NOS. 13–1421, 14–163

In the Supreme Court of the United States

BANK OF AMERICA, N.A., PETITIONER

v.

DAVID B. CAULKETT, RESPONDENT

BANK OF AMERICA, N.A., PETITIONER

v.

EDELMIRO TOLEDO-CARDONA, RESPONDENT

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

BRIEF FOR RESPONDENTS

DAVID J. VOLK
VOLK LAW OFFICES, P.A.
1901 S. HARBOR CITY BLVD., SUITE 700
MELBOURNE, FL 32901

KELLEY M. PETRY
KELLEY M. PETRY P.A.
1936 W. DR. MARTIN LUTHER KING JR. BLVD.
TAMPA, FL 33607

STEPHANOS BIBAS
Counsel of Record
JAMES A. FELDMAN
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
SUPREME COURT CLINIC
3501 SANSOM STREET
PHILADELPHIA, PA 19104
(215) 746–2297
SBIBAS@LAW.UPENN.EDU

QUESTION PRESENTED

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISION

STATUTES

OTHER AUTHORITIES

ADDITIONAL STATUTORY PROVISION INVOLVED

In addition to the statutes reprinted by petitioner, Br. 2–3, 1a–11a, another pertinent statutory provision, 11 U.S.C. § 1111, is reprinted in the appendix to this brief. App., *infra*, pp. 1a–2a.

STATEMENT

The second mortgages at issue in this case are "completely underwater": each home is worth less than the balance owed on its *first* mortgage, so there is no value left over to secure its second mortgage. Thus, each of petitioner's claims based on these second mortgages is not a secured claim, because under 11 U.S.C. § 506(a), it is secured only to the extent of "the value of [petitioner's] interest" in each property, which is zero. And because it is not a secured claim, the lien associated with that claim is void: under 11 U.S.C. § 506(d), "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void."

This reading gives full effect to the word "secured" in Section 506(d), which petitioner renders pure surplusage. It also fits with the longstanding pre-Code practice of voiding completely underwater junior liens in bankruptcy. Liens that are supported by value are preserved. But completely underwater liens, which would be extinguished in foreclosure, do not give second mortgagees leverage to hold up loan modifications between debtors and first mortgagees.

Dewsnup v. *Timm*, 502 U.S. 410 (1992), did not alter this straightforward application of the text. *Dewsnup* did not address a situation like this one, in which the mortgage is *completely* underwater, and

the Court's opinion emphasized that its narrow holding did not reach this situation. There is no basis for extending *Dewsnup* to override the express language of Section 506 and cover this case.

1a. *Bankruptcy law.* Since at least the nineteenth century, bankruptcy law has served the "twofold purpose" of "convert[ing] the estate of the bankrupt into cash and distribut[ing] it among creditors, and then . . . giv[ing] the bankrupt a fresh start." *Burlingham* v. *Crouse*, 228 U.S. 459, 473 (1913). To distribute the debtor's estate equitably, a chapter 7 liquidation first ensures that secured claims are satisfied or sufficiently protected, and then distributes the estate's assets pro rata among the general unsecured claims. *See* 11 U.S.C. §§ 506, 725, 726(b).

In order to distribute the estate, the bankruptcy court receives the claims of creditors, rules on any objections, and determines the extent to which each claim may participate in the distribution. 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]," Section 506(a) specifies which 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). Section 506 applies equally to liquidations, reorganizations, and adjustments of debts, regardless of whether they are filed under chapter 7, 11, 12, or 13. 11 U.S.C. § 103(a).

In bankruptcy, an allowed claim can be completely secured, completely unsecured, or "bifurcat[ed]" into "secured claim and unsecured claim components." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 239 n.3 (1989) (internal quotation marks omitted). Under Section 506(a), the degree of security depends on the value of the creditor's interest in the property. If the value of the creditor's interest is greater than or equal to the claim, it is completely secured under Section 506(a). If the value of the creditor's interest is zero (i.e., the mortgage is completely underwater, as commonly occurs with second mortgages), the claim is completely unsecured. If the value is between zero and the amount of the claim (i.e., the mortgage is "partially underwater"), it is bifurcated into a secured component (equal to the value of the creditor's interest in the property) and an unsecured component (equal to the remaining amount of the claim).

Thus, outside of bankruptcy, a $150,000 first mortgage and a $25,000 second mortgage on a $200,000 home are both "secured" loans because there are state-law-created liens on the home securing the loans. But in bankruptcy, the secured status of a claim is governed by federal bankruptcy law and determined by the *value* underlying the claim, not the mere existence of a lien. For example, if the property's value drops from $200,000 to $100,000, the first mortgage is undersecured, or partially un-

derwater. In that situation, because the first mortgage is senior to the second, the value of the collateral is applied to the first mortgage before the second. Section 506(a) bifurcates the first mortgage claim into a $100,000 secured claim and a $50,000 unsecured claim. Because the second mortgage is completely underwater (as there is no remaining value in the property to secure the debt), Section 506(a) leaves the second mortgagee with a $25,000 *un*secured claim. 11 U.S.C. § 506(a)(1).

After a bankruptcy court values the property and designates allowed secured and unsecured claims under Section 506(a), it must determine if any liens associated with those claims are void under Section 506(d). That subsection provides: "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void" (unless the claim was disallowed solely because it was unmatured or contingent or because the creditor failed to file a proof of claim). 11 U.S.C. § 506(d). If a lien is void, the creditor can still receive distributions from the estate along with other unsecured creditors. At the end of the bankruptcy case, the debtor becomes eligible for a discharge and the estate is distributed.

b. *Dewsnup* v. *Timm*. In *Dewsnup*, the value of the debtor's farmland had fallen below the value of her first and only mortgage. 502 U.S. at 413. In other words, the mortgage was *partially* underwater. The debtor contended that the amount of the lien associated with the mortgage should be reduced to the value of the property under Section 506(d). *Id.* The Court read the phrase "allowed secured claim" in

Section 506(d) to include the partially secured claim in that case, and therefore held that Section 506(d) did not reduce the amount of the lien. *Id.* at 417. Emphasizing the "difficulty" posed by various "[h]ypothetical applications," including that of a completely underwater mortgage, the Court "focus[ed] upon the case before [it] and allow[ed] other facts to await their legal resolution on another day." *Id.* at 416–17; *see* 90–741 Oral Arg. Tr. 8–9.

2. *Facts and procedural history.* Respondent David Caulkett bought his home in June 2006 for $249,500. Two divisions of Countrywide Financial financed the entire purchase with a $199,600 first mortgage and a $49,900 second mortgage. Opp. 5. 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 he bought his home, the housing market crashed and his home's value plummeted. Seterus, a loan-servicing company, later acquired some rights to the first mortgage. Opp. 5–6.

Respondent Edelmiro Toledo-Cardona bought his home in 2001 for $80,000, taking out an $82,872 mortgage to cover the purchase price and closing costs. Opp. 5. His initial loan-to-value ratio was 103.6%. In 2012, Quicken Loans refinanced his first mortgage with a new $135,900 loan. *Id.* At the time of this refinancing, the property was also encumbered by a $32,000 second mortgage that had been originated by Countrywide Bank in 2007. *Id.* By agreement, Countrywide resubordinated its lien to the new Quicken Loans mortgage. Opp. 5–6.

Petitioner purchased Countrywide in early 2008, acquiring rights to Messrs. Caulkett's and Toledo-Cardona's second mortgages. *Id.*; Caulkett Opp. 5.

In 2013, Messrs. Caulkett and Toledo-Cardona filed chapter 7 bankruptcy petitions in the U.S. Bankruptcy Court for the Middle District of Florida. Caulkett Opp. 6; Toledo-Cardona Opp. 6. As of his filing, Mr. Caulkett's home was valued at $98,000. The outstanding balances on his first and second mortgages were $183,264 and $47,855, respectively, totaling $231,119. Opp. 6. The balance owed on his first mortgage alone was almost twice the value of the home (187%), and the two mortgages had a combined loan-to-value ratio of 235.8%.

As of his filing, Mr. Toledo-Cardona's home was valued at $77,689. The outstanding balances on his mortgages were $135,703 and $32,000, respectively, totaling $167,703. Opp. 6. The balance owed on his first mortgage was also almost twice the value of the home (174.7%), and the two mortgages had a combined loan-to-value ratio of 215.9%. Petitioner did not contest either home's valuation.

Invoking 11 U.S.C. § 506(a) and (d), respondents moved to void each of petitioner's second mortgage liens because each was completely underwater. Caulkett Pet. App. 5a; Toledo-Cardona Pet. App. 7a. Petitioner conceded that each lien was void under Eleventh Circuit precedent. Each bankruptcy court accordingly voided the respective lien. Caulkett Pet. App. 6a; Toledo-Cardona Pet. App. 8a. On appeal, petitioner moved for summary affirmance of each judgment against it, and each district court summar-

ily affirmed. Caulkett Pet. App. 3a; Toledo-Cardona Pet. App. 5a.

The Eleventh Circuit affirmed in both cases. Caulkett Pet. App. 2a; Toledo-Cardona Pet. App. 3a. The court reasoned that although *Dewsnup* held that courts cannot void partially underwater liens, it did not overturn circuit precedent authorizing courts to void completely underwater liens. Caulkett Pet. App. 2a; Toledo-Cardona Pet. App. 2a–3a.

SUMMARY OF ARGUMENT

I. The text of the Bankruptcy Code is clear. Section 506(a) classifies every allowed claim with a lien as a "secured claim" or an "unsecured claim" depending on whether the collateral's value suffices to satisfy the claim. As petitioner concedes, if a second mortgage is completely underwater, the creditor "ha[s] only an 'unsecured claim'" under Section 506(a). Br. 11.

Section 506(d) then determines the validity of the claims' corresponding liens. It provides, with two exceptions not relevant here, that unless a claim is "an allowed secured claim, such lien is void." When a mortgage is completely underwater, no component of the mortgage is secured in bankruptcy. Thus, there is no "allowed secured claim" and the associated "lien is void."

Claims and liens are created by nonbankruptcy law, but the phrase "secured claim" is bankruptcy law's evaluation of them. Thus, Section 506 and other Code provisions use the phrase "lien secur[ing] a claim" to refer to nonbankruptcy rights, and "allowed secured [or unsecured] claim" to designate how bank-

ruptcy law treats those rights. Petitioner's reading equates the two phrases in Section 506(d) (but not elsewhere in the Code), which makes "secured claim" redundant, renders the word "secured" surplusage, and severs Section 506(d) from Section 506(a)'s definition. Petitioner's reading would also override other limitations specified elsewhere in the Code.

II. *Dewsnup* is not to the contrary. Because it contravened the natural reading of the text, as the Court acknowledged, *Dewsnup*'s holding was explicitly narrow. That case involved a partially underwater mortgage and hence a partially secured claim. In that context, the Court viewed the statute as minimally ambiguous as to whether such a partially secured claim qualified as an "allowed secured claim."

In order to expand *Dewsnup*'s holding to reach this case, petitioner repeatedly quotes or cites the Court's description of the *creditors'* position in *Dewsnup* as if it were the Court's holding. But *Dewsnup* did not—and had no occasion to—resolve whether a completely "unsecured claim" under Section 506(a) could still be an "allowed secured claim" under Section 506(d). Indeed, the situation presented here by a completely underwater second mortgage was a "[h]ypothetical . . . advanced at oral argument" that the Court's opinion expressly declined to reach and reserved for "resolution on another day." 502 U.S. at 416–17; *see* 90–741 Oral Arg. Tr. 8–9.

When the Court returned to the issue of partially secured mortgages a year after *Dewsnup*, it clearly distinguished between partially and completely underwater mortgages, relying on the presence of some

value to establish a "secured claim." *Nobelman* v. *Am. Sav. Bank*, 508 U.S. 324, 329 (1993). That line between mortgages with and without value is consistent with this Court's longstanding pre-Code practice of voiding completely underwater second mortgage liens because "[t]here [i]s no value to be protected." *In re 620 Church St. Bldg. Corp.*, 299 U.S. 24, 27 (1936). In the context of a partially secured claim, *Dewsnup* stated that Congress had not clearly overridden perceived pre-Code practice allowing liens to pass through bankruptcy. 502 U.S. at 417–20. But that contested practice was not an absolute rule, and neither the parties nor the Court in *Dewsnup* had occasion to consider *620 Church Street*. Pre-Code law authorized voiding completely underwater mortgage liens, so the historical practice cited by *Dewsnup* is absent here.

The policy considerations that motivated *Dewsnup* apply very differently to completely underwater second mortgages. Real property rarely if ever becomes completely valueless, so in practice only junior mortgages can be completely unsecured. *Dewsnup* sought to stop a debtor from using bankruptcy to give the creditor a worse deal than it might have gotten in foreclosure; here, conversely, a junior creditor who would receive nothing in foreclosure seeks more favorable results in bankruptcy. Because completely underwater second mortgages are valueless in foreclosure, second mortgagees have nothing to lose by using them as leverage to hold up deals between first mortgagees and debtors, in the hope of extracting payments.

Voiding completely underwater second mortgage liens, however, benefits first mortgagees, who can

more easily work out loan modifications so that debtors keep making payments. That flexibility helps unclog the housing market and prevents foreclosures, abandoned homes, and neighborhood blight.

Moreover, voiding a second mortgage lien does not violate the parties' original bargain. Second mortgagees bargained for their subordinate position and should expect that if their mortgages sink completely underwater, their worthless liens can be extinguished in foreclosure.

III. Petitioner's remaining arguments are meritless. We do not and have never argued that this Court need overrule *Dewsnup*, so all of petitioner's *stare decisis*, reliance, and legislative-ratification arguments are beside the point. *Dewsnup* did not reach or resolve the question presented here, and one cannot rely on what this Court has not done. Similarly, petitioner misses the mark by arguing that overruling *Dewsnup* might render certain provisions surplusage: because *Dewsnup* is the law, debtors must turn to those other provisions to address partially secured claims.

Nor is there any problem with judicial valuation or with line-drawing based on the dollar value of property. The Bankruptcy Code routinely relies on judicial assessments of present value, draws lines on that basis, and contains ample safeguards for creditors. The snippets of legislative history cited by petitioner are makeweights that do not resolve the question here. Finally, this Court has repeatedly rejected petitioner's constitutional objection to voiding valueless liens.

ARGUMENT

I. SECTION 506 OF THE BANKRUPTCY CODE EXPRESSLY VOIDS LIENS THAT ARE UNSUPPORTED BY ANY VALUE

The question presented here is how to construe 11 U.S.C. § 506. Although petitioner and its amici avoid focusing on the statute's text, the interpretation of a statute must "begin with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, NA*, 530 U.S. 1, 6 (2000) (quoting *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992)). That is particularly true in bankruptcy law. "The Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is [the Court's] obligation to interpret the Code clearly and predictably using well established principles of statutory construction." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012).

These principles resolve this case. The Code clearly and unambiguously voids completely underwater mortgage liens. There is no need to rummage through pre-Code practice, legislative history, or policy arguments, which are in any event consistent with the text. Section 506(a)(1) provides that a completely underwater claim "is an unsecured claim." Section 506(d) provides that the claim's associated "lien is void." Any other reading does violence to the text of Section 506 as well as to express limitations elsewhere in the Code.

A. Section 506 Expressly Provides that a Completely Underwater Claim "Is an Unsecured Claim," Not an "Allowed Secured Claim," so a Completely Underwater "Lien Is Void"

1. *Section 506(d) expressly voids liens when their underlying claims are either disallowed or unsecured under Section 506(a).* Section 506(d) provides 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." Thus, a lien is void if its associated "claim . . . is not an allowed secured claim." According to ordinary rules of grammar, a claim must be both "allowed" and "secured" in order to be an "allowed secured claim." A claim that is not "allowed" or not "secured" is not an "allowed secured claim." Under Section 506(d), its associated "lien is void."

The parties to this case have no dispute about the "allowed" part of that analysis. A claim may be disallowed under 11 U.S.C. § 502, often because it is unenforceable or excessive in relation to the claimant's contractual rights or the estate's interest in the property. Everyone agrees that when a claim is not "allowed," its associated "lien is void" under Section 506(d). Under the terms of Section 506(d), the same is true if a claim is not "secured."

To determine whether a claim is "secured," the obvious source is a preceding subsection of Section 506, 11 U.S.C. § 506(a). That provision expressly defines the extent to which a claim is "secured" for purposes of bankruptcy law. It provides: "An allowed claim of a creditor secured by a lien on proper-

ty . . . is a *secured claim* to the extent of the value of such creditor's interest in . . . such property . . . ." *Id.* (emphasis added). Thus, if the value of the creditor's interest in the property is equal to or greater than the creditor's claim, an allowed claim is also a secured claim. Section 506(a) also expressly addresses the situation in which the value of the creditor's interest is less than its claim. In that case, "[a]n allowed claim . . . is an *unsecured claim* to the extent that the value of such creditor's interest . . . [in the property] is less than the amount of such allowed claim." *Id.* (emphasis added). Thus, if the value of the creditor's interest in the property is zero (as petitioner agrees is true here, Br. 26), then Section 506(a) expressly provides that the creditor's claim "is an unsecured claim."

If a claim is "unsecured," and so not an "allowed secured claim," like petitioner's claims here, Section 506(d) is explicit about what happens to the "lien secur[ing] [that] claim": "such lien is void." That is what the court of appeals correctly held. Indeed, because that conclusion is based directly on the terms of the governing statute, it would take an "exceptional[]" showing to refute it. *Union Bank* v. *Wolas*, 502 U.S. 151, 155–56 (1991). The statute is clear, and "that is the end of the matter." *Chevron U.S.A., Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842 (1984).

Dewsnup is not to the contrary. There, the sole mortgage was *partially* underwater because the mortgaged property retained some value, albeit less than the outstanding debt. In that situation, the mortgage comprises both "secured claim and unsecured claim components." *Ron Pair*, 489 U.S. at 239

n.3 (internal quotation marks omitted). *Dewsnup* held that such a partially secured claim remains an "allowed secured claim" and so prevents Section 506(d) from voiding the associated lien.

But where, as here, a mortgage is *completely* underwater, no component of the mortgage is secured in bankruptcy. A completely "unsecured claim" under Section 506(a) cannot be "an allowed secured claim" under Section 506(d). There is no sound basis for extending *Dewsnup* to the completely *un*secured claim here. *Infra* pp. 26–28.

2. *"Lien secures a claim" and "secured claim" in Section 506(d) are independent phrases with distinct meanings.* Section 506(d) uses two phrases—"lien secures a claim" and "secured claim"—that sound similar but are distinct. Petitioner treats these two phrases as redundant. *See infra* pp. 17–18. But the two terms have different meanings throughout the Bankruptcy Code. The phrase "lien secures a claim" describes nonbankruptcy-law rights, while "secured claim" is a "term of art" defined by bankruptcy law. *Nobelman*, 508 U.S. at 331.

a. A mortgage comprises two state-law elements: (1) a debt backed by (2) a lien. *See* BLACK'S LAW DICTIONARY 1101 (9th ed. 2009). The debt gives rise to a "claim" under bankruptcy law because it establishes a "right to payment." 11 U.S.C. § 101(5)(A). As petitioner acknowledges, both the claim and the associated mortgage lien are creatures of state law. Br. 5, 31. Thus, Section 506(d) recognizes that "a lien secures a claim" as a matter of nonbankruptcy law, just as a "lien securing such claim" is "recognized by applicable

nonbankruptcy law" in chapter 13. 11 U.S.C. § 1325(a)(5)(B)(i)(I), (II); *see also id.* § 552(b)(1); *cf. Patterson* v. *Shumate*, 504 U.S. 753, 757–59 (1992) (discussing "applicable nonbankruptcy law").

b. While the phrase "lien secures a claim" refers to nonbankruptcy law, the term "secured claim" refers to federal bankruptcy law. Indeed, the heading of Section 506—"Determination of secured status"—makes that clear. Statutory titles and headings, while not conclusive, are useful tools for interpreting statutes. *Fla. Dep't of Rev.* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008); *Porter* v. *Nussle*, 534 U.S. 516, 527–28 (2002). In "[d]etermin[ing] secured status," Section 506 naturally addresses liens (which are fundamental to secured status) as well as claims. Section 506(d) accordingly concludes that if a claim is either disallowed or unsecured, its associated "lien is void." That statutory text refutes petitioner's unsupported and counter-textual assertion that Section 506 is somehow "primarily directed to the treatment of secured *claims*, not to the treatment of *liens*." Br. 20; *accord id.* at 32.

Accordingly, Section 506(a)(1) provides that an "allowed claim" is either a "secured claim" or an "unsecured claim" based on its bankruptcy valuation. That bankruptcy classification is given effect three subsections later, in Section 506(d). How the nonbankruptcy "lien secur[ing] a claim" is treated under Subsection (d) depends on whether the claim is or "is not an allowed secured claim" in bankruptcy. This simple, straightforward reading gives effect to each word in the term "allowed secured claim" and Section 506(d) as a whole.

c. Moreover, although *Dewsnup* treated even a partially secured claim under Section 506(a) as "secured" under Section 506(d), that leaves the statutory phrase "[t]o the extent that" to do significant work in the statute. To be sure, "[t]o the extent that" has no effect on partially secured claims and their associated liens. But "[t]o the extent that" remains necessary to address "allowed" claims. Many claims are only partially allowed, such as claims that exceed "the reasonable value" of an attorney's services under 11 U.S.C. § 502(b)(4). Although *Dewsnup* accorded "secured" status under Section 506(d) to fully or partially secured claims, liens associated with partially allowed claims are void only to the extent that they are not allowed.

B. Petitioner's Contrary Argument Contradicts the Express Terms of the Statute, Creates Surplusage, and Is Inconsistent with the Rest of the Code

1.a. *Petitioner cannot provide an intelligible reading of Section 506.* Quoting the position of the creditors in *Dewsnup* rather than the Court's holding, petitioner argues that the term "secured claim" requires only that the claim be "'secured by a lien with recourse to the underlying collateral,' regardless of the collateral's value." Br. 26. That assertion directly contradicts the terms of Section 506(a). That subsection states that a creditor's claim "is a secured claim to the extent of the value of [the] 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." Contrary to petitioner's assertion, se-

cured status expressly requires a determination of "the value of [the] creditor's interest in . . . such property." *Id.* Thus, the mere fact that a lien has "recourse to the underlying collateral, regardless of the collateral's value," Pet. Br. 26, is *not* sufficient to give it "secured" status in bankruptcy.

b. *Petitioner's reading renders the word "secured" surplusage.* Section 506(d) provides that, "[t]o the extent that a lien secures a claim . . . that is not an allowed secured claim, such lien is void." That sentence begins by identifying a "lien" that secures a "claim" and then provides for the circumstances in which that "lien is void," i.e., when the claim "is not an allowed secured claim." Under petitioner's reading, however, *every* "lien [that] secures a claim" will be a "secured claim." Therefore, the word "secured" does no work at all. As petitioner puts it, Section 506(d) "strips only liens securing *disallowed* claims." Br. 19. If petitioner were right, the word "secured" in the phrase "allowed secured claim" could (and therefore should) have been omitted.

If extended throughout the Code, petitioner's reading would likewise render surplusage other provisions that juxtapose "property securing" or "lien[s] secur[ing] claim[s]" with "allowed secured claim[s]." *E.g.*, 11 U.S.C. §§ 506(a)(1), 506(b), 506(c), 722, 724(e)(2). In a few places in the Code, the phrases *must* mean different things, or else a claim could be simultaneously secured and unsecured. For instance, a trustee can "avoid a lien that secures a claim" that is "any allowed claim, *whether secured or unsecured*, for" noncompensatory fines or punitive damages. 11 U.S.C. §§ 724(a), 726(a)(4) (emphasis

added). Likewise, Section 506(a)(1) provides (emphases added): "An allowed *claim* of a creditor *secured by a lien* on property . . . *is an unsecured claim* to the extent that the value . . . is less than the allowed amount of such claim." Unless these provisions are contradictory or nonsensical, they must refer separately to nonbankruptcy and bankruptcy law.

"It is [the Court's] duty to give effect, if possible, to every clause and word of" the Bankruptcy Code. *Hoffman* v. *Conn. Dep't of Income Maint.*, 492 U.S. 96, 103 (1989) (internal quotation marks omitted); *accord Rake* v. *Wade*, 508 U.S. 464, 471 (1993). Petitioner's argument equating the two phrases must therefore be rejected.

c. *Section 722.* Even petitioner cannot consistently maintain that the two phrases ("lien secures a claim" and "secured claim") mean the same thing throughout the Code. Petitioner acknowledges that they mean different things—and that our reading is correct—when discussing Section 722 of the Code. Br. 36.

Section 722 gives debtors the right to "redeem tangible personal property . . . from a *lien securing a dischargeable consumer debt* . . . by paying the holder of such lien the amount of the *allowed secured claim* of such holder that is secured by such lien in full at the time of redemption" (emphases added). Using the example of a car, petitioner acknowledges that "the amount of the lender's 'secured claim'" is limited to "the car's value," *not* (as its reading of Section 506(d) would have it) the entire amount of the "lien securing [the] dischargeable consumer debt." Pet. Br. 36; 11 U.S.C. § 722.

In other words, the "lien securing a dischargeable consumer debt" in Section 722 is a creature of non-bankruptcy law. Petitioner acknowledges that "secured claim," by contrast, is a bankruptcy classification under Section 506(a) and can be less than the full amount of the claim or lien if the property's value has decreased. Petitioner's logical reading of Section 722 underscores the inconsistency of its reading of Section 506(d). *See also infra* pp. 43–44.

2. *Congress chose to exempt other provisions, but not Section 506(d), from Section 506(a)'s operation.* Petitioner's theory is that "secured" status under Section 506(d) is determined by state law, rather than by Section 506(a), which defines that term in the very same section of the Code. But Congress understood that Section 506(a)'s definition of "secured claim" would apply throughout the Bankruptcy Code: "Throughout the bill, references to secured claims are only to the claim determined to be secured under [Section 506(a)], and not to the full amount of the creditor's claim." H.R. REP. NO. 95–595, at 356. When Congress wanted other Code provisions to apply to claims regardless of their secured status under Section 506(a)(1), it did something different from what it did in Section 506(d): it omitted the word "secured" or explicitly exempted the provision from Section 506(a)'s operation.

a. For instance, Section 363(k) authorizes a lienholder to credit-bid (that is, "offset [its] claim against the purchase price") at an auction of "property that is subject to a lien that secures an allowed claim," whether or not the claim remains secured in bankruptcy. 11 U.S.C. § 363(k). In contrast, Con-

gress referred to an "allowed *secured* claim" in Section 506(d).

b. Two other Code provisions show that Congress knew how to preclude Section 506(a) from operating on secured claims. First, Section 1111(b)(2) provides that if a creditor whose claim is of more than "inconsequential value" (and thus partially secured) exercises its election under this subsection, "then *notwithstanding section 506(a)* of this title, such claim is a secured claim, to the extent that such claim is allowed." 11 U.S.C. § 1111(b)(2) (emphasis added).

Second, in 2005 Congress expressly provided that "*section 506 shall not apply*" to purchase money security interests in recently purchased cars and other items. 11 U.S.C. § 1325(a)(*) (following § 1325(a)(9)) (emphasis added). Congress could have used similar language in Section 506(d) to accomplish petitioner's desired result, but chose not to do so.

"[W]hen Congress includes particular language in one section of a statute but omits it in another . . . [,] this Court presumes that Congress intended a difference in meaning." *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) (internal quotation marks and alterations omitted); *see also United States* v. *Smith*, 499 U.S. 160, 167 (1991) (canon against implying additional exceptions when some are already expressly enumerated). If Congress had wanted to divorce Section 506(a) from Section 506(d), it would have said so expressly, as it did elsewhere.

3. *Petitioner's theory would negate several key limitations on a Code provision important to business reorganizations and liquidations.* Petitioner's read-

ing of Section 506 would override two important limitations on Section 1111(b): the requirement of an election for secured status and the exemption of interests of inconsequential value. App., *infra*, pp. 1a–2a (reprinting 11 U.S.C. § 1111).

First, Section 1111(b)(2) gives lienholders in chapter 11 proceedings the option to have their partially underwater, and thus undersecured, claims nevertheless treated as "secured claim[s] to the extent that such claim[s] [are] allowed." The undersecured creditor "may elect to forego its unsecured claim and have the entire amount of its claim treated as fully secured by the collateral." Steven R. Haydon et al., *The 1111(b)(2) Election: A Primer*, 13 BANKR. DEV. J. 99, 107 (1996). So nonrecourse lenders, who ordinarily could not enforce their liens against a debtor's assets other than the collateral, may elect to have their claims treated either as completely secured (but limited to the mortgaged property) or as partially unsecured (and so including a deficiency claim against the debtor's other assets). *Id.* Petitioner's reading of Section 506, however, would automatically treat *all* allowed underwater claims backed by liens as completely secured, regardless of any election. *Cf.* Pet. Br. 39 n.20 (noting creditor's election and citing § 1129(b)(2)(A)(i), which does not itself void liens).

Second, while creditors who hold partially underwater claims can ordinarily elect secured status, they cannot do so if their interests are "of inconsequential value." 11 U.S.C. § 1111(b)(1)(B)(i). Thus, this provision protects claims with value but not *completely* underwater claims. Completely underwa-

ter claims lose their secured status, even if the holders of those claims dissent and even if they receive no distribution of property in return. 124 CONG. REC. 34,007 (1978) (statement of Sen. DeConcini).

This inconsequential-value exception prevents "creditors with liens of no market value . . . [from] attempt[ing] to bargain or harass the debtor post-confirmation to secure greater value for their lien[s]." *In re Rosage*, 82 B.R. 389, 391 (Bankr. W.D. Pa. 1987). With nothing to lose, such creditors would refuse to consent until they had extracted payoffs exceeding their claims' current value. But "the value of [a] lien related to nuisance and legal harassment is not a value recognized in bankruptcy." *Id.*

Petitioner's reading would override this policy—the same policy underlying Section 506(d)—and let all such claims remain secured regardless of whether any value still supports the lien. "[T]he canon against surplusage is strongest when," as here, "an interpretation would render superfluous another part of the same statutory scheme." *Marx* v. *Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013). Petitioner's reading would do more than just make Section 1111(b)'s provisions superfluous; it would negate the careful limitations that Congress imposed upon them.

II. *DEWSNUP*'S CAREFULLY LIMITED HOLDING, DECLINING TO VOID A PARTIALLY UNDERWATER FIRST MORTGAGE LIEN, DOES NOT EXTEND TO COMPLETELY UNDERWATER SECOND MORTGAGES

Instead of squarely focusing on the statutory text, petitioner relies almost exclusively on *Dewsnup*. But *Dewsnup*'s narrow holding cannot bear that enor-

mous weight. While *Dewsnup* found the term "allowed secured claim" barely ambiguous as applied to a partially secured claim, there is no such ambiguity in the context of the completely *un*secured claims here. Moreover, *Dewsnup* did not consider, and had no occasion to consider, any of the distinctive historical and policy arguments concerning valueless liens specifically. In particular, none of the *Dewsnup* litigants noted that this Court had upheld voiding completely valueless junior liens in bankruptcy nearly sixty years earlier. And when this Court considered a related issue in *Nobelman*, just one year after *Dewsnup*, it specifically relied on the presence of some value supporting a partially secured claim, to avoid preserving completely underwater mortgage liens.

A. *Dewsnup* Went Out of Its Way to Limit Its Holding to the Precise Situation Before It

1. *Why* Dewsnup *deviated from the statutory text.* *Dewsnup* acknowledged that the natural reading of Section 506 would void even the undersecured portion of partially underwater liens. Thus, had the Court been "writing on a clean slate, [it] might [have] be[en] inclined to agree with [the debtor] that" Sections 506(a) and (d) operate in tandem to reduce the mortgage lien to the value of the underlying collateral. 502 U.S. at 417.

But two policy considerations, plus its reading of the general historical treatment of liens in bankruptcy, persuaded *Dewsnup* to deviate from the natural reading of the text. 502 U.S. at 417–20. Still, the Court acknowledged that its reading of the stat-

ute was "not without its difficulty." *Id.* at 417. All of the Justices, both in the majority and dissent, conceded that this reading was difficult to square with the statutory text. *Id.* (majority opinion); *id.* at 422–23 (Scalia, J., dissenting); *see also Bank of Am. Nat'l Trust & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 461–63 (1999) (Thomas, J., concurring in the judgment).

2. Dewsnup *specifically avoided resolving whether completely underwater second mortgages are "secured claims."* In *Dewsnup*, the Court specifically reserved certain hypotheticals for future consideration: "Hypothetical applications that come to mind *and those advanced at oral argument* illustrate the difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations." 502 U.S. at 416 (emphasis added). Thus, the Court took pains to "focus upon the case before [it] and allow other facts to await their legal resolution on another day." *Id.* at 416–17.

At oral argument, the debtor's counsel advanced two hypotheticals to illustrate the difficulties posed by the creditors' proposed rule. One was this very case, the problem of the completely underwater second mortgage: "[I]f you have a senior lienholder and a junior lienholder, if the junior lien is worthless, this provision allows the elimination of that junior lien so that the debtor can negotiate with the senior creditor and work out a plan for repayment over a period of time." 90–741 Oral Arg. Tr. 8–9.

In *Dewsnup*, unlike here, the creditors still had a secured claim supported by some (albeit partial) val-

ue, so the mortgage was still partially secured. The Court specifically limited its holding to the case of the partially secured claim disputed by the parties before it: "[W]e hold that § 506(d) does not allow *petitioner* to 'strip down' *respondents'* lien, because *respondents'* claim is secured by a lien and has been fully allowed pursuant to § 502." 502 U.S. at 417 (emphases added). The Court thus specifically avoided resolving or even commenting on the issue presented by a completely underwater second mortgage, as advanced hypothetically at the *Dewsnup* oral argument and as presented here.

Petitioner attempts to stretch *Dewsnup*'s holding well beyond these careful limitations. Indeed, petitioner nowhere quotes the Court's actual, fact-specific holding. Instead, petitioner quotes or cites the *Dewsnup* creditors' position more than a dozen times, as if it were the Court's holding. Br. 13 (twice), 19, 22 (four times), 24 (twice), 25, 26 (twice), 27. *Dewsnup* specifically declined to go so far, acknowledging the "difficulty" posed by the creditors' broad position. 502 U.S. at 417.

3. *Bootstrapping: One cannot rely on what* Dewsnup *did not hold.* Given *Dewsnup*'s own careful limitation of its holding, which explicitly avoided resolving the issue in this case, there is no basis for petitioner's invocations of reliance, legislative ratification, and *stare decisis*. *See* Br. 40–45. One cannot rely on what this Court has not done.

"Concepts of *stare decisis* in statutory interpretation apply to the *holdings* with which the case-by-case method of decision surrounds a statute. To rec-

ognize no differences between the [mortgage interests in *Dewsnup*] and those in issue here . . . would turn the case-by-case process against itself." *United Gas Improvement Co.* v. *Cont'l Oil Co.*, 381 U.S. 392, 404 (1965) (Harlan, J.) (emphases added). Justice Jackson's caution that "[g]eneral expressions transposed to other facts are often misleading" is particularly apt here, where *Dewsnup*'s historical and policy arguments falter in the context of completely underwater second mortgages. *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944).

B. Though *Dewsnup* Found the Statutory Text Barely Ambiguous as Applied to a Partially Secured Claim, the Text Is Clear that a Completely Unsecured Claim Is Not an "Allowed Secured Claim"

The limited issue in *Dewsnup* was whether the debtor there could void the underwater portion of a partially underwater first mortgage lien. 502 U.S. at 411–12. Because the mortgage was undersecured, the creditor's claim was partially secured and partially unsecured under Section 506(a). There are two ways to view such a claim: Viewing it as separate secured and unsecured claims would have required voiding the unsecured, underwater portion of the lien under Section 506(d). Alternatively, under *Dewsnup*, one can view the claim as a single hybrid secured/unsecured claim, which remains secured in bankruptcy because it is still backed by collateral with some value. Though the latter approach does not fully sever the secured and unsecured claim components, either approach preserves a role for

Section 506(a)'s requirement of some current value as the foundation of secured status.

1. *Dewsnup* viewed "the contrasting positions of the respective parties and their *amici*" as "demonstrat[ing] that § 506 of the Bankruptcy Code and its relationship to other provisions of that Code do embrace *some ambiguities*." 502 U.S. at 416 (emphasis added). Given its policy concerns and sense of historical practice, *Dewsnup* found the term "allowed secured claim" barely ambiguous as applied to a mortgage supported by some value in the property. *Id.* at 417. The Court concluded that one could read the term broadly to include partially secured claims, but nowhere suggested that it could include completely *un*secured claims.

2. Here, by contrast, there is no equity to secure petitioner's claims. Petitioner concedes, as it must, that its claims are completely unsecured under Section 506(a), and that if foreclosure sales happened today, petitioner would reap nothing and its liens would be extinguished. Br. 11, 26. Indeed, many second mortgages (but few if any first mortgages) are completely unsecured. Because *Dewsnup* involved only a first mortgage, it had no occasion to consider this situation.

Outside of bankruptcy, if a mortgagor fails to pay its debt, the lien allows the mortgagee to foreclose on the home. But upon such a foreclosure and payment of the proceeds to the first mortgagee, there may well be nothing left over for the second mortgagee. Yet when the first mortgagee forecloses, the second mortgage lien is discharged, regardless of whether

the second mortgagee consented or received any payment. RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 7.1 (1997). Thus, in foreclosure, a completely underwater second mortgage is worthless. Because land is virtually always worth something, real property in practice never becomes completely valueless. So, absent a supervening lien, first mortgages do not sink completely underwater. Only second mortgages do.

In short, a completely unsecured claim "is not an allowed secured claim." 11 U.S.C. § 506(d). Unlike in *Dewsnup*, petitioner's claims are not at all secured, so Section 506(d) voids the liens. Nothing in *Dewsnup* calls for a different result.

C. This Court's Decision in *Nobelman* Confirms that Completely Underwater Mortgage Liens Are Void

One year after *Dewsnup*, this Court's decision in *Nobelman* confirmed the narrowness of *Dewsnup*'s holding. In *Nobelman*, the creditor and trustee advanced the same broad reading of *Dewsnup* that petitioner advances here: that every mortgage remains a perpetually secured claim, regardless of its value. Instead of accepting that broad reading of *Dewsnup*, this Court made clear that while bankruptcy courts cannot void partially underwater mortgage liens, they can void liens that are completely underwater.

The question presented in *Nobelman* was whether a chapter 13 debtor could use Section 506(a) to reduce the secured portion of a partially underwater mortgagee's claim down to the home's fair market value. 508 U.S. at 325–26. The creditor and the

trustee each devoted an entire part of its brief to *Dewsnup*, arguing that Section 506(a)'s definition of "secured claim" could not be used to void any lien under Section 506(d) or 1322(b)(2). 92–641 Am. Sav. Bank Br. 25–27; 92–641 Ch. 13 Trustee Br. 16–22, 44. Like petitioner here, the *Nobelman* creditor read "the *Dewsnup* Court [as] adopt[ing] the [*Dewsnup*] creditor's argument." 92–641 Am. Sav. Bank Br. 26. And both the creditor and the trustee argued, as petitioner does here, that Section 506(a) affects only the distribution of assets, not secured status generally. *Id.* at 13–14; 92–641 Ch. 13 Trustee Br. at 21–22.

This Court could easily have extended *Dewsnup* to resolve *Nobelman* by interpreting all mortgages as perpetually secured claims for purposes of Sections 506(d) and 1322(b)(2). After all, as petitioner argues here, a mortgage lien always secures some claim under nonbankruptcy law. Br. 19–20, 22.

But this Court rejected the creditor's and trustee's broad arguments, declining to unmoor other provisions of the Code from Section 506(a). As this Court explained, the debtors "were correct in looking to § 506(a) for a judicial valuation of the collateral to determine the status of the bank's secured claim," i.e., whether it really is to be treated as "secured" or not. *Nobelman*, 508 U.S. at 328. Section 506(a) defines the phrase "secured claim" as a "term of art," and that term of art stands in contrast to the phrase "claim secured . . . by a security interest" in Section 1322(b)(2). *Id.* at 330–31.

Instead of detaching the other Code provisions from Section 506(a), this Court rested its holding on

the continued existence of value in the collateral to secure the lien. "[T]he bank is still the 'holder' of a 'secured claim,' *because petitioners' home retains $23,500 of value as collateral*." *Id.* at 329 (emphasis added). Because the lien was still supported by enough value to provide partial security, it could not be voided. *Id.* at 331.

Moreover, *Nobelman* reasoned, trying to write down the unsecured portion of a partially underwater mortgage would have ripple effects on the creditor's other contractual rights in the mortgage, impinging on the creditor's remaining secured claim. A single note covers both the secured and unsecured components of a mortgage. Voiding the unsecured portion would necessarily alter the interest rate, monthly payment, term, or amortization schedule, which would also modify the secured portion of the mortgage. 508 U.S. at 331–32. "This conundrum" would be especially complex for adjustable-rate mortgages. *Id.* at 332. But voiding an entire mortgage lien poses no such problem.

Nobelman undermines petitioner's reading of Section 506(d). It clarifies *Dewsnup* by confirming that Section 506(a) determines the secured status of "secured claim[s]" throughout the Code. And it dispels petitioner's argument that Section 506(a) affects only the distribution of assets.[1] *Contra* Br. 11, 26,

[1] The creditor in *Nobelman*, like the creditor here, argued that *Dewsnup* made clear that every mortgage remains a "secured claim" with a valid lien even if it is completely underwater, notwithstanding Section 506(a). At oral argument, several Members of this Court expressed doubts that the creditor's position on completely underwater mortgages was settled law.

32–33. Though *Nobelman* itself involved chapter 13, its understanding of Section 506(a) extends more broadly. *See* 11 U.S.C. § 103(a) (providing that the provisions of chapter 5 apply generally to chapters 7, 11, 12, and 13).

Following *Nobelman*, all eight courts of appeals to resolve the issue have held that *Nobelman* and Sections 506(a) and 1322(b)(2) authorize voiding completely underwater second mortgage liens in chapter 13. *In re Pond*, 252 F.3d 122, 126 (2d Cir. 2001); *In re McDonald*, 205 F.3d 606, 611 (3d Cir. 2000); *In re Davis*, 716 F.3d 331, 335–36 (4th Cir. 2013); *In re Bartee*, 212 F.3d 277, 291 (5th Cir. 2000); *In re Lane*, 280 F.3d 663, 668–69 (6th Cir. 2002); *In re Schmidt*, 765 F.3d 877, 881–82 (8th Cir. 2014); *In re Zimmer*, 313 F.3d 1220, 1226–27 (9th Cir. 2002); *In re Tanner*, 217 F.3d 1357, 1359–60 (11th Cir. 2000). *But cf. In re Woolsey*, 696 F.3d 1266, 1279 (10th Cir. 2012) (reserving the interpretation of § 1322(b)(2) "and its meaning for another day" because the petitioner had specifically refused to argue it). In claiming that Section 1322(b)(2) forbids voiding home mortgage liens, petitioner ignores this unanimous contrary authority. Br. 39.

One Justice asked: "[W]hat is the result if there is a second mortgage as to which there is no adequate security at all [because the first is partially underwater]? . . . Is the second mortgagee a holder of a secured claim? . . . Even though the value of the property does not support any portion of his secured—any portion of his claim as a secured claim. . . . It's difficult for me to square that with 506(a)." 92–641 Oral Arg. Tr. 24; *see id.* at 39–40; *see also id.* at 44–46.

Moreover, this unanimous authority belies petitioner's assertion that voiding completely underwater liens would disrupt second mortgagees' expectations. Br. 21, 44. Lien-voiding has been settled law for more than a decade. If the sky had fallen in the Eleventh Circuit or in the eight circuits that permit lien-voiding in chapter 13, petitioner and its amici would have cited abundant statistics to that effect.

D. Before the 1978 Bankruptcy Code, This Court Upheld the Power of Bankruptcy Courts to Void Valueless Junior Liens

1. *Pre-Code practice cannot cloud clear statutory text.* Though petitioner relies heavily on pre-Code practice, the statutory text is too clear to warrant recourse to it here. The Code "was intended to modernize the bankruptcy laws, and as a result made significant changes in both the substantive and procedural laws of bankruptcy." *Ron Pair*, 489 U.S. at 240 (citations omitted). "In particular, Congress intended 'significant changes from current law in . . . the treatment of secured creditors and secured claims.'" *Id.* (quoting H.R. REP. NO. 95-595, at 180 (1977)). In light of this revision, "pre-Code practice . . . cannot overcome that [statutory] language. It is a tool of construction, not an extratextual supplement." *Hartford Underwriters*, 530 U.S. at 10.

2.a. *Pre-Code practice voided completely underwater junior liens.* Even if one considers pre-Code practice, it only undermines petitioner's position. Petitioner claims that the 1898 Bankruptcy Act prevented courts from voiding liens. Br. 23, 28–29. But this Court's precedent is to the contrary.

Eight decades ago, this Court affirmed bankruptcy courts' power to void valueless junior mortgage liens as an essential way to adjust competing rights among multiple creditors. In one proceeding under the 1898 Act as amended, completely underwater junior mortgagees sought to hold up a reorganization because they would receive nothing "in respect to their claims." *620 Church St.*, 299 U.S. at 25, 26–27. The junior mortgagees asserted that the plan was unfair and inequitable, deprived them of their property rights, and conflicted with *Radford*, on which petitioner here likewise relies. *Id.*; *see* Br. 23, 24, 30–31, 35 n.17 (citing *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935)).

