No. 13-1421

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**

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

In *Dewsnup* v. *Timm*, 502 U.S. 410 (1992), this Court held that a claim in a Chapter 7 bankruptcy proceeding remains an "allowed secured claim" under 11 U.S.C. § 506(d) – and a lien securing the claim therefore remains valid – even if the claim is only partially secured under 11 U.S.C. § 506(a). The question presented is whether a claim remains an "allowed secured claim" under Section 506(d) if it becomes entirely *un*secured under Section 506(a).

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## BRIEF IN OPPOSITION

## STATEMENT

Petitioner conflates first mortgages with second mortgages and partially secured claims with entirely unsecured claims. Rather than focusing on the text of the Bankruptcy Code, petitioner urges this Court to expand *Dewsnup*'s holding to cases far beyond its limited rationale and limited context. *Dewsnup* held that *partially* secured mortgages remain valid through bankruptcy but had no occasion to address *entirely un*secured junior claims, such as the one here. Indeed, this Court carefully limited *Dewsnup*'s holding to the particular facts of that case and rested

on historical and policy considerations that applied there but not here.

Two of the three supposedly contrary decisions cited by petitioner are old, none is entrenched, and none grapples with the historical and policy concerns peculiar to second mortgages that would be entirely worthless in foreclosure. This Court rightly denied certiorari on a near-verbatim petition with the same petitioner, the same counsel, the same question presented, the same circuit, and the same vehicle problem just seven months ago. Further review is unwarranted.

1. Since at least the nineteenth century, bankruptcy law has served two primary purposes. The first is to "convert the estate of the bankrupt into cash and distribute it among creditors." *Burlingham* v. *Crouse*, 228 U.S. 459, 473 (1913). The second is to "give the bankrupt a fresh start." *Id.* To distribute the debtor's estate equitably, a Chapter 7 liquidation first satisfies secured claims by selling the underlying property, and then distributes the estate's remaining assets pro rata among the unsecured creditors. *See* 11 U.S.C. §§ 506, 726(b).

An "allowed claim" is a claim eligible to participate in the distribution of estate assets. *See, e.g.*, 11 U.S.C. §§ 502, 724(b), 726(a)(2). Within the set of "allowed claim[s]," 11 U.S.C. § 506(a) specifies which claims qualify as "secured claim[s]" or "unsecured claim[s]":

> 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.

11 U.S.C. § 506(a)(1). In other words, in bankruptcy, an allowed claim can remain entirely secured; become entirely unsecured; or be bifurcated into secured and unsecured claims.

For example, a $150,000 first mortgage and a $25,000 second mortgage on a home are both "secured" loans outside of bankruptcy because the home is pledged as collateral backing the loan. But if, for example, the property's value drops from $200,000 to $100,000, the first mortgage becomes undersecured, or "partially underwater." In that situation, because the first mortgage is senior to the second, the value of the home is applied to the first mortgage before the second. In bankruptcy, Section 506(a) bifurcates the first mortgagee's claim into a $100,000 secured claim and a $50,000 unsecured claim. Because the second mortgage is "entirely underwater" (that is, there is no remaining value in the property to secure the debt), Section 506(a) leaves the second mortgagee with only a $25,000 *un*secured claim. 11 U.S.C. § 506(a)(1). If the first mortgagee forecloses on the home and sells it for $100,000, the second mortgagee receives no proceeds from the foreclosure.

After a bankruptcy court separates allowed secured and allowed unsecured claims under Section 506(a), it must next determine which liens are void under Section 506(d). That subsection provides, with 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). If a lien is void, the creditor can still receive distributions from the estate along with the other unsecured creditors.

2. In *Dewsnup*, this Court considered the application of Section 506 to a situation in which the value of the debtor's house had fallen below the value of her first and only mortgage – *i.e.*, the mortgage was partially underwater. 502 U.S. at 411-12. This Court acknowledged that the more natural reading of the statute's text would void the portion of the lien that was underwater at the time of the bankruptcy proceeding. *Id.* at 417.

The Court was concerned, however, that a later increase in the property's value would give the debtor a windfall. 502 U.S. at 417. To prevent that unfairness, and to honor the original bargain between the mortgagor and mortgagee as well as the history of liens riding through bankruptcy, *Dewsnup* read the phrase "allowed secured claim" to include undersecured claims. *Id.* at 417-20.

