No. 13-1421

IN THE

Supreme Court of the United States

BANK OF AMERICA, N.A.,

Petitioner,

v.

DAVID B. CAULKETT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF LOAN SYNDICATIONS AND TRADING ASSOCIATION, AMERICAN BANKERS ASSOCIATION AND THE CLEARING HOUSE ASSOCIATION L.L.C. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2(b), the Loan Syndications and Trading Association ("LSTA"), the American Bankers Association ("ABA") and The Clearing House Association L.L.C. ("The Clearing House") respectfully seek leave to submit the accompanying brief as an *amici curiae*, in support of petitioner Bank of America, N.A. Petitioner consented to our filing the accompanying brief, but respondent refused.

The LSTA is a financial trade association whose mission is to promote a fair, orderly, efficient, and growing corporate loan market and to provide leadership in advancing and balancing the interests of all market participants. Its interest in this case—which involves the treatment of junior mortgage creditors whose debt is undersecured at the time of bankruptcy—lies in promoting sensible and effective rules for the liquidation and collection of loans. Because its members frequently purchase debt in the secondary market, often debt secured by an inferior lien, their interest in a reasoned resolution of this problem is paramount. Moreover, as a nationwide group with members under the jurisdiction of virtually every federal court of appeals, LSTA has a unique interest in ensuring regularity and predictability throughout the circuits, and especially in uniform rules that promote efficient bankruptcy administration.

The ABA is the largest national trade association of the banking industry in the country. It represents banks and holding companies of all sizes in each of the fifty states and the District of Columbia, including community, regional, and money center banks. The

ABA also represents savings associations, trust companies, and savings banks. ABA members hold approximately 95% of the United States banking industry's domestic assets. The ABA frequently appears in litigation, either as a party or amicus curiae, in order to protect and promote the interests of the banking industry and its members.

Established in 1853, The Clearing House is the nation's oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Association is a nonpartisan advocacy organization representing—through regulatory comment letters, *amicus* briefs, and white papers—the interests of its member banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the United States.

The petition for a writ of certiorari asks the Court to decide whether a bankruptcy court can remove a junior mortgage lien from collateral solely because the bankruptcy court determines that the amount owed to a senior lienholder exceeds the current value of the collateral. The decision in this case rests entirely on the Eleventh Circuit's earlier decision in *McNeal v. GMAC Mortgage, LLC*, 735 F.3d 1263 (2012). In *McNeal*, the Eleventh Circuit reasoned that it was appropriate to remove such a lien, relying entirely on its decision in *Folendore v. Small Business*

Administration, 862 F.2d 1537 (CA11 1989). That decision, in turn, rested on the view that subsection 506(d) of the Bankruptcy Code, 11 U.S.C. § 506(d), was designed to remove liens related to claims that were allowed, but unsecured as a result of the bifurcation of secured claims by subsection 506(a) of the Bankruptcy Code, 11 U.S.C. § 506(a).

But this Court decisively rejected that reasoning in *Dewsnup v. Timm*, 502 U.S. 410 (1992), which held that subsection 506(d) removes liens from claims that are *not allowed*, not from those that are *not secured*. The remarkable intransigence of the Eleventh Circuit, persisting in the reading of a statute that this Court already has rejected, would call for this Court's attention even if it were not critically important to the Nation's secondary lending markets.

The decision in *Dewsnup*, *supra*, has established the central framework for treatment of undersecured claims in the bankruptcy process for more than twenty years. A framework of reliance built upon that decision has spread throughout the bankruptcy process. Allowing the Eleventh Circuit to establish a balkanized system, in which *Dewsnup* is given no credence within its borders though it remains the law of this Court and the rest of the Nation, has the potential not only to lead to forum shopping by debtors, but also to call into question the underlying framework that has operated without disturbance since *Dewsnup*. Accordingly, we support the petition for a writ of certiorari, and recommend that this Court grant the petition and reverse the decision of the court of appeals.

