

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BANK OF AMERICA, N.A., :
4 Petitioner : No. 13-1421

5 v. :

6 DAVID B. CAULKETT; :
7 :

8 AND :
9 :

10 BANK OF AMERICA, N.A., :
11 Petitioner : No. 14-163

12 v. :

13 EDELMIRO TOLEDO-CARDONA :
14 - - - - - x

15 Washington, D.C.

16 Tuesday, March 24, 2015

17

18 The above-entitled matter came on for oral
19 argument before the Supreme Court of the United States
20 at 10:11 a.m.

21 APPEARANCES:

22 DANIELLE SPINELLI, ESQ., Washington, D.C.; on behalf
23 of Petitioner.

24 STEPHANOS BIBAS, ESQ., Philadelphia, Pa.; on behalf of
25 Respondents.

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1 P R O C E E D I N G S

2 (10:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 13-1421, Bank of
5 America v. Caulkett, and the consolidated case.

6 Ms. Spinelli.

7 ORAL ARGUMENT OF DANIELLE SPINELLI

8 ON BEHALF OF PETITIONER

9 MS. SPINELLI: Mr. Chief Justice, and may it
10 please the Court:

11 Respondents' position is that Section 506(d)
12 of the Bankruptcy Code allows Chapter 7 debtors to keep
13 their houses, strip their underwater mortgages, and
14 prevent their lenders from accessing any later
15 appreciation in a house's value. In Dewsnap, this Court
16 rejected that position with respect to partially
17 underwater mortgages and that reasoning applies with
18 equal force to completely underwater mortgages.

19 Dewsnap held that Section 506(d) voids only
20 liens securing disallowed claims. It does not void
21 liens based on the current value of the collateral.
22 That logic applies whether the current value of the
23 collateral is a million dollars, \$1 or zero, as
24 virtually every court to address the question has held,
25 and even the Eleventh Circuit below all but admitted.

1 Outside bankruptcy, the bank would be
2 entitled to have its lien stay with the property until
3 foreclosure or payment in full.

4 JUSTICE GINSBURG: What is the value of --
5 of an -- an under -- completely underwater second
6 mortgage? How likely is it that it will ever -- that
7 the property will ever appreciate to the extent that it
8 will have real value?

9 MS. SPINELLI: Justice Ginsburg, it's quite
10 likely. In these two particular cases, to be sure, the
11 second liens are deeply underwater. That's not true in
12 every case and there's no reason to think it's true in
13 the typical case.

14 We have -- Bank of America has many cases
15 pending right now in the Eleventh Circuit. We have
16 cases in which the value of the house would need to rise
17 only by \$4,000, where it would need to rise only by
18 \$5,000, and given that we're in the middle of a market
19 upswing, it's very plausible and very likely that many
20 of these mortgages will regain equity.

21 We quote statistics in our opening brief
22 that show that between 2012 and 2014, the number of
23 underwater junior mortgages was cut in half from
24 4.2 million to 2.1 million. So houses are coming above
25 water every day.

1 And what Dewsnup held is that the
2 lienholder, according to the basic nonbankruptcy
3 bargain, is entitled to keep its lien until payment in
4 full or until a lender decides to foreclose.

5 JUSTICE KENNEDY: Do the holders of the
6 second, assuming the second is partially or fully
7 underwater, ever participate in negotiations with the
8 property owner and with the holder of the first lien and
9 say, well, if you keep the property, we'll reduce our
10 junior lead -- lien by 50 percent? Is -- is there a
11 negotiation dynamic that the rule that you propose would
12 further?

13 MS. SPINELLI: Let me be clear about this,
14 Justice Kennedy, because I think this is important. In
15 Chapter 7 bankruptcies, there are no such negotiations.
16 Chapter 7 is very simple; the debtor turns over his
17 assets. To the extent there are any nonexempt,
18 non-encumbered assets, which there typically are not,
19 the trustee will sell those assets, distribute the
20 proceeds to creditors. The debtor then receives a
21 discharge of all prepetition debt.

22 JUSTICE KENNEDY: Well, let's just talk
23 about Chapter 7 because that's what I had in mind.
24 Suppose it's a close case and they're thinking of maybe
25 insisting on -- on sale.

1 Can the junior lienholder say what if -- I'm
2 not going to prevail in the sale, but I'll -- if you
3 don't sell, then I'll cut my -- my lien in half on the
4 chance that it may go up? I mean, you -- so you
5 couldn't ever have this negotiated in -- in a Chapter 7?

6 MS. SPINELLI: In a Chapter 7 bankruptcy
7 those negotiations simply don't occur. If there's
8 nonexempt equity in the house, the trustee has to sell
9 the house --

10 JUSTICE KENNEDY: Right.

11 MS. SPINELLI: -- and distribute the
12 proceeds.

13 JUSTICE SCALIA: And the trustee doesn't
14 care, I mean, right? I mean, his job is done once --
15 once the bankruptcy is over. If -- if it goes up, it's
16 the homeowner who -- who would care.

17 MS. SPINELLI: That's correct.

18 JUSTICE SCALIA: And he's not part of the
19 negotiation. He's out of it.

20 MS. SPINELLI: That's -- that's correct.

21 Now, if --

22 JUSTICE SOTOMAYOR: I'm sorry. How does
23 this work? I'm sorry. Back up. You say the trustee
24 sells it. How does the mortgage holder in that
25 situation foreclose? Meaning if -- if the debtor no

1 longer owns the property, this doesn't go free and clean
2 to the purchaser?

3 MS. SPINELLI: The way it works, Justice
4 Sotomayor, is that if there is non-exempt equity in the
5 house which, of course, was not true in these two cases,
6 the trustee will sell the house; out of those proceeds,
7 the trustee will first satisfy the claim of the senior
8 secured lender. If there's anything left over, it will
9 go to the junior secured lender. If there's not, the
10 junior lender receives nothing, and the junior lien is
11 extinguished.

12 JUSTICE SOTOMAYOR: So when does -- do the
13 facts of this case matter?

14 MS. SPINELLI: The facts of this --

15 JUSTICE SOTOMAYOR: Because this is before
16 the -- the finished -- the wrapping-up of the plan;
17 right?

18 MS. SPINELLI: In Chapter 7 there is no
19 plan.

20 JUSTICE SOTOMAYOR: I'm sorry. This is
21 before the bankruptcy is terminated.

22 MS. SPINELLI: I think it's important to
23 understand that Chapter 7 bankruptcies happen very
24 quickly. A no-asset bankruptcy like this one will
25 usually be wrapped up in 30 to 45 days. Whereas here,

1 there's no equity in the property to be distributed to
2 creditors, and there are no other non-exempt assets,
3 there's really not very much for the trustee to do. The
4 trustee will file a notice that the case is
5 administered, and at that point, a house that's in a
6 situation of these two houses, in which there is no
7 non-exempt, non-encumbered value, will be abandoned to
8 the debtor.

9 At that point, the debtor's rights in the
10 property are precisely what they were before bankruptcy.
11 If the debtor is in default on his mortgage, then the
12 lenders can foreclose. If the --

13 JUSTICE SOTOMAYOR: Let me follow up to
14 something Justice Kennedy -- many of -- your adversary
15 plus many others, amici, have argued that if we rule in
16 the way that you seek, that wholly underwater junior
17 liens are going to be a holdup, and you are going to use
18 it as hostage value, and they point to various
19 situations in which that has occurred.