This Court rejected those claims. The amended 1898 Act protected only "'the realization of the *value* of the interests, claims or liens' affected." *620 Church St.*, 299 U.S. at 27 (emphasis added) (quoting § 77B of the Act). The collateral was worth less than the amount of the first mortgage bonds, so the second and third mortgages had no value. *Id.* at 26. "[T]he controlling finding [was] not only that there was no equity in the property above the first mortgage, but that petitioners' claims were appraised by the court as having 'no value.' *There was no value to be protected.*" *Id.* at 27 (emphasis added); *see also Wayne United Gas Co.* v. *Owens-Ill. Glass Co.*, 91 F.2d 827, 832 (4th Cir. 1937) (collecting cases); *In re Witherbee Ct. Corp.*, 88 F.2d 251, 253 (2d Cir. 1937).

Petitioner cannot dismiss these precedents simply as involving reorganizations rather than liquidations. *See* Br. 31–32. The Code explicitly provides that Section 506 applies broadly, in "case[s] under

chapter 7, 11, 12, or 13." 11 U.S.C. § 103(a). By contrast, when Congress wants to limit certain Code provisions to particular chapters, it does so expressly. *See, e.g.*, *id.* § 103(i).

In interpreting a different subsection of Section 506 in a chapter 7 case, this Court has relied on chapter 11 precedents. *Hartford Underwriters*, 530 U.S. at 10 (relying on *Ron Pair* and *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531 (1994)). Even petitioner recognizes the parallels between the chapters, repeatedly citing chapter 11 cases as generally applicable to this chapter 7 case. *See, e.g.*, Br. 7, 27, 30, 31, 37 (relying on *Travelers*, *203 N. LaSalle St.*, *United Sav. Ass'n*, *Butner*, *BFP*, *RadLAX*, and *Nordic Village*). The portion of *203 North LaSalle Street* quoted by petitioner, for instance, explicitly relies on a chapter 11 Code provision and other citations that refer specifically to reorganizations. *Compare* Br. 27, *with* 526 U.S. at 457.[2]

---

[2] Indeed, the Code recognizes that because reorganizations and liquidations can involve overlapping concepts, the two cannot be segregated. For instance, chapter 11 proceedings are frequently used for liquidations in lieu of chapter 7. 11 U.S.C. § 1123(b)(4); Elizabeth Warren & Jay L. Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 AM. BANKR. L.J. 499, 523–24 (1999). This Court has acknowledged the overlap between reorganizations and liquidations. *See Fla. Dep't of Rev.*, 554 U.S. at 37 n.2 ("Although the central purpose of Chapter 11 is to facilitate reorganizations rather than liquidations . . . , Chapter 11 expressly contemplates liquidations."); *CFTC* v. *Weintraub*, 471 U.S. 343, 353 n.6 (1985) ("While this [legislative history] reference is to . . . reorganization, nothing in the Code or its legislative history suggests that the debtor's directors enjoy substantially greater powers in liquidation."); *Duparquet Huot & Moneuse Co.* v. *Evans*, 297 U.S. 216, 220

Thus, whether a case concerns a liquidation or a reorganization is immaterial for purposes of interpreting Section 506, which applies across the Code. Where a second mortgage is completely underwater, there is no value to protect, and bankruptcy courts have long had the power to void such valueless junior liens.

b. *Liens often do not survive bankruptcy.* Petitioner also greatly overreads the history relied on by *Dewsnup*. The precedent quoted by *Dewsnup* described the maxim as a generalization, not a hard-and-fast rule: "'*Ordinarily*, liens and other secured interests survive bankruptcy.'" *Dewsnup*, 502 U.S. at 418 (emphasis added) (quoting *Farrey* v. *Sanderfoot*, 500 U.S. 291, 297 (1991)). As then-Chief Judge Posner put it, petitioner is "mesmerized by" an "old saw" that "cannot be maintained without careful qualification, that liens pass through bankruptcy unaffected. They do—unless they are brought into the bankruptcy proceeding and dealt with there." *In re Penrod*, 50 F.3d 459, 461, 463 (7th Cir. 1995)*; accord In re Lindsey*, 823 F.2d 189, 190 (7th Cir. 1987) (Posner, J.) (explaining that this "old saw . . . is no better than a half-truth"). Today, the maxim's continuing relevance is limited. As Judge Gorsuch has noted, "[w]hatever pre-[C]ode 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." *Woolsey*, 696 F.3d at 1274 (citing *Harmon* v. *United States*, 101 F.3d 574, 581 (8th Cir. 1996) (collecting examples)).

(1936) ("[T]he end to be served was essentially the same[:] . . . reorganization or liquidation or something akin thereto.").

Petitioner attempts to rely on *Long* v. *Bullard*, 117 U.S. 617 (1886). Br. 23, 28, 31, 35 n.17. *Long*, however, held simply that "a discharge in bankruptcy does not release real estate of the debtor from the lien of a mortgage" when the mortgagee had not participated in the bankruptcy proceeding. *Dewsnup*, 502 U.S. at 419 (citing *Long*, 117 U.S. at 620–21). Here, petitioner's mortgages *were* part of the bankruptcy proceedings, and petitioner could not have stayed out of them; the Code now empowers debtors, trustees, and sureties to pull creditors in. 11 U.S.C. § 501(b), (c); *see also Dewsnup*, 502 U.S. at 417–18. Moreover, *Long* says nothing about statutory voiding powers that might operate during the proceeding, before the discharge. Here, unlike in *Long*, the bankruptcy court brought an express lien-voiding statutory provision to bear.

E. *Dewsnup*'s Policy Considerations Are Largely Inapplicable to Completely Underwater Second Mortgages

Dewsnup acknowledged that its reading of Section 506(d) was strained, but justified it based on one historical and two policy considerations. 502 U.S. at 417–20. *Dewsnup* had no occasion to address how those considerations might apply to completely underwater second mortgages. As discussed, the historical record in this context does not support petitioner's argument, because this Court has long allowed bankruptcy proceedings to void completely underwater junior liens. Nor can petitioner rely on *Dewsnup*'s policy considerations; if anything, they favor voiding completely underwater mortgage liens.

1. Voiding valueless second mortgage liens benefits first mortgagees

Dewsnup's primary rationale was the need to prevent the debtor from gaining a "windfall" if the property later increased in value. 502 U.S. at 417. If a court reduced a lien to its current value, *Dewsnup* feared, even a slight increase in value would let the debtor—rather than the creditor—reap the future gain. *Id.* But here, any increase in value first and foremost benefits the first mortgagee.

Respondents' homes would have to nearly double in value before their respective first mortgagees' claims would be satisfied. Moreover, foreclosed homes typically sell at deep discounts below fair market value. *Infra* pp. 46–47. So property values would have to increase even more before there would be any value left over for a debtor, or a second mortgagee like petitioner. In this situation, there is usually nothing left over to give debtors a "windfall."

2. Voiding valueless liens keeps second mortgagees from holding up mutually beneficial workouts outside foreclosure, benefitting the housing market

Not only does voiding second mortgage liens give debtors few if any "windfalls," but it also prevents second mortgagees from exercising dubious hold-up power. Voiding valueless second mortgage liens is sometimes the only way to stop second mortgagees from obstructing mutually beneficial bargains between first mortgagees and debtors.

In order to avoid the costs of foreclosure, debtors and creditors frequently negotiate mutually benefi-

cial, consensual resolutions of troubled mortgages. Creditors typically prefer to avoid foreclosure because the process can take many months, result in substantial legal fees, and yield prices well below market value. Instead, a first mortgagee may strike a deal with a debtor, such as lowering the interest rate, extending the loan term, or writing down the principal balance. (These are often called "loan modifications" or "workout agreements.") These consensual resolutions are generally fast and sometimes let the debtor stay in the home instead of forcing the debtor to abandon it. First mortgagees often seek to arrange these workouts, so they can keep receiving payments toward the entire mortgage balance instead of foreclosing for pennies or dimes on the dollar.

But junior mortgagees often use completely underwater junior liens to block these agreements and extract payoffs. "[S]enior lienholders generally require the junior lienholder to affirmatively agree to subordinate their claim to the modified senior lien before [the senior lienholder will] agree[] to the [loan] modification." Larry Cordell et al., *The Incentives of Mortgage Servicers: Myths and Realities*, 41 UCC L.J. 347, 370 (2009). Otherwise, the senior mortgagee's modification "would [go to] benefit the junior [mortgagee] because the borrower's improved financial position frees up additional cash flows to the second-lien holders." Sumit Agarwal et al., *Second Liens and the Holdup Problem in Mortgage Renegotiation* 5 (2014), *available at* http://tinyurl.com/HoldupAgarwal. In fact, many of the agreements that govern bundles of securitized mortgage loans do

not let senior mortgagees modify a loan without resubordinating the junior lien. *Id.*

The existence of completely underwater mortgages thus results in "a 'hold-up' problem." *See* Vicki Been et al., *Sticky Seconds—The Problems Second Liens Pose to the Resolution of Distressed Mortgages*, 9 N.Y.U. J.L. & BUS. 71, 99 (2012). Because second mortgagees get nothing from a workout agreement or foreclosure, they have nothing to lose by holding up deals solely to "extract[] the largest monetary concession they can." Cordell et al. 368. These "demands can make the first lien holder less likely to modify or refinance its loan or to approve a short sale or [deed in lieu of foreclosure], because the demands make the workout too costly for the first lien holder," forcing homes into foreclosure. Been et al. 99.

Thus, as the chief economist at Moody's Analytics explained, "'[s]ubordinate liens have become the biggest hurdle to resolving the foreclosure crisis more quickly.'" Prashant Gopal & John Gittelsohn, *Second Loans Keep Houses in Limbo*, BUSINESSWEEK, July 30–Aug. 5, 2012, at 40, 41; *see also* Cordell et al. 368 ("A major impediment to refinancing and loss mitigation is the presence of junior liens . . . .").