Understandably enough, the parties to the litigation in the court of appeals briefed the case on the basis of existing law. As a result, the existing briefing has not discussed the strength of the reasoning that supports *Dewsnup*. The cogent reasoning of the decision in that case only underscores the importance of this Court moving swiftly to bring regularity to the law in this area. For that reason, we believe that a brief summarizing the reasoning that supports that decision would provide crucial aid to the Court's deliberations. As the brief explains, the holding in *Dewsnup* is compelled by a close reading of the statutory text, is the only reading that can fit sensibly with related provisions of the Bankruptcy Code, and prevents a jarring and unexplained shift from longstanding practice under both the old Bankruptcy Act and this Court's interpretations of the Code itself.

For the foregoing reasons, the Court should grant leave to file the accompanying brief.

Respectfully submitted.

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June 27, 2014

QUESTION PRESENTED

Whether subsection 506(d) of the Bankruptcy Code permits a chapter 7 debtor to "strip off" a junior mortgage lien in its entirety when the outstanding debt owed to a senior lienholder exceeds the current value of the collateral.

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INTEREST OF *AMICUS CURIAE*[1]

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[1] This brief was not authored in whole or in part by counsel for a party. No person other than the *amici* made a monetary contribution intended to fund the preparation or submission of this brief. Each of the parties received notice of the amici's intention to file this brief more than ten days before its due date.

assets. The ABA frequently appears in litigation, either as a party or amicus curiae, in order to protect and promote the interests of the banking industry and its members.

Established in 1853, The Clearing House Association L.L.C. ("The Clearing House") is the nation's oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Association is a nonpartisan advocacy organization representing—through regulatory comment letters, *amicus* briefs, and white papers—the interests of its member banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the United States.

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506(d) of the Bankruptcy Code[2] was designed to remove liens related to claims that were allowed, but unsecured as a result of the bifurcation of secured claims by subsection 506(a).

But this Court decisively rejected that reasoning in *Dewsnup v. Timm*, 502 U.S. 410 (1992), which held that subsection 506(d) removes liens from claims that are ***not allowed***, not from those that are ***not secured***. The remarkable intransigence of the Eleventh Circuit, persisting in the reading of a statute that this Court already has rejected, would call for this Court's attention even if it were not critically important to the Nation's secondary lending markets.

The decision in *Dewsnup*, *supra*, has established the central framework for treatment of undersecured claims in the bankruptcy process for more than twenty years. A framework of reliance built upon that decision has spread throughout the bankruptcy process. Allowing the Eleventh Circuit to establish a balkanized system, in which *Dewsnup* is given no credence within its borders though it remains the law of this Court and the rest of the Nation, has the potential not only to lead to forum shopping by debtors, but also to call into question the underlying framework that has operated without disturbance since *Dewsnup*. Accordingly, we support the petition for a writ of certiorari, and recommend that this Court grant the petition and reverse the decision of the court of appeals.

Understandably enough, the parties to the litigation in the court of appeals briefed the case on the basis of

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[2] For convenience, we refer throughout this brief to current provisions of Title 11 of the United States Code by section number only.

existing law. As a result, the existing briefing has not discussed the strength of the reasoning that supports *Dewsnup*. The cogent reasoning of the decision in that case only underscores the importance of this Court moving swiftly to bring regularity to the law in this area. For that reason, we believe that a brief summarizing the reasoning that supports that decision would provide crucial aid to the Court's deliberations. As the brief explains, the holding in *Dewsnup* is compelled by a close reading of the statutory text, is the only reading that can fit sensibly with related provisions of the Bankruptcy Code, and prevents a jarring and unexplained shift from longstanding practice under both the old Bankruptcy Act and this Court's interpretations of the Code itself.

SUMMARY OF ARGUMENT

1. A close reading of subsection 506(d) all but compels the holding in *Dewsnup*. The logic of the provision is to describe one group of cases (when "a lien secures a claim"), to carve out a subset of the larger group ("not an allowed secured claim"), and to apply a particular consequence (the "lien is void") to the carved-out set. The most natural reading, then, is to read the section as invalidating liens that relate to claims that are secured (the larger group), but not allowed (the carved-out subset).

The contrary reading of the Eleventh Circuit limits invalidation to a particular group of claims—those that are secured by liens but technically have been rendered unsecured for purposes of subsection 506(a). But if Congress intended in this provision to refer to that specific circumstance, it more logically would have defined the carved-out set either by reference to subsection 506(a) or by mentioning "unsecured" claims. As it works out under the reading of the

Eleventh Circuit, a statute that applies only when a "lien secures a claim," has effect only when the value of the collateral is so small that the lien ***in fact*** does not secure the claim.

The two exceptions to the body of subsection 506(d) confirm this reading. Both subsections refer to claims that are secured, but disallowed under Section 502. The subsections take them out of the general rule of the body of subsection 506(d) leaving in place liens that otherwise would be avoided. If as the Eleventh Circuit would have it, subsection 506(d) targeted unsecured claims, we would expect the exceptions to do the same.

2. The application of subsection 506(d) to strip liens from undersecured claims looks even more incongruous when we try to fit that result into the matrix of relief the Code grants bankrupt debtors. Most obvious is the right of redemption in Section 722. The right of redemption in Section 722 operates in much the same way as the strip-down right discerned by the *Folendore* panel. If a bankrupt debtor owns property, subject to a lien that exceeds the value of the property, the debtor can remove the lien from the property in the bankrupty proceeding.

The right of redemption in Section 722, however, is much narrower than the broad *Folendore* strip-down right. First, it does not apply to business property; it does not apply to real estate; it applies only to personal property of consumers. Second, the debtor acting under Section 722 must pay cash for the actual value of the asset. The *Folendore* right requires the debtor to do no such thing; it is enough for the debtor to ask that the lien be removed. Third, the debtor proceeding under Section 722 must move quickly, tendering the purchase price within just a few months after the bankruptcy filing; the nonstatutory *Folendore* process is available at any time during the proceeding.

Because the *Folendore* strip-down right is broader and more generous to debtors in every relevant respect than the cabined right of redemption in Section 722, the *Folendore* reading of subsection 506(d) renders Section 722 wholly superfluous. The natural reading of the text summarized above, by contrast, gives Section 722 an important and separate purpose within the framework for consumer bankruptcy.

3. The history of practice under the old Bankruptcy Act provides yet another difficulty for the *Folendore* reading. It is beyond dispute that creditors under the Bankruptcy Act could maintain their liens through a bankruptcy proceeding. Indeed, it has been more than a century since Congress provided that liens "pass through bankruptcy unaffected" and almost a century since the first time the Court addressed and quoted that very provision.

Moreover, the legislative reports explaining subsection 506(d) both recognize that history and explain that the provisions of subsection 506(d) would bring that practice forward under the Code. Whatever relevance the history might have—and the clarity of the text suggests that it should have little—it is adequate to establish that the reading adopted in *Folendore* would alter more than a century of routine and well-established practice.

4. Looking more broadly, this Court's previous decisions reflect a consistent skepticism about the propriety of using bankruptcy court valuations to limit the ability of secured creditors to protect their collateral. Time after time after time, the Court's examination of the relevant statute and context has

shown that Congress did not routinely separate secured creditors from their collateral. This Court's reading of subsection 506(d) in *Dewsnup* is but another example of the overarching plan of the Code for secured creditors.

ARGUMENT

The decision of the Eleventh Circuit rests on an overtly unsympathetic reading of this Court's decision in *Dewsnup*. The decision of the *McNeal* panel (the sole justification for the decision below) took the view that "obedience to a Supreme Court decision is one thing, extrapolating from its implications * * * to upend settled circuit law is another thing." *McNeal*, *supra*, 735 F.3d at 1265-66. Noting that the *Dewsnup* Court had indicated its holding would not "apply to all possible fact situations," the court of appeals declined to follow the reading of the Bankruptcy Code that this Court adopted in *Dewsnup*. *McNeal*, *supra*, 735 F.3d at 1266 (quoting *Dewsnup*, supra, 502 U.S. at 416). That might make sense if later jurisprudential developments had undermined the method of reasoning of *Dewsnup*, if later amendments to the Bankruptcy Code had altered the statutory context, or if later decisions of this Court had undercut the analysis of *Dewsnup*.

But none of those things has happened. To the contrary, the considerations that drove the decision in *Dewsnup* are as powerful now as they were then, and developments in the Court's cases since *Dewsnup* have only underscored the importance of that decision; to reject it at this time would tear a hole in the now complex fabric of this Court's interpretations of the Bankruptcy Code.

I. A Close Reading of Subsection 506(d) Limits Its Effect to Disallowed Secured Claims.

The statutory interpretation offered in *Folendore* is, charitably, facile. It could persuade no reader possessed of even passing familiarity with Chapter 5 of the Bankruptcy Code and the language of Section 506 itself.

To summarize the context briefly, Chapter 5 is the portion of the Code that evaluates and sets priorities among the claims that creditors hold against bankrupt debtors. As a general matter, it classifies claims according to two criteria: whether they are allowed and whether they are secured. Because those criteria overlap, they establish four types of claims: allowed secured claims, allowed unsecured claims, disallowed secured claims, and disallowed unsecured claims. The classification proceeds in two steps. First, Section 502 determines whether a claim is allowed or disallowed, generally by providing that the claim is allowed unless it falls within one of the exceptions set forth in the eight subparagraphs of Section 502(b), as modified by the miscellaneous rules set forth in subsections 502(c) through 502(j). If a claim is not allowed, the creditor will receive no distribution from the bankrupt's estate on that claim.

Second, Section 506 resolves a number of problems related to liens and allowed claims. Subsection 506(a) deals with allowed claims that exceed the value of the collateral; it bifurcates those claims into an allowed secured claim, in the amount of the value of the collateral, and an allowed unsecured claim, for the excess. Thus, the secured creditor, to the extent of the unsecured claim, participates in distributions to unsecured creditors. Subsections 506(b) and 506(c) deal with other situations not at issue here (interest, fees, and administrative expenses).

This case concerns subsection 506(d), which provides, with exceptions discussed below: “To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void.” On its face, this appears to take one set of circumstances—where “a lien secures a claim”—and carve out of it a lesser and included set of circumstances –where the claim that the lien secures is not an ***allowed*** secured claim. The point of the provision, then, should be to invalidate liens in the carved-out set. Because both circumstances are defined by reference to a “claim” that is “secured,” and because the qualifying additional fact associated with the carved-out set of circumstances is that the secured claim is “not * * * allowed,” the most natural understanding of the provision is that it operates to void liens on claims that are secured, but not allowed.

The contrary reading, adopted by the Eleventh Circuit in *Folendore* and reaffirmed in *McNeal*, reads this provision as turning not on whether the secured claim is allowed or not allowed, but on whether an allowed claim is secured or unsecured. Under that reading, the point of the provision is to invalidate any lien that secures an unsecured claim. But the provision is triggered only “[t]o the extent that a lien secures a claim,” and if a lien secures a claim, the claim is not, at least in common parlance, unsecured. It is true that under certain circumstances subsection 506(a) divides allowed claims secured by liens into secured claims and unsecured claims for purposes of distributions in the bankruptcy proceeding. But if the purpose of subsection 506(d) was to deal with liens secured by those ***unsecured*** claims, it is implausible that Congress would have signaled that intent by reference to circumstances in which "a lien secures a claim," rather than by a specific reference to subsection 506(a) or to unsecured claims.

Moreover it is at best odd to read the provision as primarily directed at cases in which, because the collateral is worth less than the amount of the claim, the lien in fact ***fails*** to secure the claim. To put it another way, *Folendore* (and *McNeal*) read a provision that applies "[t]o the extent that a lien secures a claim" as applying ***only*** to the extent that the lien does ***not*** secure the claim. That reading is unnatural at best.

The two exceptions to the body of subsection 506(d) confirm that the provision addresses allowability. If (as *Folendore* would have it) subsection 506(d) were designed to remove liens from unsecured claims, the exceptions to that provision naturally would address situations in which the unsecured status of a claim nevertheless did not trigger the general rule. Both of the exceptions, however, treat disallowed claims. The first exception, subsection 506(d)(1), protects liens that secure claims disallowed under subsections 502(b)(5) and 502(e). The second, subsection 506(d)(2), protects the liens of secured creditors that fail to obtain allowed secured claim status solely because they fail to file a proof of claim under Section 501. Because under subsection 502(a) a claim is not allowed unless the creditor files a proof of claim, the main body of subsection 506(d) otherwise would void liens securing payment of those claims. It is more than a coincidence that the exceptions to subsection 506(d) address disallowed secured claims rather than allowed unsecured claims; the obvious explanation is that unsecured claims do not fall within the body of subsection 506(d) in the first place, which is limited to disallowed claims.

II. The Incongruity of Applying Subsection 506(d) to Unsecured Claims Compels the Limitation of Subsection 506(d) to Disallowed Claims.

The best confirmation of the accuracy of the natural reading of the text described above comes from juxtaposing the Eleventh Circuit's broadly atextual understanding of subsection 506(d) with the specifically delineated rights the Code grants debtors in Section 722.

Congress recognized the harsh straits debtors would face under a firm rule that did not allow debtors to alter any of the rights of secured creditors. Accordingly, Section 722 grants debtors a right, carefully limited, to redeem personal property by paying the creditor the value of the collateral, even if the value paid is less than the debt. Like the right to strip down liens recognized in *Folendore*, that allows a debtor to retain collateral, unburdened by a preexisting lien, without repaying the creditor in full.

But that is where the similarities end. Unlike the untethered and uncabined right to strip down liens recognized in *Folendore*, the statutory redemption right does not extend to real estate, but rather is limited expressly to "tangible personal property intended primarily for personal, family, or household use." There is quite a remarkable difference between a statutory right that has no application either to business transactions or to real estate, and the reach of the *Folendore* strip-down right to all property, personal or real, owned by consumers or businesses.

The statutory right also requires the debtor to purchase the collateral by paying cash for its full value as of the time of the bankruptcy. The untethered *Folendore* right, by contrast, requires no *quid pro quo* for invalidation of the creditor's interest in the debtor's property. Rather, the court valuing the property simply orders the lien removed and it is gone.

Nor can the debtor proceeding under the Code (as opposed to *Folendore*) leave creditors in suspense through a long bankruptcy proceeding; the statutory redemption right requires notice to the creditor within 30 days of the filing (subsection 521(2)(A)) and cash payment of full value within 45 days thereafter (subsection 521(2)(B)). Thus, if the debtor cannot produce funds to pay full value for the collateral within 75 days after the filing, the statutory redemption right is vitiated.

Again, the *Folendore* regime would render Section 722 wholly superfluous: that court permits the debtor, at any time or from time to time, without regard to the nature of the collateral, to strip down the lien to the value of the collateral, whether or not the debtor is in a position to tender cash equal to the value of the collateral. The incongruity of forcing the superfluity of such a carefully delineated provision underscores the propriety of accepting what the text of subsection 506(d) suggests on its face. *Compare RadLAX Gateway Hotel v. Amalgamated Bank*, 132 S. Ct. 2065, 2070-71 (2012).

III. Applying Subsection 506(d) to Unsecured Claims Works a Dramatic and Inexplicable Change From Pre-Code Bankruptcy Law.

This Court consistently has respected Congress's general intention to maintain continuity of practice under the Bankruptcy Code with practice under the old Bankruptcy Act that preceded it. To that end, the Court has taken "particular care" in applying the view that Congress makes its "intent specific" when it "intends for legislation to change" the application of rules well-settled under the old Bankruptcy Act. *Midlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 501 (1986). As the Court has emphasized, "a major change in the existing rules would not likely have been made without specific provision in the text of the statute; it is most improbable that it would have been made without even any mention in the legislative history." *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 380 (1988) (per Scalia, J.). For the reasons discussed above, there is no need in this case for any interpretive "nudge"; "well established principles of statutory interpretation," *RadLAX*, *supra*, 132 S. Ct. at 2073, compel the limitation of subsection 506(d) to unsecured claims.

Still, attention to the pre-Code practice, and the undisputed understanding of that practice by those engaged in the process of formulating the new Bankruptcy Code, is useful to undermine any sense that there is something odd or novel about the straightforward reading of Section 506 summarized above (and adopted by this Court in *Dewsnup*).

