

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's 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 -- that, on the  
13 facts 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 under -- underwater mortgage. Now, why shouldn't I do  
19 that?

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

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

1 follow their logic.

2 MS. SPINELLI: Yes, Justice Scalia --

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

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

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

18 MS. SPINELLI: Okay.

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

24 MS. SPINELLI: Well, I do think  
25 Clark v. Martinez would apply in this situation and

1 present -- prevent a barrier to doing that. But in  
2 addition --

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

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

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

15 (Laughter.)

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

20 MS. SPINELLI: Okay.

21 JUSTICE BREYER: And -- and the answer is  
22 sort of personal, in a way. How strongly do you feel,  
23 given the need of the law, to advise the lawyers, advise  
24 judges, advise Congress and others? If we all keep  
25 dissenting all the time, it will be chaos. If we never

1 change, you can't stick to a principle. If you have  
2 found any way of drawing that line, I -- I don't think  
3 there is a way --

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

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

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

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

1 completely underwater.

2 JUSTICE KAGAN: Well, Ms. Spinelli-

3 JUSTICE KENNEDY: And - and are you saying,  
4 then, that there have been substantial reliance on the  
5 Dewsnap interpretation that you are supporting here by  
6 banks that have given second mortgages all over the  
7 country, huge reliance that would be upset.

8 MS. SPINELLI: I have been relying --

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

12 MS. SPINELLI: I believe that there has been  
13 reliance. I actually don't think that's the most  
14 compelling argument as to why the Court shouldn't depart  
15 from Dewsnap.

16 The language in Dewsnap simply can't be read  
17 to distinguish between completely and partially --

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

25 JUSTICE SCALIA: Yes.

1 (Laughter.)

2 JUSTICE KAGAN: And then the question is,  
3 what do we do about that and where do we go from there.  
4 And it does strike me that if -- you know, these are the  
5 most sophisticated parties that can possibly be  
6 imagined, Bank of America and other banks, and it seems  
7 to me that they would be making essentially a bet on --  
8 and they would, you know, think about all the things --  
9 what is the probability that Dewsnup will be extended to  
10 completely underwater mortgages.

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

21 So if that's the case, why should we worry  
22 about reliance?

23 MS. SPINELLI: Justice Kagan, I do believe  
24 that banks have relied on the Dewsnup decision. As to  
25 whether they specifically made calculations about when



1 it would apply -- whether it would apply in these  
2 circumstances, I don't know. But I think I would go  
3 back to the premise of your question, which is that this  
4 would be extending Dewsnap. It - it wouldn't be  
5 extending Dewsnap. It would simply be applying Dewsnap  
6 to a set of facts in which the interpretation the Court  
7 gave in Dewsnap is equally applicable.

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

12 MS. SPINELLI: It's almost 25 years old,  
13 Justice Ginsburg.

14 JUSTICE GINSBURG: And Congress could have  
15 changed it if it didn't like it, and Congress has  
16 amended the code.

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

23 JUSTICE SCALIA: Well, that proves, at most,  
24 that Congress liked Dewsnap as applied to partially  
25 underwater mortgages; isn't that right? I mean, that's

1 all it proves. They let it -- they let it stand. They  
2 did not overrule Dewsnap as far as partially underwater  
3 mortgages. It doesn't say anything about how they feel  
4 about totally underwater mortgages.

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

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

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

17 (Laughter.)

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

1 other cases.

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

3 CHIEF JUSTICE ROBERTS: And in this  
4 particular instance, I assume the difference between  
5 underwater and -- and totally -- partially underwater  
6 and totally underwater is a completely -- a completely  
7 fluid one in the sense that at the start of -- the start  
8 of the bankruptcy -- I didn't think of that one.

9 (Laughter.)

10 CHIEF JUSTICE ROBERTS: That was totally  
11 unintended.

12 (Laughter.)

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

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

25 JUSTICE BREYER: Is this -- is this right?

1 I want to be sure I understand. Under Dewsnup, the last  
2 25 years, lenders and others in the bankruptcy community  
3 have understand -- understood the way it works is the  
4 following: If you have a lien and the house is worth  
5 500,000 and your -- your lien is secured and it's worth  
6 a million, and they're in Chapter 7, you have a secured  
7 interest and they're counted as a secured creditor only  
8 to 500,000. As to the remaining 500,000, you're counted  
9 as an unsecured creditor, but you keep the lien.

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

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

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

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

18 MS. SPINELLI: Section 506 --

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

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

1           Now, I want to be clear that nothing in the  
2 way this Court reads 506(d) will affect that. That is  
3 going to be true no matter what. What Dewsnup said is  
4 that Section 506(d) does not refer back to that  
5 bifurcation in 506(a). Rather, it uses the word  
6 "secured" in the ordinary English and ordinary legal  
7 meaning of secured by a lien with recourse to the  
8 underlying collateral. And in that situation, given  
9 that reading, 506(d) only strips liens securing  
10 disallowed claims. If the claim is valid, then the  
11 creditor is entitled to --

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

16           MS. SPINELLI:           Correct.

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

19           MS. SPINELLI:           Correct.

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

24           MS. SPINELLI:           Typically, the value's not  
25 disputed. If it's -- it's usually quite clear whether

1     there is or is not nonexempt, nonencumbered value in a  
2     house, and the trustee will sell the house only if there  
3     is nonexempt, nonencumbered value.

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

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

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

19            MS. SPINELLI:             Justice -- Justice Kennedy,  
20    let me be clear.

21            JUSTICE KENNEDY:             I'm really quite surprised  
22    at that.

23            MS. SPINELLI:             Let me be clear. I am not  
24    walking away from the argument that the banks have  
25    relied on Dewsnup. I think that's unquestionably true.

1 Millions of loans have been made in reliance on  
2 Dewsnap's holding. Banks, when they make loans, price  
3 them in and extend them based on an understanding of  
4 what their recovery is going to be given default. That  
5 is true.

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

14 May I reserve the balance of my time?

15 CHIEF JUSTICE ROBERTS: You may.

16 MS. SPINELLI: Thank you.

17 CHIEF JUSTICE ROBERTS: Mr. Bibas.

18 ORAL ARGUMENT OF STEPHANOS BIBAS

19 ON BEHALF OF THE RESPONDENTS

20 MR. BIBAS: Mr. Chief Justice, and may it  
21 please the Court:

22 A claim unsupported by any value is a  
23 completely unsecured claim under Section 506(a). An  
24 unsecured claim cannot be an allowed secured claim, and  
25 its associated lien is void under Section 506(d).

1 Claims with some value remain secured. Claims with no  
2 value don't. They would be wiped out in foreclosure,  
3 and bankruptcy treats them no better than foreclosure  
4 would.

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

18 JUSTICE BREYER: How -- how -- she didn't  
19 concede it, and -- and it just seems -- you know, it's  
20 not just homeowners. You can cure me of this  
21 misapprehension, but probably in the last 25 years or  
22 30 years, there have been trillions of dollars that have  
23 been loaned to businesses. I mean, think of Lehman  
24 Brothers, and -- and they go bankrupt, and suddenly at  
25 stake are -- are hundreds of billions of dollars. And a



1 person who has made a mortgage, at least a lawyer would  
2 say, okay, you can lend the money; if things go badly,  
3 we can keep the lien. We won't collect because he is  
4 bankrupt, but markets go up and down. Keep -- keep --  
5 keep the secured interest, they might go back up, you  
6 might get it some day.

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

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

16 MR. BIBAS: In addition to Justice Kagan's  
17 answer, which is the banks are well advised and can  
18 forecast, they can read the text of the statute and  
19 Dewsnap's express --

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

25 JUSTICE SOTOMAYOR: I --

1           MR. BIBAS:           Well, I direct the Court to the  
2   Levitin amicus brief. There are two empirical studies  
3   that found natural experiments. One of them involved  
4   differences in circuits before Nobelman in Chapter 13  
5   lien voiding which found a very slight effect, 0.12 to  
6   0.18 percent, on first mortgages. The other, an  
7   empirical study by Philadelphia Federal Reserve  
8   economists, likewise found no substantial effect on  
9   markets even when different circuits adopted --

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

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

1           The other point that the Levitin brief makes  
2   is that this is primarily a problem with the housing  
3   bubble. This is a problem of very high loan-to-value,  
4   piggyback second mortgages. They found no evidence of  
5   an effect on low loan-to-value home improvement, home  
6   equity lines of credit of the sort that survive now that  
7   the regulatory --

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

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

25          Then your second question is, well, what

1 about loan modifications and bargaining. My answer  
2 there is this administration had a number of programs in  
3 place after the housing bubble; HAMP and HARP were these  
4 mortgage -- mortgage modification programs. The take-up  
5 rate on those were very disappointing, much lower than  
6 the administration expected because of this holdup power  
7 that --

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

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

18 JUSTICE SOTOMAYOR: That's statutorily.

19 MR. BIBAS: Right, statutorily is --

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

23 MR. BIBAS: It -- it doesn't use the phrase  
24 stripping down. It doesn't use the phrase void,  
25 Justice Sotomayor. And this is very important. The

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

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

15 MR. BIBAS: Yes.

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

19 MR. BIBAS: Well, Section 1129 --

20 JUSTICE BREYER: -- as to housing?

21 MR. BIBAS: Yes.

22 JUSTICE BREYER: It's a general question.

23 MR. BIBAS: There -- there is. And if  
24 it's -- if it's Lehman Brothers, if it's a Chapter 11  
25 bankruptcy reorganization --

1 JUSTICE BREYER : No, no. But assume a big  
2 business in Chapter 7.

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

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

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

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

1 (Laughter.)

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

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

20 JUSTICE SCALIA: You think this is a line  
21 that Congress drew, right?

22 MR. BIBAS: Well, Congress drew the  
23 other provisions.

24 JUSTICE SCALIA: Congress intentionally  
25 wanted Dewsnup for partially underwater and really

1 doesn't want Dewsnup for totally underwater. Come on.

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

3 JUSTICE SCALIA: All right.

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

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

15 MR. BIBAS: Okay. As a policy matter,  
16 Justice Kennedy --

17 JUSTICE KENNEDY: And his opinion didn't say  
18 that you do that.

19 MR. BIBAS: No. Your Honor, I don't believe  
20 it's draconian. If a property is \$1 above water, okay,  
21 it is preserved under this reading of Dewsnup. But we've  
22 explained in our brief that foreclosure sale at deep  
23 discounts, there are high transaction costs. So a house  
24 might have to rise by half or more in value before  
25 there's any additional money on the table. So if



1 anything, allowing preservation of a lien that has \$1 in  
2 nominal value is being somewhat overprotective, erring  
3 on the side of being generous and protective when there  
4 would be no money left in foreclosure. What it does is  
5 it clears out the liens that are nowhere close to having  
6 value in foreclosure.

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

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

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

24 MR. BIBAS: Yes. But it's far more accurate  
25 than the realistic alternative of foreclosure. There

1 are many more safeguards. One can -- the creditor can  
2 submit a proposed valuation. A creditor submits  
3 appraisals, expert testimony, there is a hearing. And  
4 that is far more protected than foreclosures which have  
5 to have -- be rushed sales, poor notice, poorly  
6 advertised, they require cash sales, that leave the  
7 creditor much less protection.

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

14         If I might now take the Court back to the  
15 text of the statute.

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

22         Here's what Dewsnap said.             Dewsnap on the  
23 one hand said, we're deciding this case and this case  
24 only. But it also said this, this is how it framed its  
25 holding. "We hold that 506(d) does not allow petitioner

1 to strip down respondent's lien because respondent's  
2 lien" -- excuse me -- "because respondent's claim is  
3 secured by a lien and has been fully allowed pursuant to  
4 502."

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

11 MR. BIBAS: Two ways. Let me focus on that  
12 sentence and then things elsewhere in the opinion and  
13 then Nobelman.

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

22 JUSTICE KAGAN: Well, I hear you, but it  
23 seems as though it's the second half of the sentence  
24 that is key here. Why are we doing this? Why are we  
25 holding this? Because the claim is secured by a lien

1 and because the claim has been fully allowed. And both  
2 of those things also apply here.

3 MR. BIBAS: Respondent's claim also had some  
4 value that made it unquestionable that it was still  
5 secured. But you're -- you're correct. I think,  
6 though, that the use of the verb "stripped down" and the  
7 use of the respondent particular limits to that  
8 situation.

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

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

25 JUSTICE ALITO: Well, why haven't you argued

1     that we should overrule Dewsnap? Is it because of  
2     reliance, because you think that there has been a great  
3     deal of reliance on Dewsnap as applied to a partially  
4     underwater mortgage, but not reliance as applied to  
5     totally underwater?

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

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

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

23            JUSTICE KAGAN:         I guess --

24            JUSTICE SOTOMAYOR:       I mean, you're giving  
25    the same -- exactly the same phrase in the statute two

1 different meanings, depending on whether one's  
2 underwater or not, completely or partially.

3 MR. BIBAS: No, Your Honor.

4 JUSTICE SOTOMAYOR: Where do you find that  
5 distinction in 506?

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

8 JUSTICE SOTOMAYOR: No. But that's the  
9 argument that Justice Scalia made that was rejected.  
10 You're giving the same phrase two different meanings.

11 How do you apply the meaning in Dewsnap to  
12 this case?

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

19 Dewsnap must be read in light of Nobelman a  
20 year later. Nobelman said there's a secured -- it's a  
21 Chapter 13 case, but it interprets 506 which applies  
22 across the code. Nobelman said there's a secured claim  
23 component, there's an unsecured claim component. The  
24 creditors in Nobelman advanced the same argument, the  
25 same argument that my adversary advances, which is 506

1 is just about priority and distribution. That it has  
2 nothing to do with lien voiding, Dewsnup resolved this  
3 issue, every claim that is secured by a lien is secured  
4 by a --

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

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

21 So the issue in Nobelman, as in Dewsnup,  
22 was, okay, we have a secured claim component under Rumph  
23 here -- we have an unsecured claim component. Do we  
24 split the baby? Do we chop them in half? And Nobelman  
25 said, no, in part, because it's a difficult thing to --

1 to change the amortization, the loan term, the payments,  
2 et cetera. There is some value here that supports this.  
3 So we're going to leave it as indivisible hold. This  
4 Court could easily understand allowed secured claim in  
5 506(d) if it wished to preserve Dewsnup's holding just  
6 as a binary term. If there's some --

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

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

24 JUSTICE BREYER: Okay. Then I'll say -- I  
25 just want some numbers. The senior -- the senior person



1 says -- put it on whatever you want. The senior person  
2 says, oh, I get to keep my \$4 million mortgage. Maybe  
3 things will change, you know, and eventually I may be  
4 able to collect some. Right? That's Dewsnap.

5 MR. BIBAS: Except --

6 JUSTICE BREYER: Except what?

7 MR. BIBAS: The -- the difficulty there --  
8 so you're saying that there's a completely unsecured  
9 second mortgage that the individual --

10 JUSTICE BREYER: No. No. I haven't made my  
11 example yet.

12 MR. BIBAS: All right.

13 JUSTICE BREYER: I just want to know if I'm  
14 right so far.

15 (Laughter.)

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

18 MR. BIBAS: Right.

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

24 MR. BIBAS: Yes.

25 JUSTICE BREYER: Yes. Okay. So junior

1 comes in, and junior says, hey, he got to keep 4 million  
2 just in case. I have my mortgage for two. Why can't I?  
3 Now -- now, I can -- I can think of some words here that  
4 might say, well, there's the difference, is what you are  
5 pointing to. I just want to know, in terms of  
6 commercial practice or anything else, what's the answer  
7 to his point? He got to keep four on the hope it will  
8 go up eventually. Why can't I keep my two? My  
9 documents are just as good as his. My mortgage is just  
10 as good as his. I mean, why can't I?

11 MR. BIBAS: So there is a functional answer,  
12 and a historical answer. I take it you're interested  
13 more in the functional answer.

14 JUSTICE BREYER: Yes.

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

22 That better outcome comes in part from hold  
23 up or hostage value that can limit the ability of the  
24 senior lender and the property holder to negotiate a  
25 loan modification, a work out, that makes everybody

1 better off, makes assets more freely transferable, and  
2 improves the -- the market. And that does come at the  
3 price of a junior lender, but that's what happens in a  
4 cram down as well. In a cram down, junior interests are  
5 squeezed out so that the senior people can -- can  
6 maximize the value of the assets and deal with them  
7 freely.