20 That, to me, is a concerning policy issue,
21 so explain why that's not true.

22 MS. SPINELLI: Justice Sotomayor, my answer
23 to that would be that's not a bankruptcy problem. There
24 are not negotiations that take place in Chapter 7 as to
25 which the junior lienholder could exercise any holdup

1 value.

2 It's -- it certainly may be the case that
3 later on the debtor may want to negotiate a modification
4 with its senior lender. That happens all the time to
5 people who have been through Chapter 7 bankruptcy and
6 people who have not. And to the extent there's a
7 housing policy issue, I don't think that's properly
8 addressed through interpretation of the bankruptcy code.
9 One of the amici --

10 JUSTICE SOTOMAYOR: Well, the bankruptcy
11 code -- code wants to give debtors a fresh start.

12 MS. SPINELLI: That is true.

13 JUSTICE SOTOMAYOR: And to the extent that
14 Chapter 7 is an attempt to do that, if you're able to
15 hold up that fresh start, that is the concern
16 they're -- they're pointing to.

17 MS. SPINELLI: Justice Sotomayor, the fresh
18 start that's given to debtors in Chapter 7 has a
19 particular nature. The nature of the fresh start in
20 Chapter 7 is that the debtor surrenders all of his or
21 her assets and in return gets a discharge of all
22 pre-petition debt. It's never been the case that the
23 Chapter 7 fresh start has encompassed an ability to
24 retain property and also strip off liens on that
25 property.

1 If the debtor wanted -- and this -- this
2 doesn't force the debtor to stay in a house that he or
3 she can't afford. If the debtor -- if the debtor wanted
4 to, say, cure a default on his mortgage and keep the
5 house, Chapter 13 is open to the debtor which permits
6 curing a default on a mortgage and maintaining payments
7 during the course of the plan.

8 Under Chapter 7, a debtor can, if the debtor
9 is in the situation of these debtors and the house has
10 been abandoned back to the debtor -- if the debtor is
11 in -- is current on its loans can keep the house, pay
12 its mortgage going forward, and be in the same situation
13 that he was prior to bankruptcy. The one thing that
14 Chapter 7 gives a debtor in that situation is that it
15 discharges the debtor of any personal liability for the
16 mortgage debt, so the lender cannot come after the
17 debtor personally. If the debtor decides that the house
18 is too expensive for him to stay in, he can stop paying
19 the mortgage and the only recourse that the lender then
20 has is to foreclose.

21 So there -- there certainly is an ability
22 for debtors to walk away from houses that they simply
23 can't afford, and there is also an ability through
24 Chapter 13 to cure existing defaults and reach an
25 arrangement for which the debtor can keep the house.

1 JUSTICE SCALIA: Ms. Spinelli, I -- I
2 dissented in Dewsnap, and I continue to believe that
3 dissent was correct. Why should I not limit Dewsnap to
4 the facts that it involved, which is a partially
5 underwater mortgage?

6 MS. SPINELLI: Justice Scalia, I don't think
7 that can be done coherently given the reasoning of
8 the Court in Dewsnap. But what the Court held in
9 Dewsnap is that Section 506(d) --

10 JUSTICE SCALIA: Yes, I understand that, but
11 I think the reasoning was wrong, and -- and very often,
12 we -- we adhere to a prior decision that, on the facts
13 of that case -- and Dewsnap did -- did say, you know,
14 we're just limiting it to the facts of this case, and
15 we're not saying what these terms mean elsewhere in the
16 Bankruptcy Act. So let's take Dewsnap at its word and
17 just limit it to what it involved, which was a partially
18 underwater mortgage. Now, why shouldn't I do that?

19 MS. SPINELLI: I don't believe that's
20 logically possible even if Dewsnap was wrongly decided
21 because Dewsnap interpreted a specific phrase in a
22 specific place in the code.

23 JUSTICE SCALIA: I understand that. But we
24 often limit prior decisions to their facts and don't
25 follow their logic.

1 MS. SPINELLI: Yes, Justice Scalia --

2 JUSTICE SCALIA: If we followed their logic,
3 we would -- we would never be able to do what I'm
4 suggesting. But we often say, yes, the logic would lead
5 us here, but it was a terrible decision, and we're not
6 going -- we're not going to extend it any further. Why
7 would that be a bad idea here?

8 MS. SPINELLI: In this situation, we're
9 talking about an interpretation of language in a
10 specific place in a statute, and to do that would be to
11 read the exact same language in the exact same place in
12 the statute to mean different things --

13 JUSTICE SCALIA: All right, I'm just not
14 getting through to you. I'm willing to do that. I'm
15 willing to do that when -- when the language was read
16 incorrectly the first time.

17 MS. SPINELLI: Okay.

18 JUSTICE SCALIA: But as a practical
19 matter -- I'm talking as a practical matter and stare
20 decisis is a very practical doctrine. Why -- why
21 should, as a practical matter, should I adhere to an
22 opinion that I think was wrong?

23 MS. SPINELLI: Well, I do think
24 Clark v. Martinez would apply in this situation and
25 present -- prevent a barrier to doing that. But in

1 addition --

2 JUSTICE GINSBURG: What is -- what is
3 Hart -- what is the case that you just cited?

4 MS. SPINELLI: I apologize, Justice
5 Ginsburg. That is one of the cases in which the Court
6 has said that the same language in the same place in the
7 same statute cannot mean different things in different
8 factual circumstances.

9 JUSTICE ALITO: There is a dissenting
10 opinion in a different area of the law on taxpayer
11 standard under the Establishment Clause, a brilliant
12 dissenting opinion that you might want to rely on in
13 this context.

14 (Laughter.)

15 JUSTICE BREYER: I've never been able to
16 figure out the answer to question he raises which is I
17 take a dissenting opinion in one case, and then when do
18 I say, okay, forget it?

19 MS. SPINELLI: Okay.

20 JUSTICE BREYER: And -- and the answer is
21 sort of personal, in a way. How strongly do you feel,
22 given the need of the law, to advise the lawyers, advise
23 judges, advise Congress and others? If we all keep
24 dissenting all the time, it will be chaos. If we never
25 change, you can't stick to a principle. If you have

1 found any way of drawing that line, I -- I don't think
2 there is a way --

3 MS. SPINELLI: I think -- I think there is,
4 Justice Breyer and Justice Scalia, which is that, I
5 mean, this Court has very rarely taken the step of
6 overruling a statutory interpretation decision.
7 Certainly never in the kind of --

8 JUSTICE SCALIA: I'm not talking about
9 overruling. I'm saying subsist as far as partially
10 underwater mortgages are concerned. The issue before us
11 is whether we should extend it to totally underwater.

12 Now, I thought you were going to tell me,
13 you know, I feel strongly that -- that Dewsnup was
14 wrong, but I'm not going to upset expectations. I mean,
15 if banks have been, you know, lending money for second
16 mortgages on the assumption that they would not be
17 stripped, I mean, that's what I thought you were going
18 to tell me. Oh, you know, many expectations that have
19 been rested upon this misbegotten opinion of Dewsnup.

20 MS. SPINELLI: It's -- it's certainly been
21 the case that since Dewsnup was decided until this
22 decision by the Eleventh Circuit in 2012, it was -- it
23 was well-established that Dewsnup applied equally to
24 completely underwater.

