as to Debtor's Motion to Determine Secured Status of Claim and to Strip Mortgage Lien (Doc. No. 32), no action will be taken by the Court in light of the Amended Motion to Determine Secured Status of Claim and Strip Mortgage Lien being granted.

4. The creditor's claim shall be treated as a general unsecured claim in this case. Upon entry of a discharge, pursuant to 11 U.S.C. § 727, the Creditor's lien is avoided and extinguished automatically without further order of the Court, provided the Eleventh Circuit Court of Appeals or the Supreme Court has not, at the time of the discharge, vacated the opinion or otherwise overruled or limited the holding of *In re McNeal*, 477 Fed. Appx. 562 (11th Cir. 2012).

DONE and ORDERED in Orlando, Florida, this 11th day of December, 2013

/s/ Karen S. Jennemann
KAREN S. JENNEMANN
CHIEF UNITED STATES
BANKRUPTCY JUDGE

Attorney David J. Volk is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-11352
Non-Argument Calendar

D.C. Docket Nos. 1:10-cv-01612-TCB;
09-BKC-78173-PWB

IN RE: LORRAINE MCNEAL,
Debtor.

LORRAINE MCNEAL,
Plaintiff-Appellant,
v.

GMAC MORTGAGE, LLC, HOMECOMINGS FINANCIAL, LLC, a GMAC company,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Filed: May 11, 2012
[735 F.3d 1263]

* * *

[1264] Before TJOFLAT, EDMONDSON, and CARNES, Circuit Judges.

PER CURIAM:

Lorraine McNeal appeals the district court's affirmance of the bankruptcy court's denial of McNeal's "Motion to Determine the Secured Status of Claim." In her motion, McNeal sought to "strip off"[1] a second priority lien on her home, pursuant to 11 U.S.C. § 506(a) and (d). Reversible error has been shown; we reverse and remand for additional proceedings.

McNeal filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code. In her petition, McNeal reported that her home was subject to two mortgage liens: a first priority lien in the amount of $176,413 held by HSBC and a second priority lien in the amount of $44,444 held by Homecomings Financial, LLC, a subsidiary of GMAC Mortgage, LLC (colletively, "GMAC"). McNeal also reported that her home's fair market value was $141,416. The parties do not dispute these factual allegations.

McNeal then sought to "strip off" GMAC's second priority lien, pursuant to sections 506(a) and 506(d). McNeal contended that, because the senior lien exceeded the home's fair market value, GMAC's junior lien was wholly unsecured and, thus, void under section 506(d). The bankruptcy court denied the motion, concluding that section 506(d) did not permit a Chapter 7 debtor to "strip off" a wholly unsecured lien. The district court affirmed.

When the district court affirms the bankruptcy court's order, we review only the bankruptcy court's decision on appeal. *Educ. Credit Mgmt. Corp. v. Mosley*, 494 F.3d 1320, 1324 (11th Cir. 2007). And we re-

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[1] In bankruptcy terms, a "strip down" of an undersecured lien reduces the lien to the value of the collateral to which it attaches and a "strip off" removes a wholly unsecured lien in its entirety.

view the bankruptcy court's legal conclusions *de novo*. *Hemar Ins.* **[1265]** *Corp. of Am. v. Cox*, 338 F.3d 1238, 1241 (11th Cir. 2003).

That GMAC's junior lien is both "allowed" under 11 U.S.C. § 502 and wholly unsecured pursuant to section 506(a) is undisputed.[2] To determine whether such an allowed—but wholly unsecured—claim is voidable, we must then look to section 506(d), which provides that "[t]o the extent that a lien secures a claim against a debtor that is not an allowed secured claim, such lien is void." *See* 11 U.S.C. § 506(d).

Several courts have determined that the United States Supreme Court's decision in *Dewsnup v. Timm*, 502 U.S. 410 (1992)—which concluded that a Chapter 7 debtor could not "strip down" a partially secured lien under section 506(d)—also precludes a Chapter 7 debtor from "stripping off" a wholly unsecured junior lien such as the lien at issue in this appeal. *See, e.g.*, *Ryan v. Homecomings Fin. Network*, 253 F.3d 778 (4th Cir. 2001); *Talbert v. City Mortg. Serv.*, 344 F.3d 555 (6th Cir. 2003); *Laskin v. First Nat'l Bank of Keystone*, 222 B.R. 872 (B.A.P. 9th Cir. 1998). But the present controlling precedent in the Eleventh Circuit remains our decision in *Folendore v. United States Small Bus. Admin.*, 862 F.2d 1537 (11th Cir. 1989). In *Folendore*, we concluded that an allowed claim that was wholly unsecured—just as GMAC's claim is here—was voidable

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[2] 11 U.S.C. § 506(a) provides in pertinent 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 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.

under the plain language of section 506(d).[3] 862 F.2d at 1538-39.

A few bankruptcy court decisions within our circuit—including the decision underlying this appeal—have treated *Folendore* as abrogated by *Dewsnup*. *See, e.g.*, *In re McNeal*, No. A09-78173, 2010 Bankr. LEXIS 1350, at *9-12 (Bankr. N.D. Ga. Apr. 9, 2010); *In re Swafford*, 160 B.R. 246, 249 (Bankr. N.D. Ga. 1993); *In re Windham*, 136 B.R. 878, 882 n.6 (Bankr. M.D. Fla. 1992). But *Folendore*—not *Dewsnup*—controls in this case.

"Under our prior panel precedent rule, a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is 'clearly on point.'" *Atl. Sounding Co., Inc. v. Townsend*, 496 F.3d 1282, 1284 (11th Cir. 2007). 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.

Although the Supreme Court's reasoning in *Dewsnup* seems to reject the plain language analysis that we used in *Folendore*, "'[t]here is, of course, an important difference between the holding in a case and the reasoning that supports that holding.'" *Atl. Sounding Co., Inc.*, 496 F.3d at 1284 (citing *Crawford-El v. Britton*, 118 S. Ct. 1584, 1590 (1998)). "[T]hat the reasoning of an intervening high court decision is at odds with that of our prior decision is no basis for a panel to depart from our prior decision." *Id.* "As we have stat-

[3] Although *Folendore* addressed the 1978 version of the Bankruptcy Code, the 1984 amendments to the Code did not alter the pertinent language in section 506(a) or (d).

ed, '[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit **[1266]** law is another thing." *Id.* In fact, the Supreme Court—noting the ambiguities in the bankruptcy code and the "the difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations"—limited its *Dewsnup* decision expressly to the precise issue raised by the facts of the case. 112 S. Ct. at 778.

Because—under *Folendore*—GMAC's lien is voidable under section 506(d), we reverse and remand for additional proceedings consistent with this decision.

REVERSED AND REMANDED.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-11352-CC

IN RE: LORRAINE MCNEAL,
Debtor.

LORRAINE MCNEAL,
Plaintiff-Appellant,
versus

GMAC MORTGAGE, LLC, HOMECOMINGS FINANCIAL, LLC, a GMAC Company,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

Filed: May 20, 2014

Before: TJOFLAT, EDMONDSON, and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE