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IN THE SUPREME COURT OF THE UNITED STATES
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LAMAR, ARCHER & COFRIN, LLP,)
Petitioner,)
v.) No. 16-1215
R. SCOTT APPLING,)
Respondent.)

Washington, D.C.

Tuesday, April 17, 2018

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

APPEARANCES:

GREGORY G. GARRE, ESQ., Washington, D.C.; on behalf
of the Petitioner.

PAUL HUGHES, ESQ., Washington, D.C.; on behalf of
the Respondent.

JEFFREY E. SANDBERG, Assistant to the Solicitor
General, Department of Justice, Washington, D.C.;
on behalf of the United States, as amicus curiae,
in support of the Respondent.

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

2 (11:18 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument in Case 16-1215, Lamar, Archer &
5 Cofrin versus Appling.

6 Mr. Garre.

7 ORAL ARGUMENT OF GREGORY G. GARRE

8 ON BEHALF OF THE PETITIONER

9 MR. GARRE: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 Section 523(a)(2)(A) of the Bankruptcy
12 Code prohibits the discharge of debts procured
13 by fraudulent statements, other than a
14 statement respecting the debtor's financial
15 condition.

16 Everyone agrees that "financial
17 condition" is a term of art used by Congress
18 and in commercial practice to refer to one's
19 overall financial status. Yet, Respondent and
20 the government ask this Court to interpret
21 Section 523 and, in particular, Congress's use
22 of "respecting" to eliminate the meaning of
23 "financial condition," of a term of art, and
24 essentially to substitute the word "finances"
25 for it.

1 JUSTICE GINSBURG: Can you tell me,
2 Mr. Garre, what is a statement respecting
3 financial condition? In addition to a balance
4 sheet and a profit and loss statement, what
5 else would qualify?

6 MR. GARRE: Sure. Well, our view is
7 that a statement respecting financial condition
8 is a statement that purports to present a
9 picture of one's overall financial situation.
10 And there are several things that could qualify
11 as -- as that.

12 One would, of course, be a classic
13 balance statement or sheet. Another would be
14 an indication of net -- net wealth or overall
15 income -- a net -- net worth. Another would be
16 a credit score, such as those that were common
17 in 1926, when Congress passed this statute.
18 Another would be net cash flow.

19 All of these things look to one's
20 overall financial situation, not to just one
21 side of the ledger, an asset or a liability,
22 and present a picture of overall financial
23 status.

24 And, again, Respondent's
25 interpretation of "respecting" essentially

1 eliminates that term as a term of limitation
2 and as a term of art and substitutes the word
3 "finances" for it. So a statement about any
4 individual input, any individual asset, any
5 individual liability suddenly becomes a
6 statement respecting financial condition.

7 And I think there are three central
8 problems with -- with -- with Respondent's
9 interpretation of "respecting."

10 The first is, as I mentioned, that --
11 that their reading of "respecting" to mean
12 "related to" eliminates Congress's decision to
13 use the term of art "financial condition." It
14 would be an odd thing for Congress to say we're
15 going to refer to "financial condition" but
16 then essentially eliminate the meaning of that
17 by saying "respecting financial condition."
18 And there's no reason why the Court has to
19 interpret "respecting" to mean "related to."
20 It can mean "related to." But it can also mean
21 "about."

22 And here in context, reading
23 "respecting financial condition" to mean a
24 statement about financial condition makes
25 perfect sense. To say something is "about"

1 means it refers to the subject of the object.
2 Here, the object is the statement and here the
3 subject is financial condition, one's overall
4 financial status.

5 So the fact that their reading of
6 "respecting" to mean "related to" would
7 eliminate "financial condition" as a term of
8 art and a term of limitation is the first
9 reason why this Court --

10 JUSTICE KAGAN: Could you tell me, Mr.
11 -- Mr. Garre, what you think the difference is
12 between "relating to" and "about"?

13 MR. GARRE: I think, Your Honor, if --
14 if you go to the dictionary, the dictionary --
15 the definition that we provide for "about"
16 means "on the subject of." It refers to the
17 subject -- the subject here is financial
18 condition.

19 "Relating to" is a much broader term
20 of breadth or at least can be used in that way.
21 I mean, this Court famously -- as Justice
22 Scalia famously said, everything is related to
23 everything essentially.

24 JUSTICE KAGAN: Yeah --

25 MR. GARRE: I mean, it's a term of

1 great breadth.

2 JUSTICE KAGAN: So there's something
3 intuitive about what you just said, but then I
4 started trying to come up with sentences in my
5 head where I switched the two words, and I
6 honestly couldn't find one where they meant
7 something different. So I'm -- I'm hoping --
8 I'm hoping you can help me come up with those
9 examples where -- you know, just give me a
10 sentence where if you have "about," it means
11 something different than if you have "relating
12 to."

13 MR. GARRE: Okay. Tell me about Ted
14 Williams's batting average. And, here, we're
15 using "about" and we're also using "batting
16 average," which is a relative -- relative term,
17 versus: Tell me something relating to his
18 batting average.

19 And I think you could see in that
20 sentence that "relating to" is a much broader
21 term, going to capture things like, oh, well,
22 he struck out in the seventh inning versus,
23 well, you know, he hit 400. It was an amazing
24 season. Or he -- he almost hit the ball just
25 -- he was almost just as likely to hit the ball

1 as he was to not hit it. That's a statement
2 about batting average.

3 Nobody would think that if you said
4 tell me about your GPA, and you said, well,
5 gee, I missed the -- the last question on my
6 last test, that that may be -- that's certainly
7 a statement relating to your GPA, that -- that
8 missing that question is going to impact, have
9 some relationship to your GPA, but you wouldn't
10 think of that as a statement about your GPA.

11 And that's the way in which Congress
12 was using "about" -- "respecting" here, as a
13 preposition to modify "financial condition."

14 JUSTICE SOTOMAYOR: I'm -- Mr. Garre,
15 the problem I have with your example is if I
16 asked you tell me about your batting average
17 and you said, I hit 5 out of 10 or I hit 6 out
18 of 10, you would be answering that question, or
19 you could say I hit 5 out of 10 when I was in a
20 -- in a position to score a run.

21 So the "about" would be answered in
22 both ways.

23 MR. GARRE: Well, I think, first of
24 all, are you referring to the subject --

25 JUSTICE SOTOMAYOR: The "respecting"

1 would be answered in both ways.

2 MR. GARRE: Well, you're -- you're
3 referring to the subject, the batting average
4 there. And your answer, actually, provide --
5 looked at both sides of the equation: How many
6 hits he got and how many times at bat he got.
7 So, in that sense, that's different than just
8 saying we're talking about an individual asset.

9 And then I think the sort of -- the
10 ambiguity in your question was, did you mean
11 his batting average in the game or his season?
12 And maybe that would be something you would
13 follow up on. But I think that your expression
14 of that is perfectly consistent with our view,
15 and sort of --

16 JUSTICE BREYER: A problem. You
17 produced an irresistible example which I can't
18 resist.

19 (Laughter.)

20 JUSTICE BREYER: And, therefore, I
21 suspect that the key of your example is the
22 word -- the word "something," not the word
23 "respecting."

24 And when you say "tell me about," what
25 usually that means is "all about." But let's

1 try it with the word "statement," which is in
2 the statute. Make a statement about his
3 batting average. Make a statement respecting
4 his batting average.