25 JUSTICE KENNEDY: Are you saying, then, that

1 there have been substantial reliance on the Dewsnup
2 interpretation that you are supporting here by banks
3 that have given second mortgages all over the country,
4 huge reliance that would be upset.

5 MS. SPINELLI: I have been relying --

6 JUSTICE KENNEDY: I -- I thought that that's
7 what you were going to say to Justice Scalia, and I
8 don't -- I don't hear that being argued.

9 MS. SPINELLI: I believe that there has been
10 reliance. I actually don't think that's the most
11 compelling argument as to why the Court shouldn't depart
12 from Dewsnup.

13 The language in Dewsnup simply can't be read
14 to distinguish between completely and partially --

15 JUSTICE KAGAN: Well, but if we could go
16 back -- I mean, I kind of agree with you that it's not a
17 very compelling argument, this reliance argument,
18 because I find myself in the same position as Justice
19 Scalia. I read the two Dewsnup opinions, and it seems
20 to me that Justice Scalia clearly has the better of the
21 argument. And then --

22 JUSTICE SCALIA: Yes.

23 (Laughter.)

24 JUSTICE KAGAN: And then the question is,
25 what do we do about that and where do we go from there.

1 And it does strike me that if -- you know, these are the
2 most sophisticated parties that can possibly be
3 imagined, Bank of America and other banks, and it seems
4 to me that they would be making essentially a bet on --
5 and they would, you know, think about all the things --
6 what is the probability that Dewsnup will be extended to
7 completely underwater mortgages.

8 And presumably, they discounted all their
9 various calculations in order to take into account the
10 probability that another court would say, you know,
11 Dewsnup is not very persuasive, and we're just not
12 willing to extend it any further. And I think that's
13 probably what Bank of America and other banks did, is
14 they said, you know, we think there is X percent chance
15 that Dewsnup will be extended and Y percent chance that
16 it won't, and they made their cost and pricing
17 calculations based on that calculation.

18 So if that's the case, why should we worry
19 about reliance?

20 MS. SPINELLI: Justice Kagan, I do believe
21 that banks have relied on the Dewsnup decision. As to
22 whether they specifically made calculations about when
23 it would apply -- whether it would apply in these
24 circumstances, I don't know. But I think I would go
25 back to the premise of your question, which is that this

1 would be extending Dewsnap. It wouldn't be extending
2 Dewsnap. It would simply be applying Dewsnap to a set
3 of facts in which the interpretation the Court gave in
4 Dewsnap is equally applicable.

5 JUSTICE GINSBURG: Even though Dewsnap
6 itself said no, we're deciding this case only, and not
7 any other. I think in -- in your brief, you did make
8 the point that Dewsnap is now how many years old?

9 MS. SPINELLI: It's almost 25 years old,
10 Justice Ginsburg.

11 JUSTICE GINSBURG: And Congress could have
12 changed it if it didn't like it, and Congress has
13 amended the code.

14 MS. SPINELLI: That's -- that's correct. I
15 mean, Congress has amended the code substantially both
16 in 1994 and in 2005. In 1994, Congress overruled or
17 modified a couple of these courts' bankruptcy decisions.
18 It overruled *Rake v. Wade*. It modified the statute in
19 response to this Court's decision in *Nobelman*.

20 JUSTICE SCALIA: Well, that proves, at most,
21 that Congress liked Dewsnap as applied to partially
22 underwater mortgages; isn't that right? I mean, that's
23 all it proves. They let it -- they let it stand. They
24 did not overrule Dewsnap as far as partially underwater
25 mortgages. It doesn't say anything about how they feel

1 about totally underwater mortgages.

2 MS. SPINELLI: Justice Scalia, there is
3 simply no distinction that can be drawn between
4 partially and completely underwater liens in this
5 situation. Dewsnup held that a secured claim is a claim
6 secured by a lien with recourse to the underlying
7 collateral. That is equally applicable here.

8 Likewise, I mean, the text of Section 506
9 certainly draws no such distinction, so it would be an
10 odd thing to do to vindicate textualism to adopt the
11 proposition that Respondents are advancing here.

12 JUSTICE SCALIA: You really know how to hurt
13 a fellow, don't you?

14 (Laughter.)

15 CHIEF JUSTICE ROBERTS: I mean, I understand
16 the notion and agree with it completely that if you have
17 a decision that's wrong, you don't extend it in any way.
18 But there are factual distinctions and there are factual
19 distinctions. I mean, Dewsnup may have been decided on
20 a Tuesday, and this case could be decided on a Thursday,
21 but you would not say, you know, we're not extending it
22 -- you know, we're simply not going to extend it to
23 other cases.

24 MS. SPINELLI: Exactly, Mr. Chief Justice.

25 CHIEF JUSTICE ROBERTS: And in this

1 particular instance, I assume the difference between
2 underwater and -- and totally -- partially underwater
3 and totally underwater is a completely -- a completely
4 fluid one in the sense that at the start of -- the start
5 of the bankruptcy -- I didn't think of that one.

6 (Laughter.)

7 CHIEF JUSTICE ROBERTS: That was totally
8 unintended.

9 (Laughter.)

10 CHIEF JUSTICE ROBERTS: But -- but the idea
11 is that, you know, throughout a bankruptcy, you could
12 have a mortgage that is -- a lien that's underwater,
13 then totally underwater, then partially underwater. And
14 the idea that you'd latch onto that as a distinction
15 seems to me to be a difficult composition.

16 MS. SPINELLI: That's exactly right. I
17 mean, the nonbankruptcy right of a lienholder is to
18 retain its lien until payment in full or until
19 foreclosure, which means that the lienholder is entitled
20 to access any equity that may develop in the future due
21 to appreciation of the property to secure its lien.

22 JUSTICE BREYER: Is this -- is this right?
23 I want to be sure I understand. Under Dewsnup, the last
24 25 years, lenders and others in the bankruptcy community
25 have understand -- understood the way it works is the

1 following: If you have a lien and the house is worth
2 500,000 and your -- your lien is secured and it's worth
3 a million, and they're in Chapter 7, you have a secured
4 interest and they're counted as a secured creditor only
5 to 500,000. As to the remaining 500,000, you're counted
6 as an unsecured creditor, but you keep the lien.

7 MS. SPINELLI: Right. Well, but --

8 JUSTICE BREYER: And so therefore, if when
9 they're out of bankruptcy someday or the house goes up,
10 or whatever it is, you still have your lien. Is that
11 right?

12 MS. SPINELLI: That's right. And let me
13 explain that, Justice Breyer.

14 JUSTICE BREYER: No. I mean, I don't --

15 MS. SPINELLI: Section 506 --

16 JUSTICE BREYER: I just wanted to be sure it
17 was right, but if you'd like to explain it further, do.

18 MS. SPINELLI: It -- it is right, and I --
19 and I would, if I might. Section 506(a) bifurcates
20 under secured claims into a secured portion and an
21 unsecured portion, and that determines the distribution
22 that a creditor can get from the estate.

23 Now, I want to be clear that nothing in the
24 way this Court reads 506(d) will affect that. That is
25 going to be true no matter what. What Dewsnup said is

1 that Section 506(d) does not refer back to that
2 bifurcation in 506(a). Rather, it uses the word
3 "secured" in the ordinary English and ordinary legal
4 meaning of secured by a lien with recourse to the
5 underlying collateral. And in that situation, given
6 that reading, 506(d) only strips liens securing
7 disallowed claims. If the claim is valid, then the
8 creditor is entitled to --

9 JUSTICE BREYER: That means that after
10 bankruptcy's over and you're back out of Section 7 --
11 Chapter 7, your lien -- unless it falls within one of
12 the other two exceptions there -- remains.

13 MS. SPINELLI: Correct.

14 JUSTICE BREYER: And therefore -- and that's
15 the understanding. Okay. I understand. Thank you.

16 MS. SPINELLI: Correct.

17 JUSTICE KENNEDY: When -- when do trustees
18 decide that they're not sure of the value of the home
19 and that they're going to sell it to find out what it's
20 worth?

21 MS. SPINELLI: Typically, the value's not
22 disputed. It's -- it's usually quite clear whether
23 there is or is not nonexempt, nonencumbered value in a
24 house, and the trustee will sell the house only if there
25 is nonexempt, nonencumbered value.

1 The -- you know, it's possible that in a
2 situation in which it's not clear, the trustee might go
3 ahead and sell the house and see how much is realized
4 for it, because that sell -- sale price would then by
5 definition establish the amount of the secured claim.

6 Typically, in -- you know, typically, in no
7 asset cases like this, there's simply no issue and
8 there's no question that the trustee is not going to be
9 selling the asset.

10 JUSTICE KENNEDY: Just -- just getting back
11 to the reliance point or really, from your argument, the
12 non-reliance point, the -- your -- your brief talked
13 about the millions of loans and so forth that have been
14 made, but you -- you seem to walk away from any reliance
15 argument.

16 MS. SPINELLI: Justice Kennedy, let me
17 clear.

18 JUSTICE KENNEDY: I'm really quite surprised
19 at that.

20 MS. SPINELLI: Let me be clear. I am not
21 walking away from the argument that the banks have
22 relied on Dewsnup. I think that's unquestionably true.
23 Millions of loans have been made in reliance on
24 Dewsnup's holding. Banks, when they make loans, price
25 them in and extend them based on an understanding of

1 what their recovery is going to be given default. That
2 is true.

3 What I was responding to is the notion that
4 banks may have relied on, you know, whether this Court
5 would apply Dewsnup to completely underwater mortgages.
6 I think that's a little bit less strong, although it's
7 true that in the 25 years since Dewsnup, it's -- until
8 this decision by the Eleventh Circuit, it's been well
9 established that Dewsnup does apply to completely
10 underwater liens.

11 May I reserve the balance of my time?

12 CHIEF JUSTICE ROBERTS: You may.

13 MS. SPINELLI: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. Bibas.

15 ORAL ARGUMENT OF STEPHANOS BIBAS

16 ON BEHALF OF THE RESPONDENTS

17 MR. BIBAS: Mr. Chief Justice, and may it
18 please the Court:

19 A claim unsupported by any value is a
20 completely unsecured claim under Section 506(a). An
21 unsecured claim cannot be an allowed secured claim, and
22 its associated lien is void under Section 506(d).
23 Claims with some value remain secured. Claims with no
24 value don't. They would be wiped out in foreclosure,
25 and bankruptcy treats them no better than foreclosure

1 would.

2 But before I get to text or holdup value or
3 Dewsnup, let me seize on the striking concession of my
4 adversary. Justices Scalia and Kagan pressed my
5 adversary who conceded that she couldn't demonstrate
6 reliance here. There were bankruptcy courts and
7 district courts that foreshadowed the ruling below, and
8 they pointed to no evidence of reliance. There is -- we
9 challenged in our brief to show that in the Eleventh
10 Circuit lending markets were being affected. No
11 evidence. There are eight circuits in which lien
12 voiding is allowed in Chapter 13. No evidence. We
13 should clear the table of a reliance argument that my
14 adversary all but concedes.

15 JUSTICE BREYER: How -- how -- she didn't
16 concede it, and -- and it just seems -- you know, it's
17 not just homeowners. You can cure me of this
18 misapprehension, but probably in the last 25 years or
19 30 years, there have been trillions of dollars that have
20 been loaned to businesses. I mean, think of Lehman
21 Brothers, and -- and they go bankrupt, and suddenly at
22 stake are -- are hundreds of billions of dollars. And a
23 person who has made a mortgage, at least a lawyer would
24 say, okay, you can lend the money; if things go badly,
25 we can keep the lien. We won't collect because he is

1 bankrupt, but markets go up and down. Keep -- keep --
2 keep the secured interest, they might go back up, you
3 might get it some day.

4 Now, that's perfectly obvious advice, it
5 seems to me, from what I know so far.

6 So -- so when you do that, the mortgage
7 lender has to decide what the interest rate is, how --
8 what the terms are, and it's pretty hard to believe
9 there isn't some effect on the brain of the -- of the
10 person who is making the mortgage from the simple fact
11 that he gets to keep that lien, it passes through
12 bankruptcy, and eventually the market may go back up.

13 MR. BIBAS: In addition to Justice Kagan's
14 answer, which is the banks are well advised and can
15 forecast, they can read the text of the statute and
16 Dewsnup's express --

17 JUSTICE BREYER: We have -- we have had
18 25 years or 30 years -- 23 years to be exact, and I --
19 and -- and the -- the fact is that, sure, they go to
20 their lawyer -- they don't -- the lawyers, and the
21 lawyers would read and the lawyers would say.

22 JUSTICE SOTOMAYOR: I --

23 MR. BIBAS: Well, I direct the Court to the
24 Levitin amicus brief. There are two empirical studies
25 that found natural experiments. One of them involved

1 differences in circuits before Nobelman in Chapter 13
2 lien voiding which found a very slight effect, 0.12 to
3 0.18 percent, on first mortgages. The other, an
4 empirical study by Philadelphia Federal Reserve
5 economists, likewise found no substantial effect on
6 markets even when different circuits adopted --

7 JUSTICE KENNEDY: It -- it -- it's hard --
8 it's hard for me to think that a decision in your favor
9 wouldn't, in a sense, hurt borrowers because the market
10 for a second is going to dry up or become much more
11 expensive. I -- I'll read the briefs and you can tell
12 me about why that theory, economic theory, might be
13 wrong, but it seems to me just common sense.

14 MR. BIBAS: Justice Kennedy, the Levitin
15 amicus brief explains in greater detail, but there is a
16 problem in the mortgage market in that first mortgagees
17 and debtors often want to work out mutually beneficial
18 resolutions. As my adversary concedes, no negotiation
19 goes on in bankruptcy. The second can prevent this from
20 happening, and we've cited multiple studies that show
21 that the second lenders may wind up forcing homes into
22 foreclosure.

23 The other point that the Levitin brief makes
24 is that this is primarily a problem with the housing
25 bubble. This is a problem of very high loan-to-value,

1 piggyback second mortgages. They found no evidence of
2 an effect on low loan-to-value home improvement, home
3 equity lines of credit of the sort that survive now that
4 the regulatory --

5 JUSTICE KENNEDY: I -- I would agree that
6 their bargaining club might be too big in some
7 instances, the -- the bargaining club of -- of the
8 second. On the other hand, it does seem to me that
9 there is room in close cases for a three-way compromise.
10 I'm -- I'm advised that that just doesn't happen in
11 Chapter 7. I find that hard to believe, but especially
12 in major bankruptcies, not homeowner bankruptcy.