Emphasizing "the difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations," and acknowledging that this

reading of the text was "not without its difficulty," this Court "focus[ed] upon the case before [it] and allow[ed] other facts to await their legal resolution on another day." 502 U.S. at 416-17.

3. Respondent David Caulkett and his wife bought their home in Melbourne, Florida in June 2006 for $249,500. They financed the entire purchase with a $199,600 first mortgage and a $49,900 second mortgage, each issued by a different division of Countrywide Financial.[1] At the time of the purchase, the first mortgage had a loan-to-value ratio of 80% and the two mortgages had a combined loan-to-value ratio of 100%. Soon after the Caulketts bought their home, the housing market crashed and their home's value plummeted. Petitioner purchased Countrywide Financial in early 2008, acquiring (among other things) rights to the Caulketts' mortgages. A firm named Seterus later acquired some rights to the first

[1] Warranty Deed to David B. Caulkett & Karen Caulkett (May 31, 2006), *available at* http://tinyurl.com/CaulkettDeed; Primary Mortgage, MIN 1000157-0006739729-5 (May 31, 2006), *available at* http://tinyurl.com/CaulkettsMortgage; Pl.'s Am. Mot. to Determine Secured Status of Claim 5-6 & doc. 26, *In re Caulkett*, No. 6:13-bk-05537-KSJ (Bankr. M.D. Fla. Sept. 24, 2013) [hereafter Pl.'s Am. Mot. to Determine Secured Status]. It is necessary to cite these public real estate records because the factual record below was not sufficiently developed to include information regarding the original purchase of the property, the first mortgage, the interest rates and similar terms of either mortgage, or the nature of petitioner's and Seterus's respective rights.

mortgage. Pl.'s Am. Mot. to Determine Secured Status 1.

In May 2013, Mr. Caulkett filed a Chapter 7 bankruptcy petition in the U.S. Bankruptcy Court for the Middle District of Florida. *Id.* As of the filing, the Caulketts' home was valued at $98,000, while the outstanding balances on the first and second mortgages were $183,264 and $47,855, respectively. *Id.* at 1-2. The balance owed on the first mortgage was almost twice the then-current value of the home (187.5%), and the two mortgages had a combined loan-to-value ratio of 235.8%.

Invoking 11 U.S.C. § 506(a) and (d) and relying on the Eleventh Circuit's decisions in *Folendore* v. *U.S. Small Bus. Admin.*, 862 F.2d 1537 (11th Cir. 1989), and *McNeal* v. *GMAC Mortgage, LLC* (*In re McNeal*), 735 F.3d 1263 (11th Cir. 2012), *reh'g en banc denied* (11th Cir. May 20, 2014), Mr. Caulkett moved to void petitioner's junior lien because the second mortgage was entirely underwater. Petitioner conceded that the lien was void under Eleventh Circuit precedent. The bankruptcy court accordingly voided the lien in a two-page order. Pet. App. 5a-6a. On appeal, petitioner moved for summary affirmance of the judgment against it while reserving its right to challenge circuit precedent. The district court summarily affirmed in a one-page order. *Id.* at 3a.

The Eleventh Circuit affirmed in an unpublished, two-paragraph, per curiam opinion. Pet. App. 1a-2a. Although petitioner reserved its right to seek rehearing en banc, *id.* at 2a, it did not do so. Three days

after the Eleventh Circuit denied rehearing en banc in *McNeal*, *id.* at 15a, petitioner filed its certiorari petition in this case.

## REASONS FOR DENYING THE PETITION

Nothing about the short per curiam decision below warrants this Court's review. An entirely underwater second mortgage "is an unsecured claim" under 11 U.S.C. § 506(a), as petitioner concedes. Pet. 5. Thus, it "is not an allowed secured claim," and its associated lien "is void" under Section 506(d). This Court's carefully limited holding in *Dewsnup* is not to the contrary: it depended on the historical treatment of first-mortgage liens and two policy considerations concerning such liens, none of which applies to entirely unsecured second mortgages.

Over the past four decades, only a handful of circuits have weighed in on the question presented. None of the circuits relied on by petitioner has entrenched its position, and none has considered whether or how the relevant policies and history apply to entirely underwater second mortgages. Furthermore, petitioner has rushed this case along, resulting in skeletal factual development and depriving the court of appeals of the opportunity to address in detail (and refute) the arguments petitioner now advances.