5 There, I'm with Justice Kagan; I have
6 a hard time seeing the difference.

7 MR. GARRE: Well, Your Honor, "a
8 statement respecting" is still going to refer
9 to about his batting average, the subject of
10 it. Not -- I think if you said tell me a
11 statement about his --

12 JUSTICE BREYER: No, not tell me.
13 Make --

14 MR. GARRE: Make?

15 JUSTICE BREYER: -- a statement about
16 his batting average.

17 MR. GARRE: Sure. He hit the --

18 JUSTICE BREYER: Make a statement
19 respecting his batting average. Now you used
20 "statement" and now there we are.

21 MR. GARRE: He hit the ball more than
22 he struck out, versus he was -- that's a
23 statement respecting batting average, versus he
24 was robbed of a hit in the seventh inning by a
25 great catch. That's not a statement respecting

1 --

2 JUSTICE BREYER: I'll take it -- I'll
3 take it under consideration.

4 (Laughter.)

5 JUSTICE ALITO: And what -- Mr. Garre,
6 what -- what trouble -- what if the debtor
7 makes a statement about a specific asset or a
8 liability, but anybody -- but the reasonable
9 listener would take that to be a statement
10 about or respecting financial situation?

11 MR. GARRE: So our view, Justice
12 Alito, is this Court should follow what
13 Congress said and say that a statement about a
14 single asset or a single liability is not a
15 statement respecting financial condition. It's
16 just not.

17 If you disagree with that, then I
18 think one fallback position the Court could
19 take would be something like what you said: A
20 reasonable person would view that as a
21 statement about one's overall financial
22 situation.

23 Now this case couldn't be -- possibly
24 be viewed in that way because it was clear that
25 this was a statement about only a single asset

1 and it was a statement in spite of his
2 financial condition.

3 So the Court couldn't possibly say
4 that the statement in this case, about an
5 individual tax refund, would be viewed, as a
6 reasonable person, in this context dealing with
7 a businessman, as a statement about --

8 JUSTICE GINSBURG: I don't -- I don't
9 follow that. Maybe you can explain that. I
10 thought this was a law firm that had a client
11 who was in default, and so the law firm said
12 we're going to stop representing you. And the
13 client said: Oh, don't do that. I'm going to
14 get a tax refund and it will enable me to pay
15 your bill.

16 Why isn't that a statement reflecting
17 -- respecting the financial position, the law
18 firm knowing that the client was unable to pay,
19 wasn't paying his bills, and then the client
20 says: I can come up with something that will
21 assure you I will be able to pay this bill?

22 MR. GARRE: Sure. And this is -- you
23 know, can come up in any number of situations
24 dealing with collateral, whereas it's not
25 uncommon for someone to know that another

1 person is in dire financial straits but,
2 nevertheless, to accept collateral in exchange
3 for property or services as a means of paying
4 for that.

5 That's not a statement about overall
6 financial condition. It's a statement that I
7 have an asset can be -- that can be used to pay
8 a debt.

9 And this case was litigated all the
10 way up on the premise that the statement at
11 issue here was a statement about his tax
12 refund, an individual asset. They argued below
13 that, in fact, what the law firm was relying
14 upon was its knowledge of his precarious
15 financial condition. And the bankruptcy court
16 rejected that and found that, no, it was
17 relying on his statement about the tax refund.

18 The district court rejected that,
19 found he was relying on -- it was relying on a
20 statement about the tax refund. And I don't
21 even think they appealed that finding to the
22 Eleventh Circuit.

23 So I think that that's why this case
24 is truly the case about a statement about a
25 single asset, a -- a tax refund, that the

1 debtor in this case lied about.

2 And -- and this -- this paradigm here,
3 the sort of classic collateral paradigm, we're
4 talking about a single asset, couldn't be
5 further removed from the situation that
6 Congress was addressing.

7 And I know not all members of the
8 Court may want to look to that legislative
9 history, but it's sort of the gorilla -- it's
10 the elephant in the room here.

11 And that's that when Congress was
12 looking at this situation in 1978, what it was
13 doing is looking at a particular abusive
14 practice by some creditors, which were using
15 written financial statements essentially to
16 dupe applicants for credit into making false
17 statements by simply omitting debts or assets
18 on those statements, and then using that as
19 coercion once they went into bankruptcy.

20 And so Congress passed a specific rule
21 that dealt with written financial statements.

22 JUSTICE GORSUCH: Mr. Garre, I'm not
23 sure I understand how that helps you even on
24 its own terms, assuming I'd be willing to look
25 at it, of course.

1 But if Congress's concern is that
2 creditors are soliciting information that's
3 incomplete about debts, liabilities, that's
4 just half of the balance sheet that you want us
5 to look at.

6 So Congress appears to have been
7 concerned, to the extent we can tell these
8 things, about misstatements only with respect
9 to one-half of overall financial condition.
10 Right?

11 MR. GARRE: Well, I don't think that's
12 completely correct, Your Honor, in the sense
13 that --

14 JUSTICE GORSUCH: Good. How?

15 MR. GARRE: -- that the legislative
16 record makes clear that the forms, the
17 financial statements that creditors were using,
18 were statements that referred to both
19 liabilities and assets. So those were
20 financial statements about financial
21 conditions.

22 JUSTICE GORSUCH: Right. No, I
23 understand that, but the concern is that the
24 misstatements were with respect to omitted
25 liabilities, right?

1 MR. GARRE: Congress -- the -- the
2 creditors in that situation were using forms
3 that represented one's overall financial
4 status, referring to a credit score, net worth
5 --

6 JUSTICE GORSUCH: But doesn't that
7 show that an omitted liability, one asset or
8 lack -- or one debt, can reflect on the overall
9 financial condition, that can be about and
10 relevant to and reflect on the overall
11 financial condition?

12 MR. GARRE: It -- it certainly can be
13 related to. But the question is what kinds of
14 statements was Congress addressing.

15 JUSTICE GORSUCH: Well, Congress
16 thought -- thought it could be about, didn't
17 it?

18 MR. GARRE: I don't -- I don't think
19 it did. I mean, it -- it said it could be
20 related to. But the situation there is you
21 have creditors who are abusing a false
22 financial statement that included liabilities
23 and assets, debtors -- debtors who are
24 essentially blameless.

25 And, here, the situation is the

1 opposite. There's no reason -- and Judge Ebel
2 recognized this in the Tenth Circuit's decision
3 in Joelson. There's no reason for a debtor to
4 be misled or mistaken about an individual
5 asset.

6 And, conversely, there's no indication
7 here in the --

8 JUSTICE GORSUCH: But if you make a
9 major representation about the absence of an
10 overwhelming debt or the presence of an
11 overwhelming asset, why can't that reflect on,
12 be about, your overall financial condition?

13 MR. GARRE: It's --

14 JUSTICE GORSUCH: I own a genuine
15 Vermeer.

16 MR. GARRE: I think, I mean, I'll give
17 two answers to that. One, my first answer is,
18 if it's a statement about a single asset, it's
19 just not a statement about overall --

20 JUSTICE GORSUCH: Ever?

21 MR. GARRE: -- financial condition.

22 JUSTICE GORSUCH: Categorically?

23 MR. GARRE: Categorically. If I said
24 I win --

25 JUSTICE GORSUCH: All right. Let's

1 say I don't --

2 MR. GARRE: You know, people who win
3 the lottery --

4 JUSTICE GORSUCH: Let's say I don't
5 accept that.

6 MR. GARRE: -- the lottery go broke
7 too.

8 JUSTICE GORSUCH: Yeah.

9 MR. GARRE: So that -- that's my first
10 answer.

11 JUSTICE GORSUCH: What's your second
12 answer?

13 MR. GARRE: And my second answer is
14 the one I gave to Justice Alito, which is that
15 if one -- if the Court rejected the first
16 answer, one could say that you'd look to
17 whether a reasonable person in context would
18 view the statement as being about one's overall
19 financial situation.

20 JUSTICE BREYER: But it depends on
21 context, doesn't it?

22 MR. GARRE: It would --

23 JUSTICE BREYER: The bank says,
24 Schmidt, you are broke. Are you kidding, says
25 Schmidt, I have a genuine Vermeer.

1 (Laughter.)

2 MR. GARRE: Right.

3 JUSTICE BREYER: I mean, and, oh, oh,
4 I didn't know that, says the teller. Here's
5 \$100,000. I mean, what -- what -- you know,
6 what's that if it's not about overall
7 financial?

8 MR. GARRE: And that would be a
9 hypothetical that I think would call into play
10 this -- this separate rule, if the Court wanted
11 to go there.

12 Now you couldn't say that about the
13 statement in this case. No reasonable person
14 would look in the context here and say that the
15 statement that I have a \$100,000 tax --

16 JUSTICE GORSUCH: Why isn't it exactly
17 like the genuine Vermeer? All right? The law
18 firm's chasing the client and -- and the client
19 says: Okay, okay, okay, I'm late in paying, I
20 know I'm terribly late in paying, but I have
21 this tax refund coming. I have the genuine
22 Vermeer almost in my possession. Right?

23 MR. GARRE: Yes. I think --

24 JUSTICE GORSUCH: Why isn't that --
25 why -- why isn't everyone in the room

1 understanding exactly what that means, which
2 is, okay, I don't have a lot else, but I've got
3 this.

4 MR. GARRE: I think -- I think it's
5 the difference between "financial condition"
6 and "ability to pay," which are two different
7 concepts, and Congress said "financial
8 condition."

9 JUSTICE GORSUCH: Well -- well, that
10 -- that's a problem for me too, and maybe you
11 can help me out with that, is the insolvency
12 definitions in --- in the tax code, at least
13 for municipalities --

14 MR. GARRE: Right.

15 JUSTICE GORSUCH: -- "financial
16 condition" is defined as the ability to meet
17 your current debts as they come due.

18 MR. GARRE: That -- that's not the way
19 Congress thought of it. If you look at the
20 definition of insolvency, it refers to
21 "financial condition" first, and the difference
22 between assets and liabilities.

23 Congress also differentiated between
24 assets and liabilities and financial conditions
25 in other provisions, where it listed those

1 terms separately in 11 U.S.C. 1103(c)(2) and
2 1106(a)(3).

3 And -- and there's two different --
4 two additional reasons why I don't think you
5 could read "respecting" in the broad "related
6 to" way that Respondent and the government ask
7 you to here.

8 The second -- the first one is that it
9 strips "financial condition" of meaning. The
10 second one is that Congress used the term
11 "related to" in nearby provisions of the
12 statute, in both 1926 and 1978, showing that
13 when Congress meant "relating to," the broadest
14 conceivable definition, it said "relating to."
15 Not "respecting."

16 And the third reason is just the
17 consequences of Respondent's and the
18 government's rule. Their rule would render the
19 baseline rule in Section 523, that debts
20 procured by fraud are not dischargeable,
21 inapplicable to a common fact pattern under
22 Section 523, which is statements made about
23 one's finances to secure credit.

24 Now the government itself on page 18
25 of its brief recognizes that that is a common

1 situation, someone making statements about
2 one's finances to -- to obtain credit. And yet
3 the consequence of Respondent's and -- and the
4 government's rule is to wipe that out as a
5 basis for discharge.

6 And there's -- there's no indication
7 at all that Congress in mind -- that Congress
8 had in mind such a dramatic reshifting of the
9 ordinary regime that it has applied for a
10 century in this context, which is a debt
11 procured by fraud is not dischargeable.

12 And this Court relied upon similar
13 considerations, for example, in *Maracich versus*
14 *Spears*, where it refused to interpret an
15 exception to the Driver's Privacy Protection
16 Act, in such a broad manner that it would
17 really strike at the heart of the overlying
18 objective there.

19 And, here, we have a textually
20 grounded objective, that this Court has
21 recognized repeatedly, of not releasing, for
22 debtors, debts procured by fraud.

23 And I think one would look skeptically
24 to a rule that would wipe out the application
25 of that age-old rule in a commonly recurring

1 context, which is statements made about
2 finances. And that's --

3 JUSTICE GINSBURG: May I -- may I ask
4 you to clarify something? I -- I may not have
5 understood this correctly. But the statement
6 "don't worry, I am above water" --

7 MR. GARRE: Yeah.

8 JUSTICE GINSBURG: -- I think you said
9 that would need to be in writing.

10 MR. GARRE: It would. And I think
11 that the -- the fairest way to read that would
12 be a statement about financial condition. And
13 that's quite different than a statement about
14 an individual asset. That fact pattern is not
15 coming up in the real world, Justice Ginsburg.
16 No reasonable creditor would rely on a
17 statement that general, but, in our view, that
18 is a statement respecting financial condition
19 that --

20 JUSTICE GINSBURG: How is -- how is
21 that significantly different from "don't worry,
22 I have an anticipated tax refund that will
23 enable me to pay your bill"?

24 MR. GARRE: Right. Because that --
25 that's -- that goes to ability to pay, not

1 overall financial condition. And, again -- and
2 it goes to why we ask for collateral in loans
3 commonly.

4 JUSTICE KAGAN: Well, but Mr. --

5 MR. GARRE: Collateral is not a --

6 JUSTICE KAGAN: I'm sorry.

7 MR. GARRE: I was going to say, I
8 mean, you -- it's not uncommon for people to
9 have -- be in dire financial straits but yet go
10 to get loans on the basis of collateral.

11 That's sort of the pay day situation that the
12 government refers to. "Ability to pay" is a
13 different concept than "financial condition."

14 Congress would have known that. At
15 the time it enacted the "financial condition"
16 language initially, there were state laws that
17 referred to "financial condition" or "ability
18 to pay," as we mentioned in our reply brief.

19 JUSTICE KAGAN: But which says more
20 about your financial condition, Mr. Garre?
21 "I'm above water." That's one option. Or "I
22 have a bank account with a billion dollars in
23 it."

24 MR. GARRE: Well, I -- I think the
25 "I'm above water" tells you about your

1 financial condition. The "I" -- because it
2 tells you about your overall financial status.
3 The "I have a bank account with a billion
4 dollars in it" tells you you have a lot of
5 money. It doesn't tell you anything about your
6 debts. Really rich people sometimes have
7 really big liabilities. Ask Bernie Madoff.
8 And so that does not give you a sense of
9 overall financial status.

10 Now, again -- and I think that calls
11 into play Justice Alito's point, that if you
12 disagreed with that, then maybe that is the
13 kind of statement that one could look at and
14 say that that is so astronomically big, a
15 reasonable person would view that as a
16 statement about overall -- concerning about
17 overall financial situation.

18 That's not the rule we would urge this
19 Court to adopt. We would urge you to follow
20 the text of what Congress said. And, again,
21 it's accepted by everyone that "financial
22 condition" is a term that refers to overall
23 financial status. That's the easiest way to
24 interpret the statute. It's the way that
25 brings it in line with the problem that

1 Congress sought to address.

2 And, again, I mean, just referring --
3 returning to that problem briefly, there you
4 had a situation of a certain class of creditors
5 that were abusing written financial statements
6 that included assets and liabilities and duping
7 creditors -- debtors into making false
8 statements. So you had blameworthy creditors
9 and essentially blameless debtors.

10 In that situation, Congress said you
11 should -- we should rebalance the scales and
12 not discharge those debts, unless they meet
13 certain additional requirements in (B). This
14 Court recognized that in *Field versus Mans*,
15 which makes it a little bit different than the
16 typical legislative history case.

17 The government strenuously argued that
18 the Court should interpret 523(a)(2)(A) in
19 *Field* in light of that specific problem it was
20 seeking to address. And that problem couldn't
21 be further removed from the situation here,
22 where you have a creditor that is entirely
23 blameless and you have a debtor which had no
24 reason to be misled or mistaken about a single
25 individual asset, which is a point that Judge

1 Ebel made in the Joelson case.

2 So, in this case, there's no -- no
3 reason to think that Congress would have wanted
4 to balance the scales any differently. And,
5 instead, there's every reason to think that
6 Congress would have intended the baseline rule
7 that has always applied in this context to
8 apply to this situation, which is that a debt
9 procured by fraud is not dischargeable.

10 Here, the district court and the
11 bankruptcy court both found that not only did
12 the debtor lie about his tax refund -- and I
13 think that the Respondent here has tried to
14 rehabilitate the debtor a little bit. But just
15 to be clear, there were findings made that he
16 lied about the amount of the tax fund and
17 whether or not they had actually received the
18 tax fund. Both times.

19 The -- the bankruptcy court found that
20 the deceit was obvious. That's at page 60a of
21 the Petition Appendix. So why would have
22 Congress have intended to -- for a debtor
23 engaged in obvious deceitful conduct against a
24 creditor who's entirely blameless, to allow the
25 debtor to discharge that debt? When you think

1 about the consequences of the kind of behavior
2 that that would promote, there's no reason to
3 think that Congress would want to promote that
4 kind of behavior, certainly not when one looks
5 at --

6 JUSTICE GINSBURG: Why wouldn't the
7 result be to get people, especially law firms,
8 to do -- do things in writing?

9 MR. GARRE: Well, and that -- and
10 that's an argument that -- that's a reason that
11 the -- the Eleventh Circuit gave, and that is
12 advanced by the Respondent here, not so much so
13 by the government. And I think that that's
14 sort of an example of the worst kind of
15 legislative purpose in the sense that there's
16 -- there's certainly no general statement of
17 purpose that Congress intended things to be in
18 writing generally.

19 If Congress really had that objective,
20 Justice Ginsburg, it wouldn't have limited the
21 writing requirements to statements about
22 financial condition. It would have applied it
23 generally.

24 Under their rule, they say that
25 statements about professional qualifications or

1 the values of assets are -- are different. But
2 if Congress was really concerned about having
3 writing -- things in writing for evidentiary
4 purposes, it would apply that across the board.

5 So I don't think there's any real
6 traction to the notion that the -- the statute
7 should be interpreted in light of this unstated
8 objective to simply generate more reliable
9 evidence in proceedings.

10 Nor is there any indication that
11 courts have had difficulty making credibility
12 determinations about lies in this context.
13 Those were carefully litigated here. Both
14 courts below heard testimony, and they
15 concluded that the Respondent in this case lied
16 about the status of his tax refund and the
17 amount of his tax refund.

18 Given that, this case falls within the
19 baseline rule that that debt is not
20 dischargeable. The only way that Respondent
21 and the government can pull that out of there
22 is to give "respecting" the broadest
23 conceivable breadth in terms of "relating to"
24 and then, once you get to that point, to ask
25 this Court essentially to impose judicial

1 limits on the breadth of that term, because
2 even they, I think, appreciate that if
3 "respecting" really means "related to" here,
4 then this is really going to swallow up the
5 whole thing.

6 I mean, they -- they say that the
7 statement has to be about an asset, the
8 Respondent does, but why isn't a statement that
9 I run a hedge fund a statement relating to
10 one's financial condition? Certainly, someone
11 might -- would reasonably view it that way.

12 Why isn't a statement that I graduated
13 first in my class from Harvard Business School
14 a statement respecting financial condition?
15 Certainly, it would be related to that.

16 And they're just asking this Court to
17 draw arbitrary limits in order to cabin the
18 reach of their rule. The government takes a
19 slightly different approach and it asks this
20 Court to -- asks this Court to adopt an ability
21 to pay overview. But that's not in the statute
22 either, as I've explained.

23 Ability to pay something by committing
24 an asset to pay a debt is different than one's
25 overall financial status. You can be deeply in

1 debt but still have an asset that you commit to
2 paying a debt.

3 If I could reserve the remainder of my
4 time.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Hughes.

8 ORAL ARGUMENT OF PAUL HUGHES
9 ON BEHALF OF THE RESPONDENT

10 MR. HUGHES: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 Petitioner's principal textual
13 argument is to say, instead of looking to
14 "relating to," they prefer the word "about."
15 Now we reject the premise that there's any
16 substantial legal difference between those two
17 concepts. But even supposing there is a
18 difference, the only example that Petitioner
19 can offer that shows any difference is what we
20 would call a trivial example, something that's
21 a trivial impact on -- on the object.

22 But in the context of this statute,
23 Section 523(a)(2), those sorts of trivial
24 examples structurally cannot exist. And that's
25 because, in addition to demonstrating -- when a

1 -- when a plaintiff comes forward with this
2 sort of claim, in addition to identifying the
3 -- the statement that the plaintiff alleges is
4 fraudulent, the plaintiff must also identify
5 why that statement was material to its
6 decision-making, why the plaintiff actually
7 relied on that statement, and why the plaintiff
8 at minimum was justified in doing so.

9 And so those requirements, those
10 necessary requirements of a Section 523(a)(2)
11 claim, necessarily and substantially limit the
12 universe of claims that could be within the
13 realm of statements respecting financial
14 condition.

15 And Congress was well aware that it
16 was crafting a statute about fraud. It well
17 knew of all of these other limitations that
18 cabined the universe of -- of the potential
19 kinds of claims. And so that precludes any
20 court from having to consider these sorts of
21 trivial examples.

22 JUSTICE GORSUCH: Well, let's -- let's
23 take Mr. Garre's example of the Harvard
24 Business School graduate. I graduated from
25 Harvard Business School. And someone might

1 reasonably rely on that and take it to be
2 material and significant. But does it relate
3 to financial condition, overall financial
4 condition? Doesn't that term have to mean
5 something?

6 MR. HUGHES: So a few things about
7 that, Your Honor. First, to directly answer
8 your question, we think that the clearest test
9 is to ask: Does the statement describe what
10 would be a line item on one's balance sheet or
11 income statement? We think that's a very easy
12 way to understand what it directly relates to.

13 JUSTICE GORSUCH: Okay. All right.
14 So you'd rule it out on the basis that it has a
15 to be at least something that would appear on a
16 financial statement.

17 All right. A lot of trivial things
18 appear on financial statements, right? I have
19 this, that, little asset. I own a car. It's a
20 secondhand car. It's not worth a whole lot,
21 but it would appear on a financial statement.
22 That would be enough in your -- under your
23 rule?

24 MR. HUGHES: Well, yes, Your Honor.
25 And what would deal with that example is the

1 materiality requirement. But, again, their
2 rule is if you make that --

3 JUSTICE GORSUCH: Well, no, no, it was
4 reasonably relied on for the purpose of the
5 loan or the services rendered or whatever, as
6 collateral, surely, of course, it was. But it
7 doesn't have anything to do with overall
8 financial condition. It just means I own a
9 very bad car.

10 MR. HUGHES: Well, the question would
11 be the reliance theory there, Your Honor. And
12 if they're relying on it, that statement,
13 because it says something about your financial
14 condition, I think that would be very clear
15 evidence that it goes to financial condition.

16 But, again, their test sets up a rule
17 where, if it appears on your balance sheet,
18 they agree (2)(B) applies in that circumstance.

19 The only question here is, if you make
20 that identical statement not in the context of
21 a balance sheet but standing alone, does all of
22 a sudden (2)(A) apply? And we think that rule
23 doesn't make any sense, because it's the
24 identical misstatement if you include a
25 misstatement about a -- a worthless car on your

1 balance sheet and you make that identical
2 statement standing alone because the -- the --
3 the loan officer comes and asks you the next
4 day: By the way, do you have any additional
5 automobiles we should -- we should know about?

