No. 16-1215

In the Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,
Petitioner,

v.

R. SCOTT APPLING,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Bankruptcy Code prohibits the discharge of "any debt . . . for money, property, [or] services . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition." 11 U.S.C. § 523(a)(2). Three Circuits have held that a statement concerning a specific asset of the debtor cannot be a "statement respecting the debtor's . . . financial condition." Two Circuits, including the Eleventh Circuit below, have held that it can be. Based on that interpretation, the Eleventh Circuit here reversed the bankruptcy court's conclusion that the debt at issue "is nondischargeable," Pet. App. 14a, even though it is based on a fraudulent statement.

The question presented is whether (and, if so, when) a statement concerning a specific asset can be a "statement respecting the debtor's . . . financial condition" within Section 523(a)(2).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 848 F.3d 953. The opinion of the district court (Pet. App. 20a-44a) is unreported. The order of the bankruptcy court denying respondent's motion to dismiss (Pet. App. 67a-81a) is reported at 500 B.R. 246. The bankruptcy court's findings of fact and conclusions of law (Pet. App. 45a-66a) are reported at 527 B.R. 545.

JURISDICTION

The court of appeals entered judgment on February 15, 2017. Pet. App. 1a-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 523(a) of Title 11 of the United States Code provides, in relevant part, that:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> * * *
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> (B) use of a statement in writing—
>
> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;

> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive . . . .

INTRODUCTION

Respondent R. Scott Appling repeatedly lied to his attorneys about the status of a specific asset—a tax refund—he had promised to use to pay for their services. First, he lied to them about how large the refund would be and, later, he lied to them about the status of the refund. As a result of those lies, petitioner Lamar, Archer & Cofrin, LLP (Lamar) agreed to continue to represent Appling in an ongoing business dispute, notwithstanding his failure to make past due payments on his legal bills. Ultimately, Appling's lies allowed him to run up more than $100,000 in fees—which he never paid. All of that must be taken as a given here because it is based on factual findings, made following a trial below, that Appling has not challenged in this Court.

The question in this case is whether Appling is entitled to discharge that debt in bankruptcy, notwithstanding that he procured it through a fraud. For centuries—indeed, for practically as long as bankruptcy has existed—the law has distinguished between the "fraudulent debtor" and "honest but unfortunate debtor," and refused to relieve debts procured through fraud. Today, that longstanding prohibition is embodied in 11 U.S.C. § 523(a)(2). Section 523(a)(2)(A) prohibits the discharge of debts for money or services obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition." This case focuses on the meaning and scope of the carve-out at the end—"other than a statement respecting . . . financial condition."

Congress adopted this so-called "financial statement exception"—and added a parallel provision in Section 523(a)(2)(B) imposing certain requirements for when a debt procured by way of a false financial statement made in *writing* is nondischargeable—as part of its overhaul of the bankruptcy laws in 1978. As this Court explained in *Field v. Mans*, the exception was adopted to address a specific practice engaged in by some creditors who elicited incomplete (and thus inaccurate) financial statements from debtors for the very purpose of insulating their own claims from discharge. 516 U.S. 59, 76-77 (1995).

In the decision below, the Eleventh Circuit acknowledged that "'[f]inancial condition'" in Section 523(a)(2)(A) refers to "one's *overall* financial status," and not to "any particular asset on its own." Pet. App. 7a-8a (emphasis added). And the court acknowledged that the only false statements at issue here concerned "a single asset"—Appling's tax return. *Id.* at 6a. The court concluded, however, that Congress's use of "respecting" unambiguously extended the financial statement exception to cover not only financial statements and other descriptions of one's overall financial status, but also any lie that "relates to" or "impacts" a debtor's "overall financial condition"—including statements about a *single* asset. *Id.* at 9a.

The text, context, and history of Section 523(a)(2)(A) all compel the rejection of that construction. "Respecting" does not always have the expansive, "related to" meaning that the Eleventh Circuit gave it here. It also means "about" or "with reference to." And that meaning—"about" or "with reference to"—makes far more sense in the context of the sentence at issue and, indeed, is how this Court has previously understood the phrase. *See Field*, 516 U.S. at 76 (recognizing that Congress sought to address "lies *about* financial condition" (emphasis added)). The Eleventh Circuit's construction of "respecting," by contrast, negates the focus on overall financial health inherent in Congress's use of the term "financial condition," and causes the exception to take a huge bite out of the anti-discharge rule.