Earlier this year, this Court denied certiorari on the same question presented, in a case plagued by the

same vehicle problem. *Bank of America* v. *Sinkfield*, 134 S. Ct. 1760 (2014) (No. 13-700) (denying certiorari). It should do the same here.

## I. There Is No Entrenched Difference Among the Circuits That Warrants This Court's Review

Further percolation is needed because any claimed divergence among the circuits is shallow and immature. Apart from the court below, only three other courts of appeals have taken positions on the question presented. *Palomar* v. *First Am. Bank*, 722 F.3d 992, 993-96 (7th Cir. 2013); *Talbert* v. *City Mortg. Servs.* (*In re Talbert*), 344 F.3d 555, 557-62 (6th Cir. 2003); *Ryan* v. *Homecomings Fin. Network*, 253 F.3d 778, 781-83 (4th Cir. 2001). No additional courts of appeals have weighed in since this Court denied certiorari in *Sinkfield* seven months ago. Eight of the twelve circuits, in which a majority of Chapter 7 bankruptcies are filed, have yet to address the issue.[2]

This paucity of circuit precedent in the thirty-six years since the passage of the 1978 Bankruptcy Code suggests that the issue is not nearly as common or important as petitioner contends. As the wild lending

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[2] *See* UNITED STATES COURTS, REPORT F-5A: U.S. BANKRUPTCY COURTS: BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12-MONTH PERIOD ENDING JUNE 30, 2014 (2014), *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2014/0614_f5a.pdf.

practices that characterized the pre-2008 housing market recede into the past and precarious second mortgages unsupported by equity become much less common, the question presented is likely to arise even more rarely.

In the circuits that bar courts from voiding entirely underwater liens, rehearing en banc has never been sought by any of the parties or granted sua sponte by the court. So none of the circuit precedents on petitioner's side of the issue has been entrenched en banc. Additionally, two of the three circuits on which petitioner relies – the Sixth Circuit in *Talbert* and the Fourth Circuit in *Ryan* – considered the issue more than a decade ago, well before the financial-crisis spike in bankruptcy filings.

Moreover, this Court does not have the benefit of any criticism or reactions by any courts of appeals to one another's opinions. Both the Fourth and Sixth Circuit's opinions were decided long before the Eleventh Circuit took its position, and they failed to discuss the many differences between partially underwater first mortgages and entirely underwater second mortgages, as discussed *infra* pp.13-19. And while the debtor's brief in *Palomar* mentioned the Eleventh Circuit's decision in *McNeal*, the Seventh Circuit in *Palomar* never mentioned the Eleventh Circuit's decision, let alone confronted its underlying rationales.

Finally, in two of the three decisions that bar courts from voiding second-mortgage liens, those

mortgages were only slightly underwater. *Talbert*, 344 F.3d at 556-57 (noting that the second mortgage was secured by a "'valueless' lien" because the first mortgage was $2,633 underwater); *Ryan*, 253 F.3d at 779 (first mortgage was $2,826 underwater). Both courts worried that the debtors could reap a "windfall," as in *Dewsnup*, if the property values increased even slightly after the liens were voided. *Talbert*, 344 F.3d at 559, 561 (quoting *Dewsnup*, 502 U.S. at 417); *Ryan*, 253 F.3d at 782-83 (same). Those borderline cases differ substantially from this case, where petitioner's second lien will remain worthless except in the unlikely event that the Caulketts' home nearly doubles in value.

Thus, neither the Fourth nor the Sixth Circuit has had to grapple with truly valueless second liens that serve only to obstruct possible consensual resolutions. That dimension was also absent in *Dewsnup,* which pitted a single debtor against a single creditor. If confronted with a case like this one, these circuits might well agree with the court below and distinguish the case from *Dewsnup*. *Infra* pp.13-16. In short, further percolation is warranted.

## II. Section 506(d) of the Bankruptcy Code Expressly Voids Second Liens That Are Entirely Underwater and Thus Entirely Unsecured Under Section 506(a)

1. The text of the statute is clear. As petitioner concedes, entirely underwater mortgages are entirely

unsecured claims in bankruptcy, under 11 U.S.C. § 506(a)(1). Pet. 5. That subsection provides: "An allowed claim of a creditor secured by a lien on property . . . is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim." Thus, an entirely underwater second mortgage is an entirely "unsecured claim."

Section 506(d) addresses the corresponding question of which liens backing those claims are void. It provides, with 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."