6 The rule they set up is, if you put it
7 on the balance sheet, (2)(B) applies, but if
8 you say it standing alone, all of a sudden
9 (2)(A) applies. That's all form and no
10 substance.

11 The rule -- the difference -- the
12 distinction between (2)(A) and (2)(B) should
13 not turn on what the packaging of the
14 misstatement is, if it occurs on a balance
15 sheet or if it occurs independently standing
16 alone; it should look to what the -- what the
17 actual substance of the statement is.

18 And when the substance of the
19 statement is one that goes to financial status,
20 then it's a (2)(B) claim because it's a
21 statement that's respecting financial
22 condition.

23 And, again, it's clear that that is
24 this case. One need look no further than their
25 amended complaint in the bankruptcy court.

1 This is at the Eleventh Circuit's appendix,
2 page A38. And they say what -- why was the tax
3 information material? And they say: "It was
4 material information regarding his and his
5 company's financial status and abilities."

6 Their theory of materiality and
7 reliance was that this statement was material,
8 and they relied upon it because it went to his
9 financial status, his ability to pay. That's
10 the identical reliance theory that the
11 bankruptcy court adopted at Petition Appendix
12 62a.

13 And so what our position is, is that a
14 -- a creditor should not be able to, on the one
15 hand, identify for purposes of -- of
16 establishing reliance and materiality that the
17 reason -- the actual reason they relied on this
18 was because it was a statement about financial
19 condition while at the same time, in -- in
20 trying to avoid the requirements of (2)(B) say
21 no, no, this was something that is not
22 respecting financial condition because it
23 didn't have the proper form of being on a full
24 balance sheet.

25 The reality, when -- when a creditor

1 relies for this actual reason, that is what
2 should govern the (2) (A)/(2) (B) analysis. Or
3 else, again, you lead to these bizarre results,
4 as I said, it shouldn't matter the truthful
5 packaging.

6 Again, as -- as --

7 JUSTICE GINSBURG: Your -- your --
8 your understanding shrinks what would once fit
9 under (2) (A). So what remains under (2) (A)
10 when you don't have a writing requirement?

11 MR. HUGHES: So, Your Honor, a
12 substantial amount remains under (2) (A), as 34
13 years of Fourth Circuit practice have shown,
14 and that's because most of the claims -- most
15 plaintiffs under Section 523(a) (2) are not
16 lenders. Most plaintiffs have a variety of
17 fraud claims that are entirely outside the loan
18 context.

19 And so just to look at this Court's
20 recent 523(a) (2) cases, two years ago, the
21 Court considered Husky International
22 Electronics about fraudulent conveyance, which
23 was a (2) (A) case.

24 Prior to that, the Court looked at
25 Cohen v. de la Cruz, which was a case about a

1 fraudulent scheme to overcharge rents, in
2 violation of state law. That was a (2) (A)
3 case.

4 Prior to that, in Grogan, with
5 securities fraud, that was a (2) (A) case. All
6 of these cases that deal with fraud entirely
7 outside the lending capacity come up as (2) (A)
8 cases. And as we've said, for 34 years, our
9 approach has governed in the Fourth Circuit,
10 and (2) (A) is -- is very much alive and well
11 there.

12 We documented dozens of examples of
13 all sorts of frauds; for example, when somebody
14 misrepresents the quality of service or the
15 goods that they're selling and a whole panoply
16 of -- of issues that have been addressed as
17 (2) (A) cases in the Fourth Circuit, which has
18 applied Angler for -- for the past 34 years.

19 JUSTICE KAGAN: In saying that, are
20 you saying that (2) (A) does not really exist
21 anymore with respect to fraud on lenders?

22 MR. HUGHES: No, it still can exist
23 for fraud with lenders, particularly when
24 somebody is making a statement at the time of
25 obtaining debt as to a future promise. And

1 there, the fraudulent claim would not be what
2 about their financial condition, but something
3 that they are going to do in the future,
4 perhaps how they use the proceeds of a loan or
5 if they're going to convey ownership interests
6 of the person who's giving them the loan.

7 So there still is a role for (2)(A) in
8 the context of lending. But the context of
9 this statute, Congress was quite clear in -- in
10 creating (2)(B) where it intended to have
11 (2)(B) apply in the main in the lending
12 capacity, that was because Congress recognized
13 that there was a pattern and practice of abuses
14 in the particular consumer lending space. And
15 that's why Congress felt the need to impose
16 heightened consumer protections in the -- in
17 the (2)(B) context.

18 And we think it would be a bizarre
19 result if those protections could be
20 circumvented by a rule, such that if the lender
21 asks for everything but overall financial
22 condition, if they just ask for the three most
23 important assets and the three most important
24 debts, all of a sudden those protections would
25 cease to apply, even though the -- the creditor

1 is getting the identical information that they
2 want from getting a holistic balance sheet.

3 So the context of this statute, we
4 think, very clearly indicates why Congress
5 would prefer for an approach that applies to
6 statements about single assets, every bit as
7 much as a statement about an overall balance
8 sheet.

9 In -- in addition to -- to that
10 particular purpose, the very example that
11 Congress gave in enacting the statute was a
12 list of debts, only something on the debtor's
13 balance sheet. And Congress had cited to a
14 bankruptcy court decision, *In re Hill*, where
15 Bankruptcy Judge Baer very clearly explained
16 that the kind of example that Congress had in
17 mind was not the kind of -- of document from
18 which overall net worth could be obtained.

19 So the very example that Congress
20 enacted or identified for purposes of (2)(B)
21 would not be captured by Petitioner's rule,
22 which I think would be a surprising result.

23 Beyond that, we know that Congress had
24 in mind that (2)(B) would have real effect, and
25 that's because the 1970 Bankruptcy Commission,

1 when it issued its report in 1973, it
2 recommended doing away with this exemption to
3 bankruptcy in its entirety. It found that, on
4 the whole, it was doing more harm than good to
5 the public.

6 Now Congress said we're not going to
7 go that far. We're going to strike a
8 compromise, and lenders will be able to exempt
9 debts from discharge in these circumstances.

10 CHIEF JUSTICE ROBERTS: And they --
11 they all read the Bankruptcy Commission report?

12 MR. HUGHES: Well, it was -- it was
13 entered in -- into the record, Your Honor.

14 CHIEF JUSTICE ROBERTS: It was entered
15 into the record? Oh, then I'm sure they all
16 read it.

17 (Laughter.)

18 MR. HUGHES: Your Honor, though, to be
19 clear, our principal argument rests on the text
20 of the statute. And we think that that
21 resolves this case. We -- we don't submit that
22 going to these other sources are -- are
23 necessary.

24 We think the text is clear, but to the
25 extent that there's any possible ambiguity, we

1 -- we don't believe there is any, but we think
2 all of these other points line up behind it,
3 because along the same line, prior to the 1978
4 recodification, five circuits had looked at
5 materially identical language, and they all
6 reached the same result.

7 Again, we think the text is the most
8 compelling basis for the Court to decide this
9 case, but the fact that the text, the
10 legislative history, the -- the statutory
11 lineage, and the clear purpose all line up the
12 same direction, we think indicates why the
13 Eleventh Circuit was absolutely correct in its
14 -- its decision with this case.

15 JUSTICE SOTOMAYOR: May I go back to
16 the argument Mr. Garre -- Garre did? He said
17 the Congress was seeking to -- to protect
18 debtors where credit companies were telling
19 them to omit a particular item.

20 MR. HUGHES: Yes, Your Honor.

21 JUSTICE SOTOMAYOR: How does this rule
22 protect those creditors?

23 MR. HUGHES: How --

24 JUSTICE SOTOMAYOR: Because, if the
25 debtor provides the balance sheet in writing

1 but omits something that the creditor asks --
2 tells them it's not -- it's unimportant, why
3 does the writing requirement save the debtor?
4 It doesn't really.