The problem is likely to be particularly acute when the second mortgage is securitized (pooled with other mortgages, sliced into many layers, and sold off separately), which may make it impossible in practice to procure the consent of every interested party. The hold-up power exercised by second mortgagees can thus clog the housing market, creating a large backlog of homes in foreclosure instead of keep-

ing those homes occupied by homeowners who continue to make payments. Such raw power to hold up deals to extract payment is not a legitimate source of value protected by bankruptcy law. *Supra* p. 22.

Worse yet, homes awaiting foreclosure sales quickly fall prey to vandalism and crime, so they tend to lower the value of nearby homes significantly, ultimately contributing to neighborhood blight. *See* John Y. Campbell et al., *Forced Sales and House Prices*, 101 AM. ECON. REV. 2108, 2110, 2121, 2128 (2011) (empirical study finding that foreclosures, on average, lower the value of the foreclosed home by $44,000 and depress the value of nearby homes by between $148,000 and $477,000).

Thus, while voiding partially underwater first mortgage liens could hypothetically risk giving debtors windfalls, voiding completely 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 second mortgage liens helps first mortgagees, neighborhoods, and the housing market generally by promoting consensual workouts in lieu of foreclosure.

3. Second mortgagees' bargains already reflect their subordination to first mortgagees

Second mortgagees bargained for their more precarious security position beneath first mortgagees. They understood that they had no right to prevent foreclosure and would receive nothing in foreclosure if the collateral's value fell below the first mortgage's balance. So voiding completely underwater second

mortgage liens does not violate second mortgagees' bargains.

Before the housing crash, many homes had high loan-to-value ratios, frequently reaching "nearly 100%." Martin Feldstein, *How to Stop the Mortgage Crisis*, WALL ST. J., Mar. 7, 2008, at A15. In this case, Mr. Caulkett's two mortgages had a combined loan-to-value ratio of 100% when they were issued, and Mr. Toledo-Cardona's ratio was 103.6%. Such second mortgagees could foresee what came to pass: because loan-to-value ratios were so high, any drop in home values would immediately impair their loans' values and quickly make them valueless.

Dewsnup worried about voiding liens solely to benefit "other unsecured creditors . . . who had nothing to do with the mortgagor-mortgagee bargain." 502 U.S. at 417. But that concern does not apply when voiding the second mortgage lien benefits a first mortgagee, "who had [every]thing to do with the mortgagor–mortgagee bargain." *Id.*

Even outside of bankruptcy, if a first mortgagee forecloses on a home, the foreclosure sale extinguishes the second mortgage lien, and the second mortgagee receives no proceeds from the foreclosure sale. To compensate for their higher risk, second mortgagees demand more favorable terms than first mortgagees, such as higher interest rates. In 2009, for example, borrowers paid interest rates that were nearly twice as high for $30,000 home-equity loans (which are junior mortgages) as for traditional 30–year mortgages. Opp. 17 & n.3. Both greater rewards and greater risks, including the risk of lien

removal in foreclosure by first mortgagees, are central to second mortgagees' bargains.

Petitioner erroneously argues that voiding second mortgage liens "would be an enormous and unwarranted disruption of settled expectations," implying that it would raise mortgage costs substantially. Br. 44. But that claim is not supported by the empirical evidence. *See supra* p. 32. A recent empirical study found that rulings authorizing cramdowns of partially secured mortgages in bankruptcy did not substantially raise interest rates for homeowners. Joshua Goodman & Adam Levitin, *Bankruptcy Law and the Cost of Credit: The Impact of Cramdown on Mortgage Interest Rates*, 57 J.L. & ECON. 139, 141 (2014). This is likely because "lenders are [already] pricing in the risk of principal modification," whether by foreclosure, bankruptcy, or otherwise. *Id.* Thus, second mortgagees' bargains already reflect their subordinated status, and their higher interest rates already price in the expected risk of loss via foreclosure, lien-voiding, or simple nonpayment.

III. PETITIONER'S REMAINING ARGUMENTS ARE MERITLESS

A. Voiding Completely Underwater Liens Neither Conflicts with the Other Code Provisions Cited by Petitioner nor Renders Them Surplusage

1. Petitioner does not and cannot claim that our plain-language reading of Section 506(d) would make other provisions of the Code superfluous. The most it can claim is that *overruling Dewsnup* might arguably render other provisions superfluous or override

their limitations. Br. 20, 35–40. But petitioner attacks a straw man: we do not and have never argued that this Court need overrule *Dewsnup*. As long as *Dewsnup* remains good law, debtors cannot use Section 506(d) to void partially underwater liens. Thus, a debtor who wants to void a lien still attached to property with some value must turn to one of the other provisions cited by petitioner. Giving Section 506(d) its plain meaning renders neither these powers nor the limitations placed on them surplusage.

2. Moreover, the principal provision relied on by petitioner, Section 722, is distinct from Section 506(d) in three key respects. First, Congress enacted Section 722 to protect debtors from harsh state redemption laws governing personal property. *See, e.g.*, U.C.C. § 9–623(b) (requiring debtors to pay the *entire* amount owed in order to redeem property after default). In order to protect consumers, Section 722 expressly provides that its right of redemption survives "whether or not the debtor has waived the right to redeem under this section." Section 506(d) contains no such ban on waiver.

Second, in keeping with this consumer-protection policy, Congress titled Section 722 a "Redemption" provision. This provision, unlike Section 506(d), guarantees the debtor the right to maintain all title in the debtor's property under state law. In essence, Section 722, unlike Section 506, "amounts to a right of first refusal." H.R. REP. NO. 95–595, at 380–81; 6 COLLIER ON BANKRUPTCY ¶ 722.01 (16th ed. 2014). *But see* Pet. Br. 36 n.18.

Third, Section 722 authorizes a debtor to redeem "tangible *personal property* intended primarily for personal, family, or household use" that is security for "a dischargeable consumer debt" (emphasis added). *See supra* pp. 18–19. It does not apply to real property. Unlike real property, tangible personal property is seldom subject to multiple liens, so such liens will rarely be completely underwater.

3. Similarly, petitioner claims that reading Section 506(d) as voiding completely underwater liens would render Section 1322(b)(2) surplusage. Br. 39. But Section 1322(b)(2) applies broadly to modifying rights in chapter 13 plans, including the rights of holders of claims that were never secured by a lien. More importantly, it allows debtors, with court approval, "to modify the number, timing, or amount of the installment payments," as well as other terms such as installment charges. *Till* v. *SCS Credit Corp.*, 541 U.S. 465, 475 (2004) (plurality opinion); *accord* 8 COLLIER ON BANKRUPTCY ¶ 1322.06[1] (16th ed. 2014). Unlike Section 1322(b)(2), Section 506(d) grants no power to adjust these other terms and rights.

B. The Code Consistently Relies on Judicial Valuations at Specific Times

1. *Valuations, finality, and a fresh start.* Petitioner objects that bankruptcy courts should not void completely underwater liens because the Code supposedly manifests a "general aversion to reliance on judicial valuation" and because property values are "constantly shifting." Br. 27. Petitioner argues that relying on judicially determined valuations would

produce inequitable and "absurd result[s]," *id.*, but the Code's text, structure, and policies belie these assertions. The Code seeks to resolve creditors' claims promptly and finally in order to grant debtors a fresh start, "unhampered by the pressure and discouragement of preexisting debt." *Grogan* v. *Garner*, 498 U.S. 279, 286 (1991) (internal quotation marks omitted).

2. *Judicial valuations.* Congress determined that bankruptcy court valuations adequately protect junior lienholders' rights. Section 506 expressly contemplates a judicial valuation hearing: "Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest." 11 U.S.C. § 506(a)(1). "[Section] 506(a) [provides] for a judicial valuation of the collateral to determine the status of the [creditor's] secured claim." *Nobelman*, 508 U.S. at 328. As the House Committee Report's commentary on this provision explained, "*[c]ourts will have to determine value* on a case-by-case basis, taking into account the facts of each case and the competing interests in the case." H.R. REP. NO. 95–595, at 356 (emphasis added).

3. *Valuation at a specific time.* The Code routinely requires bankruptcy courts to value property of the estate at a specific time during the bankruptcy proceeding. Section 506 consistently uses the present tense, rather than the future tense, requiring a "[d]etermination of secured status" based on whether the claim "*is* a secured claim" or "*is not* an allowed

secured claim." 11 U.S.C. § 506(a)(1), (d) & heading (emphases added).

Other provisions of the Code consistently rely on judicial valuations at a specific time. *E.g.*, 11 U.S.C. § 502(b) (determining amount of claims "as of the date of the filing of the petition"); *id.* § 522(a)(2) (same, for valuing exempted property). For instance, the provisions of chapters 11, 12, and 13 instruct courts to value property "as of the effective date of the plan." 11 U.S.C. §§ 1129(a)(7)(A)(ii), (a)(7)(B), (a)(9)(B)(i), (a)(9)(C)(i), (b)(2)(A)(i)(II), (b)(2)(B)(i), (b)(2)(C)(i), 1225(a)(5)(B)(ii), 1228(b)(2), 1325(a)(5)(B)(ii).