A. Under the Bankruptcy Act, Liens Passed Through Bankruptcy Unaffected.

The most relevant point is the bedrock principle reflected in the Bankruptcy Act of 1898, that, absent some specific rule in the Act, liens passed through bankruptcy unaffected: "Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law * * * shall not be affected by this Act." Bankruptcy Act 67d, 30 Stat. 564; *see City of Richmond v. Bird*, 249 U.S. 174, 177 (1919) ("Section 67d * * * declares that liens given or accepted in good faith and not in contemplation of or in fraud upon this act, shall note be affected by it."); *see also Long v. Bullard*, 117 U.S. 617, 620-21 (1886) (recognizing similar rule even before adoption of the Bankruptcy Act).[3]

That principle was as true for undersecured creditors as it was for those whose collateral exceeded the value of their loans. Outside of reorganization proceedings, no provision of the Act countenanced involuntary reduction of the amount of a creditor's lien for any reason other than payment of the debt; the Act generally dealt only with *in personam* liabilities. Thus, the undersecured creditor under the Act had only three options: "(1) to prove his claim as an unsecured claim and surrender his security; or (2) to prove his claim as a secured claim and give the bankrupt credit for the value of the security; or (3) not to prove at all and rely solely on the security." 3 *Collier on Bankruptcy* ¶ 57.07[3], at 169 (J. Moore 14th ed. 1976).

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[3] The *Dewsnup* Court's recognition of that practice (502 U.S. at 418-19) was more than a passing observation. To the contrary, this Court repeatedly has recognized the Code's respect for that principle. *See, e.g.*, *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991) ("Codifying the rule [under the Act], the Code provides that a creditor's right to foreclose on the mortgages survives through the bankruptcy."); *Owen v. Owen*, 500 U.S. 305, 309 (1991) ("[P]roperty [in the bankrupt's estate] will remain subject to the lien interest of the mortgage holder."); *Farrey v. Sanderfoot*, 500 U.S. 291, 297 (1991) ("Ordinarily, liens and other secured interests survive bankruptcy. * * * * Congress generally preserved this principle when it comprehensively revised bankruptcy law with the Bankruptcy Reform Act of 1978.").

The first option is irrelevant to our inquiry; if the creditor waives its lien, the effect on its rights is voluntary. The third option grants the creditor rights analogous to the result under Section 506(d)(2): the lien, not addressed in the bankruptcy, endures unaffected by it.

It is the second option that most closely tracks the present dispute: where the secured creditor attempts to receive a share of the bankrupt's estate to compensate for a shortfall between the value of its collateral and the amount of its claim. In that situation, it was clear that the creditor could pursue the collateral to the full extent of its debt, even if the "security proved subsequently to be more valuable than estimated" by the bankruptcy court. *Collier on Bankruptcy*, *supra*, ¶ 57.20[6.2], at 359. That practice, of course, is the precise opposite of the rule *Folendore* discerns in subsection 506(d): that a creditor whose collateral increases in value is limited in all cases to the value placed upon the collateral, by the court, at the time of the bankruptcy proceeding.

B. The Crafters of Section 506 Understood That Liens Always Had Passed, and Would Continue to Pass, Through Bankruptcy Unaffected.

Recognizing the limited relevance the legislative history has in light of the clarity of subsection 506(d), we nevertheless submit that the attention to this problem in the legislative history should provide considerable pause before engaging on any counter-textual application of subsection 506(d) that would extend it to unsecured claims.

Most obviously, both of the relevant reports directly reject the atextual reading of subsection 506(d) adopted in *Folendore*. The House Report, for example, offers an explicit understanding of subsection 506(d) as bearing the mundane interpretation discussed above:

> ***Subsection (d) permits liens to pass through the bankruptcy case unaffected.*** However, ***if*** a party in interest requests the court to determine and allow or disallow the claim secured by the lien under section 502 and ***the claim is not allowed, then the lien is void to the extent that the claim is not allowed.*** The voiding provision does not apply to claims disallowed only under section 502(e), which requires disallowance of certain claims against the debtor by a codebtor, surety, or guarantor for contribution or reimbursement.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 357 (1977) (emphases added).