5 MR. HUGHES: Well, Your Honor, that's
6 because --

7 JUSTICE SOTOMAYOR: It doesn't save
8 the debtor because --

9 MR. HUGHES: Your Honor, in (2)(B),
10 there were two particular protections. One was
11 the writing requirement, and you're correct,
12 the writing requirement would not apply. But
13 the other distinction between (2)(A), which
14 does the work in that case, is the reasonable
15 reliance requirement.

16 Congress enhanced the standards from
17 justifiable reliance, which typically does not
18 require any affirmative duty to investigate, to
19 reasonable reliance, which would include a duty
20 to investigate, particularly for that example,
21 because they said creditors, because they get
22 consumer reports and other kinds of information
23 from credit rating agencies, they can either
24 know or pretty easily find out if that -- if
25 that statement is incomplete.

1 And so the reasonable reliance
2 requirement is what -- what takes care of those
3 cases.

4 JUSTICE ALITO: Would you respond to
5 -- to Mr. Garre's argument that the statement
6 here concerns ability to pay and not financial
7 condition?

8 MR. HUGHES: Well, it's hard for me to
9 see the distinction between those two, Your
10 Honor, because I think people are concerned
11 about ability-to-pay statements because they go
12 to financial condition, and vice versa,
13 financial condition statements are -- are
14 relevant to condition -- to ability to pay.

15 But, again, as the government says,
16 ability to pay is a very important part of this
17 test. We have two separate amicus briefs who
18 identify a separate way to look at financial
19 condition, which is not just balance sheet
20 solvency but is equitable solvency, which goes
21 to ability to pay.

22 So I think another way to look at this
23 case is a statement that shows ability-to-pay
24 liquidity is a statement that goes to financial
25 condition. I think it's very hard to

1 disaggregate those two.

2 And this is obviously a statement
3 about ability to pay. And so I think that does
4 confirm that it is a statement respecting
5 financial condition.

6 Now I -- I think the one distinction
7 that they try to make at page 14 of the yellow
8 brief is that there was a model code that --
9 back in 1926 that looked to statements
10 respecting financial condition and the means of
11 ability to pay, and they try to suggest that
12 since only "statement respecting financial
13 condition" was plucked from that model code,
14 that "means of ability to pay" is something
15 different.

16 That "means of ability to pay," the
17 language in the context of that model code, was
18 doing something very different. It was
19 applying to what we today think of payment from
20 insiders. So, for example, if you show up at
21 the jewelry store and you say: Well, I don't
22 have the ability to pay, I'm not going to make
23 a representation about my financial condition,
24 but my very wealthy grandmother is going to
25 come tomorrow and pay for this diamond, that is

1 a representation about your means of your
2 ability to pay, which is distinct from your
3 financial condition.

4 So the distinction that they try to
5 make in the yellow brief at page 14 is -- is
6 about those third-party ability of means to
7 pay. When you take those third parties out, I
8 don't think there's much distinction between
9 "financial condition" and the "ability to pay."

10 JUSTICE GINSBURG: What about the
11 argument that you would be putting a burden on
12 small businesses that deal informally? You
13 would be putting a recordkeeping requirement on
14 them for a statement like: I've got this tax
15 refund.

16 MR. HUGHES: Well, so, Your Honor,
17 this rule has applied for 34 years in the
18 Fourth Circuit, and neither Petitioner nor its
19 amici have come up with a shred of evidence
20 that there has been any untoward policy effect
21 on small business or any other sector of the
22 economy.

23 And I think we know exactly why,
24 because the NFIB amicus brief cites its own
25 report, and its report, at page 8, concludes

1 that bankruptcies are not significant problems
2 for small business. It goes through all the
3 other problems that small businesses have in
4 obtaining payment, and it says bankruptcies are
5 relatively insignificant.

6 And then that same report, at page 6,
7 explains why, beyond that, that small
8 businesses stand to benefit more from expansive
9 rules that protect debtors for the very reason
10 that small business owners are more likely to
11 be debtors in bankruptcy cases than the general
12 population.

13 So the NFIB's own evidence suggests
14 that -- that bankruptcies like this do not pose
15 any practical problem on small businesses,
16 beyond that -- that these sorts of rules help
17 small business owners who are more likely to
18 declare bankruptcy. And there's just simply no
19 empirical evidence, even though we know our
20 rule has governed for 34 years in the
21 Carolinas, Virginias, and Maryland, and there's
22 been no indication of any sort of overreach of
23 -- of recordkeeping.

24 CHIEF JUSTICE ROBERTS: Well, you
25 know, we -- we get these arguments a lot. This

1 rule has been there for 30 years, and there are
2 no problems. I mean, there are a lot of
3 factors go into whether or not your -- there's
4 no empirical evidence. It's not like there's a
5 daily report about what charges have been made
6 and then the cases have been settled or
7 anything like that.

8 The fact that there haven't been that
9 many reported decisions, which I assume is the
10 basis for your statement it hasn't been a
11 problem, doesn't really tell you all that much
12 in cases like this.

13 MR. HUGHES: Well, I think, Your
14 Honor, the -- the point that we make is a -- is
15 a more limited one, which is to say if the sky
16 were falling in the Fourth Circuit, there would
17 be some evidence or some outcry from these very
18 substantial jurisdictions. There would be some
19 indication that there was a problem that --
20 that came from this rule.

21 So we're using this -- the -- the
22 absence of evidence in the Fourth Circuit to
23 simply say that any view of a policy concern is
24 substantially overblown, because there hasn't
25 been any identification of even a single case

1 where there have been imposition of
2 recordkeeping obligations that have been deemed
3 improper or any sort of improper cost on small
4 businesses.

5 And, again, I think when we look to
6 the NFIB evidence, that shows exactly why.
7 This is just not a problem that, in the
8 aggregate, was of concern to small businesses;
9 and, rather, Congress was looking at this as
10 consumer protection, how it dealt with consumer
11 lending in the aggregate, and that's why it
12 drafted the broad statute that it did to
13 preclude any kinds of circumvention, because,
14 again, a rule to the contrary would -- would
15 lead to a result where if, you know, Applying
16 had not just said I'm getting a \$100,000
17 refund, but I'm getting a \$100,000 refund and,
18 therefore, my head is above water, that all of
19 a sudden (2) -- (2)(B) would apply.

20 That's just all form over substance,
21 and there's no reason to think that -- that
22 Congress would have actually done that. So we
23 think our rule accords with what actual
24 creditor behavior is, and that should be the
25 rule of decision that Congress was concerned

1 about substances.

2 Additionally, as I've said, our rule
3 captures the -- the only single example that
4 Congress gave. And -- and finally, I think our
5 rule is just plainly required by the -- the
6 clear text of the statute, that the word
7 "respecting" has a broadening function, there's
8 been no indication that it has anything but a
9 broadening function, and regardless if one
10 thinks it's "relating to," "respecting,"
11 "about," all of that broadening function leads
12 to the very same rule that the Eleventh Circuit
13 adopted below, where statements about assets
14 and liabilities necessarily qualify.

15 JUSTICE SOTOMAYOR: Could -- could you
16 tell me how you think -- why you think your
17 rule is better than the Solicitor General's
18 suggestion?

19 MR. HUGHES: Well, our rule is -- is
20 superior for several reasons. It accomplishes
21 Congress's goal of extending debtor protection
22 to this range of claims because, but for our
23 rule --

24 JUSTICE SOTOMAYOR: So how is your
25 rule different from the Solicitor General's?

1 MR. HUGHES: Oh, sorry. Sorry. Apart
2 from the Solicitor General's rule, I don't
3 think our -- our approach has any pragmatic
4 difference. I've -- I've thought through all
5 the examples, and I can't think of an example
6 where our rule departs from where the Solicitor
7 General's rule would come out. We think our
8 rule is a bit -- is -- is straightforward and
9 -- and an easy one to apply.