4. *Safeguards Protect Creditors' Value.* Bankruptcy law provides a number of safeguards for creditors. Valuation is an adversarial process that lets creditors object to debtors' valuations of claims or property and present their own proposed valuations, supported by appraisals and expert testimony. FED. R. BANKR. P. 3012, 7001(2); *see also, e.g.*, *In re Old Colony, LLC*, 476 B.R. 1, 6–8 (Bankr. D. Mass. 2012).

Far from underestimating value, judicial valuations based on appraisals and comparable sales provide much more accurate assessments of fair market value than foreclosure sales outside of bankruptcy. "[Forced] sales are rushed, poorly advertised, done on a cash, not credit, basis, do not allow buyers to examine the property well, and may entail potential future litigation. All these factors reduce the potential field of buyers, reducing the price it will command." *Ehring* v. *W. Cmty. Moneycenter (In re Ehring)*, 900 F.2d 184, 188 n.2 (9th Cir. 1990). In addition, fair market value does not reflect the high

costs and delays associated with foreclosure sales. Thus, an empirical study of 1.8 million Massachusetts home sales between 1987 and 2009 found that in foreclosure, homes sell at an average discount of 27%. Campbell et al. 2109–10, 2114. Bankruptcy valuations thus safeguard completely underwater mortgages far more than actual foreclosure sales would.

C. The Code Draws Lines Based on Dollar Values

Petitioner claims that it is "absurd" and arbitrary to draw distinctions based on the current value of the property. Br. 27. But there is a significant difference between partially underwater and completely underwater mortgages. *Nobelman* feared that voiding only part of a mortgage lien could create a "conundrum" of rewriting "the mortgage contract" to "recalculat[e] the amortization schedule" and the like, having ripple effects on the remaining secured portion of the mortgage. 508 U.S. at 331–32. Voiding an entire mortgage lien, by contrast, does not.

Here, as elsewhere, Congress can and must draw lines. Often, "the legislature must necessarily engage in a process of line-drawing" and put some people with "almost equally strong claim[s] . . . on different sides of the line." *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315–16 (1993) (internal quotation marks omitted). "[T]he fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Id.* (internal quotation marks omitted).

Congress has drawn such value-based lines throughout the Bankruptcy Code. Section 1111(b) is one example, *supra* pp. 21–22, and there are dozens of others. A debtor whose monthly income is $1 above the applicable median family income in his state is subject to means testing in chapter 7, and any chapter 13 plan must ordinarily span five rather than three years. 11 U.S.C. §§ 707(b)(7)(A), 1322(d)(1), 1325(b)(4). A chapter 7 debtor whose projected disposable income over the next five years is $12,475 triggers a presumption of abuse, while one with a projected disposable income of $12,474.99 may not. *Id.* § 707(b)(2)(A)(i). Such predictions of future income are necessarily imprecise; incomes and values fluctuate up and down, but nonetheless need to be assessed. Dozens of other Code provisions are likewise triggered by precise dollar thresholds, most of which increase every three years. *See* Memorandum from Judge Thomas F. Hogan, Admin. Office of the U.S. Courts, *Automatic Adjustment of Certain Dollar Amounts in the Bankruptcy Code and Official Bankruptcy Forms* (Mar. 13, 2013), *available at* http://tinyurl.com/HoganMemo. Here, drawing the line at completely underwater mortgages is particularly reasonable because such mortgages would yield nothing in foreclosure.

D. The Legislative History Does Not Contradict the Clear Text

1. *Legislative history cannot cloud the statute's clear text.* Legislative history is of no moment when interpreting clear provisions of the Bankruptcy Code. "In such a substantial overhaul of the [bankruptcy laws], it is not appropriate or realistic to ex-

pect Congress to have explained with particularity each step it took." *Ron Pair*, 489 U.S. at 240. Thus, unless there is genuine ambiguity in the text, there is no need to resort to legislative history. *RadLAX*, 132 S. Ct. at 2073; *Patterson*, 504 U.S. at 761; *Barnhill* v. *Johnson*, 503 U.S. 393, 401 (1992). "[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute." *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 592 (1980). "In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Id.*

At least in the context of completely underwater second mortgages, the Bankruptcy Code's text is too clear to warrant recourse to legislative history. A completely underwater mortgage "is an unsecured claim," not "an allowed secured claim," so a completely underwater "lien is void." 11 U.S.C. § 506(a)(1), (d).

2. *Petitioner's legislative history does nothing to resolve the issue.* Petitioner's legislative-history arguments are, in any event, makeweights. Br. 33–34. The drafting history quoted does nothing to "ma[k]e clear that a lien was not voided unless a party in interest had objected to the underlying claim and the court had affirmatively disallowed it." Pet. Br. 33. The language quoted by petitioner includes the same requirement as the current statute that a "lien is void" unless its underlying claim is "an allowed secured claim." It simply raises, but cannot answer, the question presented here: whether "allowed se-

cured claim" in Section 506(d) means the same thing as "allowed . . . secured claim" in Section 506(a). The existence of two exceptions pertaining to disallowance in no way restricts voiding liens due to their unsecured status.

Petitioner also quotes the House Report for the proposition that "Subsection (d) *permits* liens to pass through the bankruptcy case unaffected." H.R. REP. NO. 95–595, at 357 (emphasis added); Br. 34. That observation adds nothing to petitioner's argument. At the risk of stating the obvious, the word "permits" is permissive, not mandatory. *See* BALLENTINE'S LEGAL DICTIONARY AND THESAURUS 120 (1995) (listing "permissive" as the antonym of "compulsory").

Of course, as *Long* held, liens are not automatically voided by bankruptcy discharges. They may pass through bankruptcy unaffected, unless and until the bankruptcy court brings Section 506(d) or some other express lien-voiding provision to bear. Section 506(d) permits a lien to pass through bankruptcy so long as it is supported by a claim that is both allowed and secured.

Petitioner's other snippets of legislative history fare no better. The main Senate Report quoted by petitioner, Br. 34, interpreted the Senate's version of Section 506(d), which was ultimately rejected in favor of the House version. 124 CONG. REC. 33,997 (1978) (statement of Sen. DeConcini). The House's references to *Long* and *Radford* are consistent with our reading of those cases as merely recognizing that by itself, "[t]he bankruptcy discharge will not prevent enforcement of *valid* liens." H.R. REP. NO. 95–

595, at 361 (emphasis added); Pet. Br. 35 n.17; *supra* pp. 33, 36. That truism simply raises the question in this case: whether the lien remains valid or whether "such lien is void" under Section 506(d). It is petitioner that adds the gloss, outside of quotation marks, that "liens pass through bankruptcy unaffected." Br. 35 n.17.

E. The Constitution's Bankruptcy Clause Empowers Congress to Authorize Voiding Completely Underwater Liens

Finally, petitioner suggests that voiding valueless junior liens is unconstitutional. Br. 23–24. But the Constitution's Bankruptcy Clause gives Congress broad power to distribute the property of debtors and release them from legal liability, even by "impair[ing] the obligation of contracts." *Hanover Nat'l Bank* v. *Moyses*, 186 U.S. 181, 188 (1902). There is no clear-statement requirement or presumption against Congress's exercise of this express power. *Contra* Pet. Br. 31 (citing *BFP*, which laid down no such broad rule). "Bankruptcy proceedings constantly modify and affect the property rights established by state law." *Wright* v. *Union Cent. Life Ins. Co.*, 304 U.S. 502, 517 (1938).

Petitioner cites *Radford* as having found an unconstitutional taking. Br. 24. But petitioner neglects to mention that this Court disavowed *Radford* nine years later as an example of when this Court "may fall into error." *Helvering* v. *Griffiths*, 318 U.S. 371, 400, 401 & n.52 (1943). Moreover, in *Radford*, the statute's infirmity was not that it voided valueless liens, but that it abridged *valuable* liens *retroac-*

tively and let debtors purchase their property for "much less than the appraised value." 295 U.S. at 589, 591–92. As petitioner's own amicus concedes, "cases subsequent to *Radford* seem to focus on protection of lien *value* existing at the time of bankruptcy." Community Bankers Amicus Br. 13–14.

Secured creditors have a right to protect their liens *only* "to the extent of the value of the property. There is no constitutional claim of the creditor to more than that." *Wright* v. *Union Cent. Life Ins. Co.*, 311 U.S. 273, 278 (1940) (citations omitted); *accord 620 Church St.*, 299 U.S. at 25, 27 (rejecting the same argument based on *Radford*). Here, petitioner concedes that its liens are unsupported by any value. Br. 26. There is thus no constitutional concern.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted,

DAVID J. VOLK
VOLK LAW OFFICES, P.A.
1901 S. HARBOR CITY BLVD., SUITE 700
MELBOURNE, FL 32901

KELLEY M. PETRY
KELLEY M. PETRY P.A.
1936 W. DR. MARTIN LUTHER KING JR. BLVD.
TAMPA, FL 33607

STEPHANOS BIBAS
Counsel of Record
JAMES A. FELDMAN
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
SUPREME COURT CLINIC
3501 SANSOM STREET
PHILADELPHIA, PA 19104
(215) 746–2297
SBIBAS@LAW.UPENN.EDU

FEBRUARY 17, 2015

APPENDIX

Section 1111 of Title 11 of the United States Code provides:

§ 1111. Claims and interests

(a) A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(a)(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated.

(b)(1)(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless—

> **(i)** the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or
>
> **(ii)** such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.

(B) A class of claims may not elect application of paragraph (2) of this subsection if—

(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or

(ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.

(2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.