According to the plain language of these provisions, if a claim is entirely underwater and thus an entirely "unsecured claim" under Section 506(a), it "is not an allowed secured claim" and "such lien is void" under Section 506(d).

2. That statutory text is unaltered by *Dewsnup*'s carefully limited holding. *Dewsnup* addressed an undersecured first mortgage, which resulted in a claim that remained partially secured under Section 506(a). One could have conceptualized that claim either as one secured claim plus one unsecured claim (with the latter resulting in a void lien under Section 506(d)) or as a single hybrid secured/unsecured claim (which remained "secured," and thus not void, under Section 506(d)). The creditor's reading of the statute, which treated a partially underwater claim as one

single "allowed secured claim" notwithstanding Section 506(a), was "not without its difficulty." *Dewsnup*, 502 U.S. at 417. The Court thus acknowledged that it "might be inclined to agree," based on the text of the statute, that the debtor's reading is correct and that the two subsections operate together to void the underwater portions of partially underwater liens. *Id.*

But two policy considerations plus the historical treatment of liens persuaded the *Dewsnup* Court to deviate from the more natural reading of the text. 502 U.S. at 417-20. First, *Dewsnup* was intent on preventing debtors from reaping windfalls. Voiding the underwater portion of a lien could result in such a windfall if the property later increased in value, *Dewsnup* feared. *Id.* at 417. Second, *Dewsnup* noted, the mortgagee had originally bargained for priority over the debtor and other creditors "who had nothing to do with the mortgagor-mortgagee bargain." *Id.* Voiding the underwater portion of the lien would renegotiate that bargain, subverting the priority for which the mortgagee had bargained. Finally, *Dewsnup* also relied on the historical practice of liens riding through bankruptcy. The *Dewsnup* Court thus declined to read the statute as "effect[ing] a major change in pre-Code practice." *Id.* at 419.

This Court was exceptionally careful to confine *Dewsnup*'s scope to the particular factual setting before it. It emphasized "the difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations." *Dewsnup*, 502 U.S. at 416. It

took pains to resolve only "the case before [it] and allow other facts to await their resolution on another day." *Id.* at 416-17. This Court thus warned against what petitioner seeks to do here: expand *Dewsnup*'s reasoning to this very different factual and legal context. *Cf. Crawford-El* v. *Britton*, 523 U.S. 574, 585 (1998) ("There is, of course, an important difference between the holding in a case and the reasoning that supports that holding.").

3. In the situation considered in *Dewsnup*, the first mortgage was merely *under*secured, not entirely *un*secured, because it was only partially underwater. (In practice, real property never becomes entirely valueless. So, absent a supervening lien, first mortgages do not sink entirely underwater; only junior mortgages do.) Thus, in *Dewsnup*, the mortgage included secured components and still qualified as "an allowed secured claim." As explained below, *Dewsnup*'s policy and historical concerns do not apply equally to second mortgages that are entirely underwater, with no remaining secured components. There is no compelling reason to stretch the phrase "allowed secured claim" beyond *partially secured* claims to embrace *entirely unsecured* claims as well.

a.i. *Voiding Worthless Junior Liens Benefits Senior Creditors, Not Just Debtors. Dewsnup*'s primary rationale, preventing windfalls to debtors if property later appreciates, is much less applicable to entirely underwater junior liens. *Dewsnup* feared that if a court could void the underwater portion of a first lien and the property later rose in value, the

debtor – rather than the creditor – would reap the future gain. 502 U.S. at 417. But if a court voids an entirely underwater junior lien, any future appreciation goes first and foremost to the partially underwater senior creditor, not the debtor. Here, the Caulketts' home would have to nearly double in value before the senior creditor's claim would be satisfied. Moreover, foreclosed homes typically sell at depressed prices, and proceeds must also pay the costs of foreclosure. Thus, in practice, any increase in property value would have to be even greater before there would be any value left over for a debtor, or a junior creditor like petitioner. There is usually nothing left over to give a debtor a "windfall."

ii. Not only does voiding junior liens give debtors few if any "windfalls," but it also helps senior creditors maximize the value of their own secured claims and unclog the housing market. Voiding junior liens is sometimes the only way to stop junior lienholders from obstructing mutually beneficial bargains between senior creditors and debtors.