13 MR. BIBAS: Two responses, Justice Kennedy.
14 The first part of your question was, well, what is the
15 effect on mortgage lending? Even if there were an
16 effect on second mortgage lending, one has to balance
17 that against maximizing the value of first mortgages,
18 which are purchase money mortgages which are helped by
19 unclogging the housing market. The chief economist at
20 Moody's Analytics said that resolving subordinate liens
21 was the biggest obstacle to the housing recovery.

22 Then your second question is, well, what
23 about loan modifications and bargaining. My answer
24 there is this administration had a number of programs in
25 place after the housing bubble; HAMP and HARP were these

1 mortgage modification programs. The take-up rate on
2 those were very disappointing, much lower than the
3 administration expected because of this holdup power
4 that --

5 JUSTICE BREYER: Why is this all about
6 housing? Why isn't it about -- maybe it is. I'm -- I'm
7 expecting an answer. Why -- why is it just about
8 housing? Why isn't it about Lehman Brothers? Why isn't
9 about it about businesses? Why isn't it about
10 commercial property?

11 MR. BIBAS: Because currently, in Chapter 11
12 in -- in cramdown reorganizations and the like, similar
13 lien voiding already happens when there is no value to
14 be -- to secure it.

15 JUSTICE SOTOMAYOR: That's statutorily.

16 MR. BIBAS: Right, statutorily is --

17 JUSTICE SOTOMAYOR: Now, where in any
18 statute in 11 or 13 did Congress ever use the word
19 voiding a lien as opposed to stripping down a lien?

20 MR. BIBAS: It -- it doesn't use the phrase
21 stripping down. It doesn't use the phrase void,
22 Justice Sotomayor. And this is very important. The
23 NACBA brief goes into this. There are references to
24 retaining liens, to satisfying liens, to modifying
25 liens. But as NACBA explains, those provisions all

1 piggyback on 506, which values a claim. It goes over
2 for adjudication in Chapter 11, the different classes of
3 creditors, and then back to 506(d) which is the
4 provision that says that it voids liens. And NACBA's
5 fear is that if this Court does not allow Section 506(d)
6 to do what it's supposed to do, it could impair not only
7 housing mortgage modifications, but business
8 bankruptcy --

9 JUSTICE BREYER: Well, yes, but no. I'm --
10 I'm not -- I just want to understand it. I'm --
11 housing -- I'm a mall. I'm Lehman Brothers.

12 MR. BIBAS: Yes.

13 JUSTICE BREYER: I go bankrupt. There are
14 all kinds of liens all over the place. Doesn't the same
15 law apply to them --

16 MR. BIBAS: Well, Section 1129 define --

17 JUSTICE BREYER: -- as to housing?

18 MR. BIBAS: Yes.

19 JUSTICE BREYER: It's a general question.

20 MR. BIBAS: There -- there is. And if
21 it's -- if it's Lehman Brothers, if it's a Chapter 11
22 bankruptcy reorganization --

23 JUSTICE KENNEDY: No, no. But assume a big
24 business in Chapter 7.

25 MR. BIBAS: Yes. Businesses under Chapter 7

1 do not receive a discharge, and so typically the
2 business is filing under Chapter 11. If there is a
3 liquidation, you are right, though, that the same logic
4 could apply there. And whether it a business bankruptcy
5 or it's a mortgage, a home bankruptcy, there is still
6 the need for the bankruptcy code's policies of finality
7 and a fresh start.

8 JUSTICE SCALIA: You know, I -- I'm not
9 familiar with the widespread practice of giving -- of
10 taking a second mortgage on a business loan unless it's
11 your father-in-law. It's -- it's a very common practice
12 for -- for purchases of homes. I -- I -- I'm not aware
13 that it's a common practice in businesses, getting --
14 getting second mortgages. I -- it seems to me quite
15 rare.

16 MR. BIBAS: But there are different tranches
17 of debt sometimes, senior and junior debt obligations,
18 that would be analogous. But you're right.
19 Numerically, this is going to be a huge issue in -- in
20 the housing market.

21 JUSTICE SCALIA: Mr. Bibas, I'm really not a
22 poor loser and -- and, you know --

23 (Laughter.)

24 JUSTICE SCALIA: -- I've -- I've lost in
25 Dewsnup. What I am concerned about is the -- what

1 should I say -- the ridiculousness of saying if under
2 Dewsnup -- and you haven't asked us to overrule Dewsnup
3 -- under Dewsnup, if -- if there's \$1 worth of value,
4 okay, you don't lose your lien. But if there is zero
5 value, \$1 less and it's stripped entirely, it seems to
6 me a -- a very strange -- strange outcome. Why would
7 any intelligent system want to produce an outcome like
8 that?

9 MR. BIBAS: I'll talk about that doctrinally
10 and then as a policy matter. Doctrinally, the code has
11 dozens of provisions that turn on a dollar difference in
12 eligibility for Chapter 7 or presumptions of abuse of a
13 like. Congress draws these lines. Section 1111(b) for
14 business bankruptcies and reorganizations talks about
15 inconsequential value. You keep your lien if it has
16 some value. If it doesn't --

17 JUSTICE SCALIA: You think this is a line
18 that Congress drew, right?

19 MR. BIBAS: Well, Congress drew the
20 other provisions.

21 JUSTICE SCALIA: Congress intentionally
22 wanted Dewsnup for partially underwater and really
23 doesn't want Dewsnup for totally underwater. Come on.

24 MR. BIBAS: I didn't say that, Your Honor.

25 JUSTICE SCALIA: All right.

1 MR. BIBAS: I -- I'd remind Your Honor of --
2 of your opinion in Green v. Bock Laundry. If it's
3 necessary to deviate from the text, which Dewsnap
4 admitted it was deviating from the text, pick the
5 deviation that does the least violence to the text, that
6 minimizes the amount of the deviation. We preserve a
7 link and Dewsnap did not completely sever the
8 link between 506(a)'s requirement --

9 JUSTICE KENNEDY: It may take the least
10 violence from the text, but it leaves, as Justice Scalia
11 suggested, absolutely draconian arbitrary results.

12 MR. BIBAS: Okay. As a policy matter,
13 Justice Kennedy --

14 JUSTICE KENNEDY: And his opinion didn't say
15 that you do that.

16 MR. BIBAS: No. Your Honor, I don't believe
17 it's draconian. If a property is \$1 above water, okay,
18 it is preserved under this reading of Dewsnap. But we
19 explained in our brief that foreclosure sale at deep
20 discounts, there are high transaction costs. So a house
21 might have to rise by half or more in value before
22 there's any additional money on the table. So if
23 anything, allowing preservation of a lien that has \$1 in
24 nominal value is being somewhat overprotective, erring
25 on the side of being generous and protective when there

1 would be no money left in foreclosure. What it does is
2 it clears out the liens that are nowhere close to having
3 value in foreclosure.

4 CHIEF JUSTICE ROBERTS: Isn't the question
5 complicated by the fact that whether it's \$1 above or \$1
6 below is a matter of a fairly subjective valuation by
7 the court?