The passage makes two points important to the interpretive controversy. First, the initial sentence indicates that the provision generally allows liens to pass through bankruptcy unaffected, a concept directly contradictory of the *Folendore* view that the central object of the provision is to strip liens to the judicially determined value of the collateral. Indeed, the *Folendore* regime makes a mockery of the Committee's promise that liens ordinarily would pass through the process "unaffected."

Second, descending from general import to specific application, the passage suggests that the point of the provision is to void liens when a "claim is not allowed." Buttressing that point (and the discussion above), the report emphasizes a single exception, for cases in which the creditor comes into the bankruptcy and the court disallows its claim. That understanding precisely tracks the *Dewsnup* Court's reading of the same language, undermining considerably any notion that those crafting this provision contemplated the broad application the *Folendore* court discerned.

Nor is there any reason to think that a contrary view on the part of the Senate forced a departure from that understanding. Rather, the section-by-section analysis of the parallel provision of the Senate bill explained: "Subsection (d) provides that to the extent a secured claim is ***not allowed***, its lien is void unless the holder had neither actual notice nor knowledge of the case, the lien was not listed by the debtor in a chapter 9 or 11 case or such claim was disallowed only under section 502(e)." S. Rep. No. 989, 95th Cong., 2d Sess. 68 (1978) (emphasis added).

In sum, whatever relevance the legislative history of subsection 506(d) might have to the interpretation of its language, it is beyond dispute that those responsible for crafting the provision were aware of pre-Code practice, that they approved it, and that they did not expect the provision to have the broad and unprecedented application the *Folendore* court has given it.

IV. Applying Section 506(d) to Unsecured Claims Is Inconsistent with the Framework of this Court's Decisions About Bankruptcy Treatment of Secured Claims.

In closing, we emphasize one overarching regularity of this Court's decisions under the Bankruptcy Code, an unwavering skepticism about the reliability of bankruptcy court valuations of collateral as a basis for infringing on the ability of the secured creditor to protect and enforce its lien. It is of course necessary in some contexts to move forward based solely on a bankruptcy court's valuation, a reorganization in which the debtor retains collateral providing an obvious example. But in all of the manifold contexts in which the Court has confronted an important limitation on the rights of secured creditors, premised on an ad hoc judicial valuation of the collateral, the Court has taken a view limiting the significance of a purely judicial valuation.

So, for example, in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), the Court held that a debtor could not recover collateral previously sold at foreclosure, based on the claim that the value of the property as determined by the bankruptcy court was markedly higher than the value the creditor received at foreclosure. Similarly, in *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988), and *Bank of America Nat'l Trust & Sav. Ass'n v. 203 North LaSalle Street Partnership*, 526 U.S. 434 (1999), the Court rejected the idea that shareholders of a bankrupt entity could retain ownership, over the objections of secured creditors, without a market process for testing the value of the affected collateral. Again, most recently in *RadLAX*, *supra*, the Court refused to countenance a process under which a debtor would sell a creditor's collateral (apparently to a related party) at a sale at which the creditor was prevented from credit bidding the amount of its debt. As in the earlier cases, the effect of the decision (albeit one required in the Court's judgment by the text of the statute) was to protect the ability of the secured creditor to take its chances with its collateral rather than any valuation arising from the bankruptcy process.

The decision in *Dewsnup* falls comfortably within that constellation of holdings. A careful and sensitive reading of the text, informed by its context, compels the conclusion in *Dewsnup* just as it has in so many other cases, that Congress's plan for the Code did not heedlessly alter the foundational rights of secured creditors long preserved to them inside and outside of the bankruptcy process. The contrary view of the Eleventh Circuit is not only disrespectful of this Court's authority as the final interpreter of Congress's enactments, but also of the text, history, and plan of the Bankruptcy Code itself.

CONCLUSION

The reasoning of *Folendore*, rejected by this Court in *Dewsnup* but given new life by the Eleventh Circuit in *McNeal*, cannot be reconciled with the text of the Code, its structure and history, or its overarching purposes. The petition details the mischief the decision already is causing in the lower courts. We respectfully submit that the Court should grant the petition for a writ of certiorari and reverse the decision of the court of appeals.

Respectfully submitted,

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