To avoid bankruptcy or foreclosure, debtors can negotiate consensual resolutions with their mortgagees. Creditors typically prefer to avoid foreclosures, because the process can take many months, result in substantial legal fees, and reap prices well below market value. Instead, senior creditors may try to strike deals with debtors, such as agreeing to short sales (for less than the first mortgage balance), refinancing their debts, or writing down mortgage balances so debtors will keep making payments on

underwater loans. These consensual resolutions are generally faster, net higher payouts to creditors, and sometimes let debtors keep their homes instead of abandoning them.

But junior lienholders often use entirely underwater second liens to block these agreements. Because a short sale requires a second mortgagee's agreement to sell the home free of the lien, the second mortgagee's lien gives it a veto over the short sale. Junior lienholders thus create "hostage situations" for senior lienholders and debtors by vetoing short sales and forcing many homes into foreclosure instead. Prashant Gopal & John Gittelsohn, *Home Sales Held Hostage by Junior Lien Holders: Mortgages*, BUSINESSWEEK, July 23, 2012, *available at* http://tinyurl.com/pneq9cd. Because second mortgagees would get nothing from a sale, they have nothing to lose by holding up sales solely to extract settlements from first mortgagees. As the chief economist at Moody's Analytics explains, "'[s]ubordinate liens have become the biggest hurdle to resolving the foreclosure crisis more quickly.'" *Id.* "Second mortgages . . . have become one of the biggest roadblocks" to short sales and the housing recovery, because junior liens often have no value except as leverage to stop deals. Nick Timiraos, *Second-Mortgage Standoffs Stand in Way of Short Sales*, WALL ST. J., Nov. 27, 2010, *available at* http://tinyurl.com/nuq2vwa; *see also* Alex Ulam, *Why Second-Lien Loans Remain a Worry*, AM. BANKER, Apr. 29, 2011, *available at* http://tinyurl.com/p65qt9m (explaining that junior lienholders "can stall or block

a short sale or a loan mod[ification] that reduces principal, and they have an incentive to do so").

Thus, while voiding partially underwater first mortgage liens may result in what could plausibly be seen as windfalls to debtors, voiding entirely underwater second mortgage liens is unlikely to do so. That is especially true where, as here, the second mortgage is deeply underwater. Instead, voiding those junior liens helps senior creditors and the housing market generally by promoting consensual resolutions as alternatives to foreclosure.

None of the courts of appeals has considered whether these crucial differences distinguish the two-creditor situation from the single-creditor situation in *Dewsnup*. Further percolation would let them do so in the first instance.

b. *Junior Creditors' Bargains Already Reflect Their Subordination to Senior Creditors*. Before the housing crash, junior mortgages (including home-equity loans and lines of credit) had high loan-to-value ratios, frequently reaching "nearly 100%." Martin Feldstein, *How to Stop the Mortgage Crisis,* WALL ST. J., Mar. 7, 2008, *available at* http://tinyurl.com/kfjr54x (not limiting this observation to second mortgages). In this case, the Caulketts' two mortgages had a combined loan-to-value ratio of 100% when it was issued. Such junior lenders bargained for the situation that came to pass: because loan-to-value ratios were so high, any drop in home values would immediately impair the loans' value and

quickly make them valueless – much faster than for first mortgages.

In other words, these mortgagees negotiated for their position subordinate to senior lienholders, "who had [every]thing to do with the mortgagor-mortgagee bargain." *Dewsnup*, 502 U.S. at 417. Even outside of bankruptcy, if a first mortgagee forecloses on a home, the foreclosure sale removes the junior lien. The most that a junior creditor may claim is that its junior (and often worthless) lien should have been removed via foreclosure, not that it held inviolable priority. As compensation for their more precarious security position, second mortgagees demanded higher interest rates and other favorable terms. In 2009, for example, borrowers paid interest rates that averaged about four percentage points higher for $30,000 home-equity loans than for 30-year mortgages.[3] Both greater rewards and greater risks, including the risk of foreclosure by first mortgagees, were part of junior creditors' bargains.