8 MR. BIBAS: On the contrary, Your Honor,
9 Section 506(a) expressly provides for judicial
10 valuation. Nobelman recognized it would be judicial
11 valuation. The house reports recognized it would be
12 judicial.

13 CHIEF JUSTICE ROBERTS: Oh, no, I know it's
14 judicial valuation, but that's -- that's the problem.
15 If you're cutting a fine line and saying it's up to the
16 judge who can look ahead and say, well, this is going to
17 happen in the bankruptcy, and I'm worried about that.
18 No one's going to say a valuation at \$50,001 is
19 accurate, but 49,999 is not. But that is in control of
20 the judge who's doing the valuation.

21 MR. BIBAS: Yes. But it's far more accurate
22 than the realistic alternative of foreclosure. There
23 are many more safeguards. One can -- the creditor can
24 submit a proposed valuation. A creditor submits
25 appraisals, expert testimony, there is a hearing. And

1 that is far more protected than foreclosures which have
2 to have -- be rushed sales, poor notice, poorly
3 advertised, they require cash sales, that leave the
4 creditor much less protection.

5 The realistic alternative here is throwing
6 the house into foreclosure, and -- and outside a
7 bankruptcy and then, in fact, the creditor winds up
8 worse off. Not just the second, who has nothing to gain
9 and nothing to lose, holds it up, the first mortgagee
10 winds up losing value.

11 If I might now take the Court back to the
12 text of the statute.

13 JUSTICE KAGAN: Mr. Bibas, before you do,
14 could I go back to something that the Chief asked
15 about -- that the Chief Justice asked about earlier,
16 which is this question of whether a distinction between
17 fully underwater and partially underwater is coherent at
18 all.

19 Here's what Dewsnup said. Dewsnup on the
20 one hand said, we're deciding this case and this case
21 only. But it also said this, this is how it framed its
22 holding. "We hold that 506(d) does not allow petitioner
23 to strip down respondent's lien because respondent's
24 lien" -- excuse me -- "because respondent's claim is
25 secured by a lien and has been fully allowed pursuant to

1 502."

2 So this claim, too, is secured by a lien and
3 has been fully allowed pursuant to 502. It seems to
4 come within this statement of the holding. And I guess
5 the question is, you know, how -- how is it that we can
6 say that this is a sensical distinction at all given
7 that holding?

8 MR. BIBAS: Two ways. Let me focus on that
9 sentence and then things elsewhere in the opinion and
10 then Nobelman.

11 That sentence was careful, unusually
12 careful, to phrase the holding in terms of the
13 particular parties. That respondent had value in the
14 mortgage. That's why the Court said respondent's claim,
15 not claims in general. Then it used the verb "stripped
16 down." That's bankruptcy jargon for a partially secured
17 mortgage and reducing the amount, scaling down the
18 indebtedness, the court said two days later.

19 JUSTICE KAGAN: Well, I hear you, but it
20 seems as though it's the second half of the sentence
21 that is key here. Why are we doing this? Why are we
22 holding this? Because the claim is secured by a lien
23 and because the claim has been fully allowed. And both
24 of those things also apply here.

25 MR. BIBAS: Respondent's claim also had some

1 value that made it unquestionable that it was still
2 secured. But you're -- you're correct. I think,
3 though, that the use of the verb "stripped down" and the
4 use of the respondent particular limits to that
5 situation.

6 It's very important, though, to go back
7 three sentences before that to see what the court
8 hedged. The court specifically reserved hypothetical
9 applications advanced at oral argument. Petitioner
10 advanced two hypotheticals at oral argument. One of
11 those was of the completely underwater junior mortgage.
12 The court said that those hypotheticals illustrate the
13 difficulty of the broad creditors in government's rule,
14 the same rule that Ms. Spinelli says that the court
15 embraces. The same rule she quoted during her argument
16 as if it were the court's holding, about, well, there's
17 some collateral, therefore, it's secured.

18 The court declined to rule on all possible
19 fact situations, in light of that hypothetical, and it
20 said we, therefore, focus on the case before us and
21 allow other facts to await their legal resolution.

22 JUSTICE ALITO: Well, why haven't you argued
23 that we should overrule Dewsnap? Is it because of
24 reliance, because you think that there has been a great
25 deal of reliance on Dewsnap as applied to a partially

1 underwater mortgage, but not reliance as applied to
2 totally under?

3 MR. BIBAS: Your Honor, it's quite right
4 that those are two different categories. It's not our
5 burden to take on steri decisis because we win under
6 Dewsnap. Either way, the Court can do what it wants,
7 but we have not advocated it. We've been faithful to
8 Dewsnap's holding and its reasoning, including the
9 express limitations it put on its reasoning. Its
10 reasoning was limited to a case with some value.

11 JUSTICE GINSBURG: But the law would be much
12 more coherent if either Dewsnap applies to the totally
13 underwater as well as partially underwater, or Dewsnap
14 is overruled.

15 MR. BIBAS: I don't believe that's the
16 case -- in terms of -- while the Court could consider
17 overruling Dewsnap, we haven't advocated for that.
18 Because even -- our reading of the statute is still more
19 faithful to the text than Petitioner's.

20 JUSTICE KAGAN: I guess --

21 JUSTICE SOTOMAYOR: I mean, you're giving
22 the same -- exactly the same phrase in the statute two
23 different meanings, depending on whether one's
24 underwater or not, completely or partially.

25 MR. BIBAS: No, Your Honor.

1 JUSTICE SOTOMAYOR: Where do you find that
2 distinction in 506?

3 MR. BIBAS: Okay. Section 506(a) defines
4 what an allowed secured claim is.

5 JUSTICE SOTOMAYOR: No. But that's the
6 argument that Justice Scalia made that was rejected.
7 You're giving the same phrase two different meanings.
8 How do you apply the meaning in Dewsnup to
9 this case?

10 MR. BIBAS: On -- on 506(d). Dewsnup was
11 interpreting a claim that was a -- it was a hybrid. It
12 was -- it had a secured claim component and an unsecured
13 claim component. The secured claim component had some
14 value. That value was sufficient under 506(a) that
15 there was a partial secured claim.

16 Dewsnup must be read in light of Nobelman a
17 year later. Nobelman said there's a secured -- it's a
18 Chapter 13 case, but it interprets 506 which applies
19 across the code. Nobelman said there's a secured claim
20 component, there's an unsecured claim component. The
21 creditors in Nobelman advanced the same argument, the
22 same argument that my adversary advances, which is 506
23 is just about priority and distribution. That it has
24 nothing to do with lien voiding, Dewsnup resolved this
25 issue, every claim that is secured by a lien is secured

1 by a --

2 JUSTICE SOTOMAYOR: But Nobelman was not
3 about 506. It was about 1322. And 1322 talks about the
4 bankruptcy court's power to modify the rights of any
5 creditor, whether it's secured or unsecured. That's how
6 it's been read by the courts.

7 MR. BIBAS: Yes. But 1322's operative
8 phrase is "modifying the rights of holders of secured
9 claims." In order to be a holder of secured claim, one
10 must have a secured claim. And so in Nobelman, this
11 Court stressed petitioners were correct in looking to
12 Section 506(a) for a judicial valuation of the
13 collateral to determine the status of the bank's secured
14 claim, whether there was a secured claim or not. There
15 was a secured claim component, and so the Court said the
16 bank is still the holder of a secured claim because
17 Petitioner's home retains \$23,500 of collateral.