10 But I think, in all of these cases, if
11 you think of ability to pay as either a
12 requirement of the rule --

13 JUSTICE SOTOMAYOR: All right. So
14 articulate your rule and articulate them for me
15 so that I have a clear idea of the differences.

16 MR. HUGHES: Sure. So --

17 JUSTICE SOTOMAYOR: I know they spoke
18 about context and purpose, and you didn't.
19 So --

20 MR. HUGHES: Yes, Your Honor. Our
21 rule is that any statement that has a direct
22 impact on one's overall financial condition,
23 which Petitioner defines as the balance of
24 assets and liabilities, is a statement
25 respecting financial condition. So we think an

1 easy way to think of this is, if it's a
2 statement describing a single line item on a
3 balance sheet or an income statement, that's
4 what qualifies.

5 The government's rule is they -- they
6 say it's "an affirmative representation about a
7 single asset if that representation is offered
8 as evidence of the debtor's ability to pay."
9 So they add that "if evidence of debtor's
10 ability to pay."

11 We think that's just descriptive of
12 what's going to happen in these cases, rather
13 than something that has to be added as a test.
14 They offer this example of -- of items in
15 commerce. We think our rule would come out the
16 same way with items in commerce, just when one
17 thinks about the timing of the transaction,
18 because when that transaction closes, the
19 representation one's relying upon that the good
20 is genuine isn't about something on one's
21 balance sheet; it's about an item that's
22 actually being transmitted in commerce and it's
23 coming off one's balance sheet. So, at that
24 time of reliance, it's -- it's not a balance
25 sheet style statement.

1 So I don't think there's any practical
2 difference between where we are and where the
3 Solicitor General is.

4 Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Sandberg.

8 ORAL ARGUMENT OF JEFFREY E. SANDBERG
9 ON BEHALF OF THE UNITED STATES, AS AMICUS

10 CURIAE, IN SUPPORT OF THE RESPONDENT

11 MR. SANDBERG: Mr. Chief Justice, and
12 may it please the Court:

13 Our view and Respondent's view of the
14 statute leaves the no-discharge rule in fraud
15 cases basically intact. We're just
16 interpreting the scope of the statute's
17 provision that says that statements need to be
18 in writing. And as the colloquy with
19 Respondent's counsel makes clear, although some
20 statements might indeed be insignificant, the
21 dollar bill in my pocket or, by analogy, a
22 single at bat of Ted Williams, the statute's
23 only concerned with representations that have
24 actual effect on creditor behavior.

25 And the determination whether a

1 statement is one respecting financial condition
2 or not will make a practical difference only
3 when the creditor has actually relied on it and
4 the reliance was, at a minimum, at least
5 justifiable.

6 And the creditor who has relied on a
7 statement about the value of a single asset,
8 such as here a tax refund, has done so for
9 exactly the same purpose that one would
10 customarily rely on a comprehensive financial
11 statement for, which is to form a judgment
12 about the debtor's creditworthiness for
13 purposes of consummating or not consummating a
14 particular transaction.

15 So "a statement respecting financial
16 condition" is ultimately about the topic of the
17 statement. It's not about the significance of
18 the statement. So, if I make a statement about
19 the status of the project being financed, say,
20 I lied to the lender and say that we broke
21 ground, we're moving on to Phase II when, in
22 fact, there's not even a shovel that's hit the
23 dirt yet, that's not a statement respecting
24 financial condition; that's a statement
25 respecting something else.

1 I think it's also worth bearing in
2 mind that this phrase wasn't plucked out of the
3 ether in 1978. It had existed in prior
4 bankruptcy law dating back to 1926. And it had
5 been interpreted by courts over the years to
6 extend beyond statements about overall
7 financial condition, to include statements
8 about particular assets under circumstances
9 where a creditor had relied on that statement
10 and -- and been defrauded.

11 It's also worth bearing in mind that
12 the -- the focus of the legislative process in
13 the 1970s was the Commission's report. One of
14 the two bills that was before Congress in the
15 '70s was drafted by the Commission. The
16 Commission included four legislators of the
17 nine members, and the hearings were all about
18 what had happened before the Commission, what
19 the Commission was proposing. And it's
20 striking that the Commission had proposed to
21 eliminate the fraud exception to discharge
22 entirely for consumer debts, not just for false
23 financial statements, for all -- for all
24 consumer debts.

25 And Congress thought that that went

1 too far. But it ultimately preserved a rule
2 that this -- for the particular class of
3 statements that deal with financial condition,
4 the representation would need to be in writing
5 if the creditor sought to render that claim
6 non-dischargeable in the bankruptcy --

7 JUSTICE ALITO: You say that a
8 statement respecting the debtor's financial
9 condition "encompasses an affirmative
10 representation about a single asset if that
11 representation is offered as evidence of the
12 debtor's ability to pay," right? So it's --

13 MR. SANDBERG: That's right.

14 JUSTICE ALITO: That goes -- it is the
15 intent of the person making the statement, the
16 subjective intent of the person making the
17 statement?

18 MR. SANDBERG: No, we see it as an
19 objective test -- test that turns on the
20 context in which the statement is made. So, if
21 a creditor hearing that statement in the
22 context in which the statement was made -- and,
23 remember, what -- we're talking here about oral
24 statements because it only makes a
25 difference --

1 JUSTICE ALITO: Right.

2 MR. SANDBERG: -- for oral statements
3 really.

4 So, if the -- if the creditor says:
5 Tell me about your financial condition and the
6 debtor says: Here are the three significant
7 assets I own that you should know about, one of
8 them is a genuine Vermeer --

9 JUSTICE ALITO: So, if the debtor
10 makes the statement not intending it to be
11 evidence of -- to be taken as evidence of the
12 debtor's ability to pay, but it is taken in
13 that way by the creditor, that counts or a
14 reasonable creditor would take it that way?

15 MR. SANDBERG: I think a reasonable
16 creditor gets closest to the -- the right
17 approach. It's an objective test. In other
18 areas of the law this Court has looked to, in
19 discerning the purpose of a statement, has
20 applied an objective test, such as, for
21 example, whether an out-of-court statement is
22 testimonial or not.

23 And -- and we think that it's
24 important for it to be objective just so that a
25 creditor doesn't come into court when it files

1 its complaint in the adversary proceeding and
2 say: I didn't subjectively rely on it for
3 ability to pay; I relied on something else.

4 JUSTICE KAGAN: But Mr. --

5 JUSTICE GORSUCH: Your -- your test --
6 I'm sorry, please.

7 JUSTICE KAGAN: Mr. Hughes said that
8 there was really no practical difference
9 between your test with the evidence of
10 ability-to-pay language in it and his test
11 without it.

12 Do you disagree with that or agree
13 with that?

14 MR. SANDBERG: As I understand
15 Respondent's position, there -- there is no
16 practical difference in how it turns out.
17 We're really -- the point of our ability-to-pay
18 language is -- is to get at what we think
19 Congress was trying to do here.

20 And one can agree or disagree as a
21 general matter with its policy choice, but what
22 we think Congress was trying to do was treat
23 statements that go to a debtor's ability to pay
24 differently than -- than other types.

25 So a statement respecting financial

1 condition is -- is one made for the purpose of
2 shedding light on one's financial condition.
3 And -- and why ever would a creditor care about
4 that? Because they want to know if they're
5 going to get their money back.