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

17 MR. BIBAS: Right. But there's not the same  
18 multi-creditor --

19 JUSTICE BREYER: No. There is one rather  
20 than two, and maybe two would be better than three, or  
21 three would be better than four.

22 MR. BIBAS: Since you are asking  
23 specifically in functional terms -- and I will get to  
24 the bankruptcy history later -- it's -- there is a  
25 coordination problem when -- a coordination problem can

1 be a game of chicken. Each of them holding out for more  
2 money and then people -- two people can drive over a  
3 cliff in a game of chicken.

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

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

23 Well, that is not realistically what happens  
24 in these cases. In borderline cases, 105, 110 percent  
25 of loan-to-value, people stay in the houses. They keep

1 paying. It's too much cost to pick up the kids and move  
2 to a different home. When you get to 130 percent of  
3 loan-to-value, the median home that's underwater with a  
4 second that is underwater is 135 percent loan-to-value.

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

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

22 (Laughter.)

23 JUSTICE KAGAN: And so the -- so the  
24 question, to me, is -- or at least one question is  
25 whether we should bite the bullet and overturn Dewsnup,

1 and maybe you are right, that that's for us to decide.  
2 And you -- but if -- if you do have something relevant  
3 to say about that matter, here's your chance to say it.

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

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

1 completely underwater hypothetical on the face of its  
2 opinion.

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

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

15 MR. BIBAS: Yes.

16 JUSTICE SOTOMAYOR: That's what it said.

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

18 JUSTICE SOTOMAYOR: Exactly. For  
19 purposes --

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

24 JUSTICE SOTOMAYOR: So once -- once  
25 the Court has the power, what it was saying under 1322,

1 to modify that, then the Court could change both the  
2 secured or -- and I'm -- the whole lien is what it was  
3 talking about.

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

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

23 Present economic value is what this Court's  
24 cases have consistently focused on. The value of the  
25 claim is equal to the value of the collateral, this



1 Court has said, and that's the present value of the  
2 collateral. The statute uses the present tense in  
3 Section 506, whether it is or is not. It's not about  
4 forecasting or speculating into the future. That would  
5 be unworkable. But judicial valuations are workable.  
6 The Bankruptcy Rules, Rule 3012 and 7001 provide for it.  
7 And there is abundant case law that shows it to be both  
8 workable and fairer to creditors than the alternative  
9 which is a foreclosure.

10 The judgment below should be affirmed.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Ms. Spinelli, you have 4 minutes left.

13 REBUTTAL ARGUMENT OF DANIELLE SPINELLI

14 ON BEHALF OF THE PETITIONER

15 MS. SPINELLI: Thank you.

16 Just a couple of points.

17 Completely underwater liens are not  
18 valueless. Their value stems from the potential for  
19 appreciation in the collateral.

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

24 The value if the houses were sold today is  
25 simply irrelevant because the situation only arises

1 where the debtor is keeping the house. And one could  
2 have said in Dewsnup, look, the current value of the  
3 collateral is less than the amount of your loan. It's  
4 fair to give you the current value of -- of the  
5 collateral.

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

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

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

1 brief in Section 1325 for Chapter 13, and actually this  
2 is not in the addendum, 1129(b) for Chapter 11.

3 Those provisions would make no sense if  
4 506(d) were itself a lien-stripping provision. And just  
5 to take one example, if one looks at Section  
6 1325(a)(5) which appears on page 6A of the blue brief,  
7 that sets out the terms under which a Chapter 13 debtor  
8 can strip down liens, and it says that with respect to  
9 each allowed secured claim provided for by the plan, the  
10 plan provides that the holder of such claim retain the  
11 lien, securing such claim until the earlier of the  
12 payment of the underlying debt determined under  
13 nonbankruptcy law or discharge.

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

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

25 But to respond to Justice Kagan's question,

1 beyond that, the rule of law simply doesn't allow this  
2 Court in the typical situation to overrule a statutory  
3 interpretation decision in a case like this where  
4 Congress, over the past 25 years, has acquiesced in that  
5 decision.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 MS. SPINELLI: Thank you.

8 CHIEF JUSTICE ROBERTS: The case is  
9 submitted.

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