18 So the issue in Nobelman, as in Dewsnap,
19 was, okay, we have a secured claim component under Rumph
20 here -- we have an unsecured claim component. Do we
21 split the baby? Do we chop them in half? And Nobelman
22 said, no, in part, because it's a difficult thing to --
23 to change the amortization, the loan term, the payments,
24 et cetera. There is some value here that supports this.
25 So we're going to leave it as indivisible hold. This

1 Court could easily understand allowed secured claim in
2 506(d) if it wished to preserve Dewsnup's holding just
3 as a binary term. If there's some --

4 JUSTICE BREYER: If you can do that,
5 linguistically, I can see a difference. The part that
6 I'm having a hard time with is if this earlier case
7 survives. Let's imagine a commercial loan. And I put
8 it in a commercial context, because the numbers -- a
9 mortgage -- a lender lends \$5 million -- the senior
10 lender -- to a commercial building, which then goes into
11 the Chapter 7. The junior lender lends 2 million, so
12 now he has 7 million. The property ends up being worth
13 a million. So the senior lender under Dewsnup comes in
14 and says, okay, I have a secured interest for a million,
15 but I can keep the -- the mortgage here for 4 million,
16 you know, in case things change ten years from now.
17 Isn't that under Dewsnup? The senior guy can, that's
18 partly --

19 MR. BIBAS: Well, in the corporate
20 bankruptcy, this doesn't apply --

21 JUSTICE BREYER: Okay. Then I'll say -- I
22 just want some numbers. The senior -- the senior person
23 says -- put it on whatever you want. The senior person
24 says, oh, I get to keep my \$4 million mortgage. Maybe
25 things will change, you know, and eventually I may be

1 able to collect some. Right? That's Dewsnup.

2 MR. BIBAS: Except --

3 JUSTICE BREYER: Except what?

4 MR. BIBAS: The -- the difficulty there --
5 so you're saying that there's a completely unsecured
6 second mortgage that the individual --

7 JUSTICE BREYER: No. No. I haven't made my
8 example yet.

9 MR. BIBAS: All right.

10 JUSTICE BREYER: I just want to know if I'm
11 right so far.

12 (Laughter.)

13 JUSTICE BREYER: There's -- there's one
14 mortgage. It's \$5 million. The property is worth one.

15 MR. BIBAS: Right.

16 JUSTICE BREYER: And so what happens to --
17 to bank X is he gets maybe, as a secured creditor, the
18 million, if he wants, but if he doesn't want to collect
19 it now, he doesn't have to, and he keeps \$5 million. He
20 keeps that mortgage going as long as he wants.

21 MR. BIBAS: Yes.

22 JUSTICE BREYER: Yes. Okay. So junior
23 comes in, and junior says, hey, he got to keep 4 million
24 just in case. I have my mortgage for two. Why can't I?
25 Now -- now, I can -- I can think of some words here that

1 might say, well, there's the difference, is what you are
2 pointing to. I just want to know, in terms of
3 commercial practice or anything else, what's the answer
4 to his point? He got to keep four on the hope it will
5 go up eventually. Why can't I keep my two? My
6 documents are just as good as his. My mortgage is just
7 as good as his. I mean, why can't I?

8 MR. BIBAS: So there is a functional answer,
9 and a historical answer. I take it you're interested
10 more in the functional answer.

11 JUSTICE BREYER: Yes.

12 MR. BIBAS: I'll start there. There is a
13 big difference between a single creditor, single debtor
14 situation. In Dewsnup, the debtor was just trying to
15 stop a foreclosure, so the debtor could get a better
16 deal. Here we have a multi-creditor situation. The
17 creditor -- this junior creditor is seeking a better
18 outcome than it would get in state law foreclosure.

19 That better outcome comes in part from hold
20 up or hostage value that can limit the ability of the
21 senior lender and the property holder to negotiate a
22 loan modification, a work out, that makes everybody
23 better off, makes assets more freely transferable, and
24 improves the -- the market. And that does come at the
25 price of a junior lender, but that's what happens in a

1 cram down as well. In a cram down, junior interests are
2 squeezed out so that the senior people can -- can
3 maximize the value of the assets and deal with them
4 freely.

5 JUSTICE BREYER: Why can't you say the same
6 thing about only one lender? He doesn't have to keep
7 that four, you know. He could say, give me 30 cents
8 extra. I will foreclose today, and -- and there you
9 are, free, never having this hanging over your head.
10 And I'll do it for an extra 30 cents, you find it. Now,
11 that's called -- the same thing you say -- it's
12 called -- what did you call it? Whatever it is. You
13 see, people with mortgages can do that.

14 MR. BIBAS: Right. But there's not the same
15 multi-creditor --

16 JUSTICE BREYER: No. There is one rather
17 than two, and maybe two would be better than three, or
18 three would be better than four.

19 MR. BIBAS: Since you are asking
20 specifically in functional terms -- and I will get to
21 the bankruptcy history later -- it's -- there is a
22 coordination problem when -- a coordination problem can
23 be a game of chicken. Each of them holding out for more
24 money and then people -- two people can drive over a
25 cliff in a game of chicken.

1 Now, on to the bankruptcy history. Why is
2 this relevant to the law? There's a steady trajectory
3 in bankruptcy law of increasing lien voiding power.
4 Under -- in 1934, section 77(b) authorized lien voiding
5 in business or organizations. In 1938, the Chandler
6 Act, Chapter 12, extended that to individual
7 organizations. In 1952, the amendments broadened it.
8 They rejected the absolute priority rule for individual
9 debtors, so the debtor can hang on to the assets, and
10 the liens can still be voided.

11 Then in 1978, the modern code enacted
12 Section 506, which applies across the code, Chapter 7,
13 11, 12, and 13. So this is part of an increasing
14 recognition over time that it's necessary to solve these
15 hold up problems. And the realistic alternative -- my
16 -- my friend, Ms. Spinelli, in her reply brief says,
17 well, if we hang on to this lien, ten years from now,
18 first, we will keep getting paid down, and then our
19 second will come into the money. Right?

20 Well, that is not realistically what happens
21 in these cases. In borderline cases, 105, 110 percent
22 of loan-to-value, people stay in the houses. They keep
23 paying. It's too much cost to pick up the kids and move
24 to a different home. When you get to 130 percent of
25 loan-to-value, the median home that's underwater with a

1 second that is underwater is 135 percent loan-to-value.

2 When you get to 150 percent of
3 loan-to-value, at those ranges, lots of people are in
4 default. They qualify for bankruptcy because they've
5 lost a job, or they are ill. They can't make the
6 payments and pay into a black hole of negative equity.
7 They walk away. The home is thrown into foreclosure
8 anyway, and the senior creditor is worse off. And the
9 junior doesn't care because the junior doesn't get
10 anything either way.

11 JUSTICE KAGAN: Mr. Bibas, can I take you
12 back to Justice Alito's question, which was about stare
13 decisis, and why you haven't argued it? Because I tell
14 you that my sort of reaction to this case is that these
15 distinctions that you are drawing between partially
16 underwater and fully underwater are not terribly
17 persuasive. But the only thing that may be less
18 persuasive is Dewsnup itself.

19 (Laughter.)