None of the courts of appeals has considered whether this crucial difference in priority distinguishes

[3] According to Bankrate's graphs of rate trends, in November 2009, a $30,000 home-equity loan charged a 9.13% interest rate on average, compared with a 4.98% average rate for a 30-year residential mortgage. *See Graph Rate Trends*, BANKRATE, http://tinyurl.com/ohqw6vz (under "Category" select "Loans and Lines of Credit," and under "Product Type" select "30K FICO-Based High LTV Home Equity Loan." Compare the graphed results to selecting "Mortgage Loans" under "Category" and "30 Year Fixed" under "Product Type").

second mortgages from first mortgages under *Dewsnup*. Further percolation would let them do so in the first instance.

c. *Unlike First Mortgages, Which Had Long Passed Through Bankruptcy Unaffected, There Is No Comparable History of Second Mortgages in the Decades Before the 1978 Bankruptcy Code*. *Dewsnup* emphasized that for more than a century, mortgage liens had passed through bankruptcy unaffected. But this long history was one of first mortgages. 502 U.S. at 419. In the decades leading up to the 1978 Bankruptcy Code, second mortgages composed only a tiny fraction of the mortgage market, between 1.5% and 3.2%. Joyce M. Manchester & James M. Poterba, *Second Mortgages and Household Saving*, 19 REGIONAL SCI. & URB. ECON. 325, 327 tbl. 1 (1989). It was not until around the time the Bankruptcy Code was enacted that state and federal legislation abolished or lifted usury caps and loan-to-value limits and permitted new loan structures – policies that encouraged the explosive growth in second mortgages.[4]

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[4] *See, e.g.*, Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, sec. 322, § 5(c)(1)(B), sec. 403, § 24, secs. 801-07, 96 Stat. 1469, 1499, 1510-11, 1545-48 (codified at 12 U.S.C. §§ 371, 1464(c)(1)(B), 3801-05) (eliminating maximum loan-to-value ratios for residential real property, lifting other prior restrictions on real estate loans, and promoting alternative mortgage transactions); Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 501, 94 Stat. 132, 161-63 (codified at 12 U.S.C. § 1735f-7) (preempting state usury ceilings).

Because they were far less common than first mortgages before the 1978 Bankruptcy Code, there was no comparably settled practice of preserving *second* mortgage liens in bankruptcy. So allowing the voiding of second mortgage liens does not "effect a major change in pre-Code practice." *Dewsnup*, 502 U.S. at 419.

None of the courts of appeals has considered whether this crucial difference in historical practice distinguishes second mortgages from first mortgages under *Dewsnup*. Further percolation would let them do so in the first instance.[5]

## III. This Case Is a Poor Vehicle Because It Lacks a Fully Developed Adversarial Presentation in the Lower Courts

This case is a poor vehicle for review because petitioner conceded judgment in each court below, leading to summary affirmances with little opportunity for courts to refute, or even confront, the arguments petitioner now advances. "While this Court

[5] Petitioner's amicus errs in suggesting that, by allowing courts to void underwater liens, the Eleventh Circuit has rendered superfluous the right to "redeem tangible personal property" under 11 U.S.C. § 722. Amicus Br. 5-6, 11-12. Because *Dewsnup* forbids voiding partially underwater liens, a debtor who wishes to redeem his personal property from a senior lien must still use Section 722. Moreover, personal property is rarely encumbered by multiple liens and so rarely has entirely underwater liens.

decides questions of public importance, it decides them in the context of meaningful litigation." *The Monrosa* v. *Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959). Hurried proceedings blunt the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

Here, the parties failed to develop the arguments and record in the courts below. Petitioner conceded judgment in the bankruptcy court, the district court, and the Eleventh Circuit. Though it briefed the issue in the Eleventh Circuit, it admitted that the panel was bound to follow circuit precedent and affirm the voiding of the junior lien. "[T]here are no facts in dispute," as petitioner notes (at 21), only because petitioner bypassed developing or contesting the relevant facts. Indeed, even such basic facts as the original sale price, original first mortgage amount, original loan-to-value ratio, and interest rates were not part of the record below. *Supra* p.5 & n.1. Because petitioner admitted defeat, Mr. Caulkett had no reason to defend the Eleventh Circuit's rule and so did not fully brief the issue. The same vehicle defect afflicted Bank of America's petition in *Sinkfield* (No. 13-700), in which this Court denied certiorari earlier this year.

The opinions below similarly reflect the lack of a significant adversarial presentation. The courts engaged in rote application of the law with no discussion of arguments or reasoning. Each opinion was unpublished, and the Eleventh Circuit panel's opinion

was unpublished and per curiam. If this Court were to proceed with this thinly developed case, it would have to do so without the benefit of the lower courts' legal analysis. A reasoned, published decision below would better inform the Court's consideration of the issues on both sides.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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