No. 21-134

In The
Supreme Court of the United States

JESUS VASQUEZ, JR. AND
PENNEY LEIGH VASQUEZ,

Petitioners,

v.

WILMINGTON SAVINGS FUND SOCIETY, FSB,
AS TRUSTEE OF STANWICH MORTGAGE TRUST F,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

REPLY BRIEF IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

ARGUMENT

I. This Court Reluctantly Followed *Dewsnup* in *Caulkett*

Justice Thomas writing for a unanimous court in *Caulkett* highlights the textual shortcomings of *Dewsnup* by pointing out,

> [I]f the value of a creditor's interest in the property is zero—as is the case here—his claim cannot be a 'secured claim' within the meaning of § 506(a). And given that these identical words are later used in the same section of the same Act—§ 506(d)—one would think this presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning. *Under that straightforward reading of the statute, the debtors would be able to void the Bank's claims*.
>
> Unfortunately for the debtors, this Court has already adopted a construction of the term "secured claim" in § 506(d) that forecloses this textual analysis. *See Dewsnup v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992).

Bank of America, N.A. v. Caulkett, 575 U.S. 790, 794 (2015) (emphasis added) (citation and quotations omitted).

The Court in *Caulkett* then makes clear that the debtors did not ask the Court to overrule *Dewsnup*,

id. 575 U.S. at 795, and then proceeds in the lone footnote of the case to list the case law and scholarly criticism of *Dewsnup*, *id*. at footnote †. This footnote again emphasizes that, "Despite this criticism, the debtors have repeatedly insisted that they are not asking us to overrule *Dewsnup*." *Id*. The Court in *Caulkett* did not expand the holding of *Dewsnup*; rather, it held its nose and followed its flawed reasoning because no party before it had asked for *Dewsnup* to be overruled—a mistake that is to be corrected with this appeal.

II. *Stare Decisis* Does Not Prevent *Dewsnup* From Being Overruled

The erroneous precedent that is *Dewsnup* can still be overturned despite the high burden imposed by the doctrine of *stare decisis*. As repeatedly explained by this Court, *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

But *stare decisis* does not prevent flawed precedents from being overruled. *See, e.g.*, *Monell v. Department of Soc. Svcs*., 436 U.S. 658, 695 (1978) ("Although we have stated that *stare decisis* has more force in statutory analysis than in constitutional adjudication because, in the former situation, Congress can correct our mistakes through legislation, [] we have never

applied *stare decisis* mechanically to prohibit overruling our earlier decisions determining the meaning of statutes.") (citations omitted). In fact, between 1961 and 2016, this Court expressly overruled statutory precedent in thirty-one cases. *See The Constitution of the United States of America (With Analysis)*, S. Doc. No. 112-9, at 2613-15 (2d Sess. 2016), https://www.govinfo.gov/content/pkg/GPO-CONAN-REV-2016/pdf/GPO-CONAN-REV-2016-13.pdf (last visited October 7, 2021).

One notable example of this Court overruling one of its incorrect decisions in the face of withering criticism—a direct parallel to the overwhelming condemnation of *Dewsnup*—is *Continental Inc. v. GTE Sylvania Incorporated*, 433 U.S. 36 (1977). In *Continental v. Sylvania*, this Court recognized the error it made in deciding a case just 10 years earlier in *United States v. Arnold, Schwinn Co.*, 388 U.S. 365 (1967). According to the Court in *Sylvania*,

> Since its announcement, *Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. The great weight of scholarly opinion has been critical of the decision, and a number of the federal courts confronted with analogous vertical restrictions have sought to limit its reach. In our view, the experience of the past 10 years should be brought to bear on this subject of considerable commercial importance.

Sylvania, 433 U.S. at 47-49 (1977) (footnotes omitted).

More recently, this Court has set forth guideposts for attempts to overturn statutory precedent. Precedent that later proves to be confusing or "unworkable" is subject to being overturned. *Kimble v. Marvel Entm't, LLC.*, 576 U.S. 446, 459 (2015) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)).[1] Following *Patterson* and *Kimble*, *Dewsnup* must be overturned as it is confusing and is still proving to be unworkable today[2]. As pointed out in the Petition for Certiorari, *Dewsnup* has created confusion in so-called "Chapter 20" bankruptcy cases. [Pet., pp. 30-32]. Just two months ago, the United States Bankruptcy Court for the Eastern District of New York relied upon *Dewsnup* in requiring a "wholly unsecured" lien to be paid in a Chapter 13 plan, despite the debtor discharging liability on that claim in a prior Chapter 7 case. *In re Hopper*, No. 21-70139-reg (Bankr. E.D.N.Y.

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[1] The Court in *Kimble* also points out that critics of statutory interpretation decisions "can take their objections across the street, and Congress can correct any mistake it sees." *Id*. at 456. (citing *Patterson*, 491 U.S. 172-173). Such a lobbying effort for consumer debtors does not seem likely. Individuals filing for Chapter 7 bankruptcy protection do so because they cannot afford their debts. In light of this reality, it seems implausible that they could afford to hire lobbyists to advocate for changing the Bankruptcy Code.

[2] *Dewsnup* is also ignored when interpreting other chapters of the Bankruptcy Code, this is despite Section 506(d) being applicable to all chapters pursuant to 11 U.S.C. § 103(a). *See Woolsey v. Citibank, N.A. (In re Woolsey)*, 696 F.3d 1266, 1276 (10th Cir. 2012) ("So it is that Dewsnup has lost every away game it has played: its definition of 'secured claim' has been rejected time after time elsewhere in the code and seems to hold sway only in § 506(d).").