6 JUSTICE ALITO: What if it's a false
7 --

8 JUSTICE GORSUCH: Following up on --
9 sorry.

10 JUSTICE ALITO: What if it's a false
11 statement about an asset, but it isn't one that
12 would be taken by a -- a reasonable creditor as
13 having any significant bearing on financial
14 condition?

15 MR. SANDBERG: Well, I think that that
16 statement probably would not be material or it
17 would not be one that the creditor would have
18 reasonably relied upon. By hypothesis, we're
19 talking about circumstances in which a creditor
20 has come into court and said: I was defrauded.
21 This statement that was made was so significant
22 that I made a different lending decision than I
23 would have.

24 But then they -- they turn -- when it
25 comes to the analysis of "statement respecting

1 financial condition," they say: Oh, no, this
2 statement wasn't significant enough to go to
3 the debtor's overall financial condition. It's
4 -- it just merely affected my decision about
5 whether to consummate the deal.

6 And I think that what Congress was
7 focused on in the 1970s, for better or worse,
8 was to affect real-world creditor behavior.
9 And --

10 JUSTICE SOTOMAYOR: So why do we have
11 to look at the debtor's intent? Why don't we
12 just -- won't the elements of reasonable
13 reliance capture almost -- how can -- how can a
14 creditor reasonably rely on a statement that
15 wasn't -- that couldn't have been intended as
16 --

17 MR. SANDBERG: I think that's right.
18 I don't think we are looking to the debtor's
19 intent under our approach. I think we're
20 looking at what an objective observer coming at
21 things from the creditor's side of the
22 transaction would understand the statement to
23 have been made for. Was it to shed light on
24 the debtor's ability to -- to pay or not?

25 JUSTICE GORSUCH: We've been focusing

1 on the balance sheet, and that's where your
2 focus has been. Is it an asset? Would it
3 appear on a financial statement?

4 But what about an income statement or
5 a representation about a future stream of
6 income that wouldn't appear on a balance
7 statement but might appear on an in -- income
8 statement? I understood there to be a little
9 daylight between your -- your position and your
10 colleagues' on that.

11 MR. SANDBERG: I think our approach
12 would cover those statements because we think
13 that they are financial representation --
14 representations that go to ability to pay. I'm
15 not sure whether Respondent's counsel would say
16 that their approach doesn't sweep that in. I
17 think they also have referred to income or debt
18 statements, in addition to balance sheets.

19 And in that sense, where -- the
20 government's approach isn't tethered to any --
21 the formality of the particular document or
22 what would appear on any particular document.
23 It's really about the purpose to which the
24 statement --

25 JUSTICE GORSUCH: Well, but you talked

1 about assets or liabilities. That -- that
2 doesn't necessarily represent income, future
3 income streams.

4 MR. SANDBERG: That's right. The
5 articulation of the government's test that my
6 colleague read sort of baked into it the
7 premise of this case, which was a statement
8 about a single asset.

9 And so I don't know that this Court
10 would need to think about the entire universe
11 of representations in -- in order to resolve
12 it, but certainly a statement that is not just
13 about an asset or a liability but is about an
14 income or an expenditure would also fall within
15 our approach.

16 So -- and as to why the Congress may
17 have required statements to be in writing, it's
18 true that it could have said much more in the
19 legislative history than -- than it did, but we
20 know one thing for a fact from the face of the
21 statute. And everyone agrees about it.

22 Congress did require statements to be
23 in -- in writing if they're respecting
24 financial condition in order for the creditor
25 to prevail. Congress could have written in

1 (2) (A) "a statement in writing respecting
2 financial condition," but it didn't. It said
3 "statement respecting financial condition."

4 And then, in (2) (B), it imposed a
5 writing requirement. And we think the -- the
6 only way to -- to give -- we don't see how
7 under Petitioner's approach it would be
8 sensible to distinguish between statements that
9 -- that go to the whole and statements that go
10 to some or most or -- or one.

11 I'd be happy to entertain any further
12 questions that the Court may have.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Five minutes, Mr. Garre.

16 REBUTTAL ARGUMENT OF GREGORY G. GARRE

17 ON BEHALF OF THE PETITIONER

18 MR. GARRE: Thank you, Mr. Chief
19 Justice.

20 The rule advanced by Respondent and
21 the government would essentially wipe out the
22 application of 523's baseline rule in the
23 consumer finance or simple collateral
24 situation.

25 The government says itself on page 18

1 of its brief that statements respecting
2 debtors' finances are, of course, common in
3 credit transactions. And under the rule that
4 you've just heard today, any false statements
5 about finances are going to result in a debt
6 that's not dischargeable, if they're made
7 orally, which, as the National Federation of
8 Independent Businesses has told this Court,
9 statements about finances are still made orally
10 in common transactions throughout the United
11 States by small businesses and regular folks.

12 And there's just absolutely no
13 indication that Congress intended to put
14 creditors who are blameless in a situation
15 where the debts created by deceitful debtors
16 are going to be entirely discharged under this
17 rule.

18 The Fourth Circuit case law only
19 proves that the Fourth Circuit has invented
20 artificial limits on Respondent's "related to"
21 principle. What -- what that case law doesn't
22 show is all the debts about false statements,
23 about individual assets that are being
24 discharged in the Fourth Circuit and putting
25 creditors in hardship situations that Congress

1 did not intend to be discharged. So I don't
2 think the Fourth Circuit case law really gets
3 them anywhere.

4 The -- the problem in this case is
5 completely different than the problem that
6 Congress had in mind. We're talking about
7 debtors and creditors make a false statement
8 about a single asset in the classic kind of
9 collateral situation, where a -- there's no
10 reason to think that the creditor is
11 blame-worthy in any way and where the -- the
12 debtor is entirely deceitful.

13 In that situation, there's no
14 evidence, either in the text or the history,
15 that Congress intended to weigh the balance in
16 favor of debtors there and excuse debtors by
17 discharging debts procured by fraud.

18 The ability-to-pay concept is just
19 different than financial condition. Collateral
20 on a \$1,000 loan, you may be able to use that
21 collateral to pay the loan, but that has no
22 bearing on your overall financial situation.

23 Lots of people who are in dire
24 financial situations make statements about
25 collateral in order to make loans. And a

1 lender might look at the statement about a
2 piece of property as evidence of an ability to
3 pay, but that is not evidence of one's overall
4 financial condition.

5 And one thing, ironically, that I
6 didn't hear from either Respondent or the
7 government today is any real argument based on
8 the text of the statute, either "respecting,"
9 which they've relied upon up to this point, or
10 "financial condition." Nor did I hear them
11 dispute that "financial condition" does refer
12 to one's overall financial status.

13 And I didn't hear any explanation as
14 to how their "related to" interpretation of
15 "respecting" doesn't negate that term as a term
16 of art and term of limitation.

17 The last thing I would say is, if this
18 Court does adopt a new test in this area, and
19 there have been, you know, competing versions
20 of possibilities for this Court, we would urge
21 this Court to vacate the decision below and to
22 remand.

23 For one thing, there's -- there's a
24 dispute among the parties about exactly why
25 Respondent made a false statement about the tax

1 refund, whether Lamar was relying on its
2 overall financial status.

3 The courts below heard that and
4 rejected the Respondent's position that he
5 advanced today. And I would urge you to look
6 at pages 60 to 61 of the Petition Appendix and
7 39 and 40 of the Petition Appendix, where the
8 courts below held that we relied on the
9 statement about his tax refund and not his
10 overall financial condition.

11 And because we relied on a statement
12 about a single asset and not a statement about
13 his overall financial condition, and because
14 that statement was indisputably false, the debt
15 at issue in this case should not be discharged
16 under the command of Congress.

17 If there are no further questions.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel. The case is submitted.

20 (Whereupon, at 12:15 p.m., the case
21 was submitted.)

22

23

24

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