20 JUSTICE KAGAN: And so the -- so the
21 question, to me, is -- or at least one question is
22 whether we should bite the bullet and overturn Dewsnup,
23 and maybe you are right, that that's for us to decide.
24 And you -- but if -- if you do have something relevant
25 to say about that matter, here's your chance to say it.

1 MR. BIBAS: I think it's worth -- if
2 the Court wishes to consider that, and, again, that's
3 not been the position we've advocated, because we don't
4 need it to win. It's worth starting with Justice
5 Thomas's concurring opinion in 203 North LaSalle, which
6 pointed out the massive confusion that has been sewn in
7 the Court's trying to grapple with this ruling, which
8 Judge Gorsuch's ruling Woolsey that says that Dewsnup
9 has lost every away game it's played, that it doesn't
10 fit with the other provisions of the code. There is a
11 lot of confusion there.

12 It has almost uniform criticism in scholarly
13 commentary. My colleague can't point to reliance
14 interest in the markets. And the empirical studies
15 discussed in the Levitin brief suggest that there isn't
16 substantial reliance on this, in part, because you
17 benefit from first mortgagees who manage to maximize
18 their value by voiding some of these junior ones. And
19 so the reliance interest that my friend has walked away
20 from and the uniform criticism of Dewsnup might interest
21 this Court in considering revisiting it, but it's not
22 necessary, because Dewsnup itself reserved the
23 completely underwater hypothetical on the face of its
24 opinion.

25 It was exceptionally narrow, and the lawyers

1 could read and see that it declined to reach this issue.
2 And I -- I do think that it is very important to read
3 Dewsnap together with Nobelman, that Dewsnap doesn't
4 stand on it's own, that Nobelman -- it's true. It was
5 under 1322(b)(2). It was a Chapter 13 case, but it was
6 fundamentally about interpreting 506(a). Is it just a
7 distribution provision, as my client argued --

8 JUSTICE SOTOMAYOR: No. What -- what
9 the Court said -- I don't understand that argument. It
10 said there's -- yes, you -- you divide it up to secured
11 and unsecured, but you treat it all the same.

12 MR. BIBAS: Yes.

13 JUSTICE SOTOMAYOR: That's what it said.

14 MR. BIBAS: You treat it all the same --

15 JUSTICE SOTOMAYOR: Exactly. For
16 purposes --

17 MR. BIBAS: You decline to cut it into
18 pieces, and one of the reasons that you decline to cut
19 it into pieces is because the claim secured by a lien
20 encompasses both secured --

21 JUSTICE SOTOMAYOR: So once -- once
22 the Court has the power, what it was saying under 1322,
23 to modify that, then the Court could change both the
24 secured or -- and I'm -- the whole lien is what it was
25 talking about.

1 MR. BIBAS: But the last part of the opinion
2 pointed out that if you modify the unsecured portion you
3 have a ripple effects upon the secured portion. You
4 wind up changing things like the -- the interest rate or
5 the amortization or the fees. And so you might be
6 viewed as -- as sabotaging or undermining what deserves
7 to remain a secured component. In this situation, there
8 is no -- no such problem.

9 So all -- it is worth noting, by the way, my
10 friend also says, well, this lien, it can sit out there,
11 maybe it retains value sometime in the future; isn't
12 that enough value. And I think Justice Breyer was
13 gesturing towards that. All eight circuits after
14 Nobelman have understood that Nobelman drew a line
15 between some value and no value. All eight circuits
16 that confront lien voiding in Chapter 13 allow it
17 because they recognize that the completely underwater
18 junior qualifies as no value within the meaning of the
19 code.

20 Present economic value is what this Court's
21 cases have consistently focused on. The value of the
22 claim is equal to the value of the collateral, this
23 Court has said, and that's the present value of the
24 collateral. The statute uses the present tense in
25 Section 506, whether it is or is not. It's not about

1 forecasting or speculating into the future. That would
2 be unworkable. But judicial valuations are workable.
3 The Bankruptcy Rules, Rule 3012 and 7001 provide for it.
4 And there is abundant case law that shows it to be both
5 workable and fairer to creditors than the alternative
6 which is a foreclosure.

7 The judgment below should be affirmed.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Ms. Spinelli, you have 4 minutes left.

10 REBUTTAL ARGUMENT OF DANIELLE SPINELLI

11 ON BEHALF OF THE PETITIONER

12 MS. SPINELLI: Thank you.

13 Just a couple of points.

14 Completely underwater liens are not
15 valueless. Their value stems from the potential for
16 appreciation in the collateral.

17 Indeed, a lien that's completely underwater
18 by a dollar might have more value than a lien that is
19 supported by a dollar of equity, depending on the
20 potential for appreciation.

21 The value if the houses were sold today is
22 simply irrelevant because the situation only arises
23 where the debtor is keeping the house. And one could
24 have said in *Dewsnup*, look, the current value of the
25 collateral is less than the amount of your loan. It's

1 fair to give you the current value of -- of the
2 collateral.

3 Dewsnap held to the contrary, and that's
4 precisely the same here. There is no distinction that
5 supports drawing a line at completely underwater liens,
6 given that the secured creditor has the same
7 nonbankruptcy right to have its lien stay with the
8 collateral until foreclosure and payment in full and to
9 realize any appreciation in the value of that
10 collateral.

11 This -- this doesn't give a junior
12 lienholder a better deal than it would receive under
13 State law. It gives it the same deal it would receive
14 under State law.

15 To respond to a point that I think
16 Justice Sotomayor made, the fact that there are specific
17 provisions in Chapters 11 and 13 that do permit
18 stripping down liens in certain circumstances supports
19 the Dewsnap Court's view of 506(d). It certainly
20 doesn't undermine it. 506(d) is not the provision that
21 strips down liens in Chapters 11 and 13. Rather, there
22 are specific provisions which are in the addendum to our
23 brief in Section 1325 for Chapter 13, and actually this
24 is not in the addendum, 1129(b) for Chapter 11.

25 Those provisions would make no sense if

1 506(d) were itself a lien-stripping provision. And just
2 to take one for example, if one looks at Section
3 1325(a) (5) which appears on page 6A of the blue brief,
4 that sets out the terms under which a Chapter 13 debtor
5 can strip down liens, and it says that with respect to
6 each allowed secured claim provided for by the plan, the
7 plan provides that the holder of such claim retain the
8 lien, securing such claim until the earlier of the
9 payment of the underlying debt determined under
10 nonbankruptcy law or discharge.

11 Now, it would make no sense to permit the
12 lender to keep its lien until payment of the full debt
13 if the lien had already automatically been stripped down
14 under 506(d) to the value of the collateral, and that's
15 just one example.

16 We discussed some others in our briefs,
17 including Section 722, and we also discuss in our briefs
18 the -- the textual indications in Section 506 that
19 support the Dewsnap's Court's holding. So -- and those
20 are all reasons why Dewsnap was correctly decided in the
21 first instance and shouldn't be overruled.

22 But to respond to Justice Kagan's question,
23 beyond that, the rule of law simply doesn't allow this
24 Court in the typical situation to overrule a statutory
25 interpretation decision in a case like this where

1 Congress, over the past 25 years, has acquiesced in that
2 decision.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MS. SPINELLI: Thank you.

5 CHIEF JUSTICE ROBERTS: The case is
6 submitted.

7 (Whereupon, at 11:10 a.m., the case in the
8 above-entitled matter was submitted.)

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