August 5, 2021) https://www.nyeb.uscourts.gov/sites/nyeb/files/opinions/21-70139.pdf (last visited October 7, 2021). Reaching its conclusion, the court noted the split of cases addressing wholly unsecured liens in Chapter 20 cases. *Id*. Slip op. at 8 ("Courts are divided regarding the appropriate treatment of junior mortgage liens that have been stripped off in a chapter 13 after *in personam* obligations were discharged in a prior Chapter 7 case.").

According to the court in *Hopper*, the courts on one side "look to the Supreme Court's reasoning in *Dewsnup* . . . [t]he *Dewsnup* decision provides that . . . liens ride through bankruptcy unaffected" *Id*. Slip op. at 9 (citing *In re Akram*, 259 B.R. 371, 377 (Bankr. C.D. Cal. 2001)). On the other side, courts that do not allow wholly unsecured, discharged liens to be paid in Chapter 13 cases "rely heavily on the injunction provision of § 524 of the Code." *Id*. at 10. (citing *In re Rosa*, 521 B.R. 337, 339 (Bankr. N.D. Cal. 2014)).

Notably, the Bankruptcy Appellate Panel of the Ninth Circuit has recently opined on whether *Akram* or *Rosa* is the appropriate holding. *See Washington v. Real Time Resolution, Inc. (In re Washington)*, 602 B.R. 710 (9th Cir. B.A.P. 2019). The panel in *Washington* rejected the holding of *Akram* that relied upon *Dewnup* and instead upheld *Rosa*. *Id*. at 716. In doing so, the *Washington* panel reversed the bankruptcy court's holding that found a previously discharged, wholly unsecured lien must be allowed as an unsecured claim in chapter 13. A reversal of a ruling that was identical to *Hopper*.

If *Dewsnup* were overruled, there would be no conflict in these Chapter 20 cases. In a Chapter 7 case unsecured liens would be voided and the personal liability would be discharged. Then in the following Chapter 13 case, there would no lien that "passed through unaffected." With the lien voided and no *in personam* liability because of the Chapter 7 discharge, no claim (secured, unsecured, or otherwise) would exist in the new Chapter 13 case. By overturning *Dewsnup*, this Court can eliminate the split in these cases and create uniformity—a uniformity required by the Constitution. U.S. Constitution, Article I, § 8, cl. 4.

III. Silence Does Not Show Congress Ratified *Dewsnup*

Section 506(d) has not been amended, nor has any legislative history been written about it, since *Dewsnup*. This Court has been clear that Congressional inaction does not make law or ratify one of its decisions. *See e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 175, footnote 1 (1989), *superseded by statute on other grounds*, 105 Stat. 1071:

> It does not follow, however, that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation. Congress may legislate, moreover, only through the passage of a bill which is approved by both

> Houses and signed by the President. *See* U.S. Const., Art. I, § 7, cl. 2. Congressional inaction cannot amend a duly enacted statute.

This understanding that Congressional inaction does not reflect approval of Supreme Court precedent is buttressed by two oft-cited decisions of the 1940s. Beginning with *Helvering v. Hallock*, 309 U.S. 106 (1940), this Court stated, "It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines." *Id*. at 119. Further from *Helvering*, "we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Id*. at 121. *Helvering* was reinforced a few years later by *Girouard v. United States*, 328 U.S. 61, 69-70 (1946) ("It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court's own error."); and again by *James v. United States*, 366 U.S. 213, 220-221 (1961) ("But the fact that Congress has remained silent or has re-enacted a statute which we have construed, or that congressional attempts to amend a rule announced by this Court have failed, does not necessarily debar us from re-examining and correcting the Court's own errors.") (citing *Girouard* and *Helvering*). *Helvering* remains good law today. *See June Medical v. Russo*, 591 U.S. ___, concurring op. at 4 (Roberts, C.J., concurring in judgment) (June 29, 2020).

It is also unclear how Section 506(d) could be amended by Congress to reflect a further elaboration on its current unambiguous language. As recognized in *Caulkett*, 575 U.S. at 794, and the dissent in *Dewsnup*, 502 U.S. at 421 (Scalia, J., dissenting), "allowed secured claim" in Section 506(d) is not ambiguous as it was just defined above in Section 506(a). Was Congress supposed to rewrite Section 506(d) in the wake of *Dewsnup* to add a footnote to "allowed secured claim" to read, "as defined above in Section 506(a)"? Such a requirement would be absurd.

Congressional inaction, if anything, shows that the original unambiguous language of Section 506(d) is the proper reading. Under *Dewsnup*, the word "secured" in "allowed secured claim" is now superfluous. *Id*. at 425 (Scalia, J., dissenting). The standard from *Dewsnup* is: (1) does the creditor have a lien, and (2) is the claim of this creditor fully allowed, *id*. at 417, if so, then no portion of the lien can be void. If Congress wanted to adopt *Dewsnup*'s holding then it would have amended Section 506(d) to read: "To the extent that a lien secures a claim against the debtor that is not an allowed [] claim, such lien is void." No amendment to Section 506(d) has been made and nothing should be inferred from such inaction. The one thing that can be agreed upon, however, is that no support exists for *Dewsnup* through either Congressional or judicial action. The time has come for *Dewsnup* to be overruled.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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