The Eleventh Circuit's construction of Section 523(a)(2)(A) also starkly departs from background principles of bankruptcy law. This Court has recognized repeatedly, in connection with this same provision, that it is "unlikely that Congress . . . would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud." *Grogan v. Garner*, 498 U.S. 279, 287 (1991). Under the Eleventh Circuit's interpretation, however, debtors are free to lie to creditors' faces, and still earn a "fresh start," so long as their lies relate—in some way—to their finances. That rule would blow a hole through the longstanding rule that debts procured through fraud generally are *not* dischargeable. Yet there is no indication that Congress contemplated such a major shift in bankruptcy law. Not a peep. This Court therefore should be especially reluctant to adopt an interpretation that reaches that result.

The decision below should be reversed.

STATEMENT OF THE CASE

I. STATUTORY HISTORY

Congress enacted the statutory provision at issue, 11 U.S.C. § 523(a)(2), in 1978. As this Court has previously recognized, however, Section 523(a)(2) embodies a principle that is nearly as old as bankruptcy law itself: the "basic policy . . . of affording relief only to an 'honest but unfortunate debtor.'" *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (quoting *Grogan*, 498 U.S. at 287)). Because the "historical pedigree of the fraud exception," *id*. at 223, provides the backdrop for Congress's action in 1978, we begin by briefly recounting that history here.

1. Since the Founding, American bankruptcy law has always recognized that the salutary protections of bankruptcy should be reserved for "honest debtors." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1101 (1833). The line drawn "between the fraudulent and the honest bankrupt" traces its lineage back to the English bankruptcy laws from which Americans borrowed. *See* St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, Vol. 1, App. 259 (1803) (online 1987, Univ. of Chicago), http://press-pubs.uchicago.edu/founders/documents/a1_8_4_bankruptcys3.html ("It is, however, necessary to distinguish between the fraudulent and the honest bankrupt: the one should be treated with rigor; but the bankrupt, who, after a strict examination, has proved before proper judges, that either the fraud, or losses of others, or misfortunes unavoidable by

human prudence, have stripped him of his substance, ought to receive a very different treatment.").

This principle has remained a fixture throughout the entire evolution of bankruptcy law in the United States. During the debate on one of Congress's first attempts at a federal bankruptcy code in 1840, for example, then-Senator Martin Van Buren called "the distinction between fraud and misfortune the great point." *Life of Martin Van Buren* (June 13, 1840)*, in Volumes of Speeches Delivered in Congress* 326 (Globe Office, 1840). "[I]mprisonment of the unfortunate debtor . . . ought everywhere to be regarded as an outrage," he observed. *Id.* But "[o]n a man imprisoned for [fraud]," he continued, "the community would look with feelings of indifference." *Id.*

Debtors are of course no longer imprisoned today, but Congress has always been wary of granting the privileges of bankruptcy to those who have secured debts through frauds. When it first allowed discharge of debts without creditor consent in 1867, Congress provided a "long list of dishonest or otherwise reprehensible acts" that would disqualify a debtor from any discharge whatsoever. Vern Countryman, *Bankruptcy and the Individual Debtor—A Modest Proposal to Return to the Seventeenth Century*, 32 Cath. U.L. Rev. 809, 815-16 (1983); *see also* 40th Cong., ch. 258, 15 Stat. 227, 228 (1868). And that principle, expressed in various forms, has been embodied in our bankruptcy laws ever since.

As the United States has advised this Court, "[t]he policy against discharging debts incurred by fraud is deeply embedded in the bankruptcy law, and has been recognized in every bankruptcy statute since the Act of March 2, 1867." *Grogan* U.S. Amicus Br. 13, 1990 WL 10022411; *see also* U.S. Amicus Br. 10, *Husky Int'l*

Electronics, Inc. v. Ritz, 136 S. Ct. 1581 (2016), 2015 WL 9488262 ("Congress[] [has made a] policy determination that an individual who owes a debt for money or property obtained by fraud is not the type of honest but unfortunate debtor who is entitled to the benefits of the bankruptcy system. That determination reflects the broader understanding that equitable principles govern the exercise of bankruptcy jurisdiction, and that a creditor's right to recovery is paramount in the face of a debtor's dishonesty."); *Cohen*, 523 U.S. at 217; *Grogan*, 498 U.S. at 287; *Brown v. Felsen*, 442 U.S. 127, 128 (1979).

2. By the time Congress enacted the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (the predecessor to the modern Bankruptcy Code), it had begun to express the anti-fraud principle in language still used today. Section 17(2) of the 1898 Act, codified at 11 U.S.C. § 35 (1932), made discharge unavailable for "judgments in actions for fraud," or where property was obtained "by false pretenses or false representations." 30 Stat. at 550. A few years later, Congress amended Section 17 to provide that "liabilities for obtaining property by false pretenses or false representations" would be nondischargeable, thereby clarifying that debts arising from a debtor's dishonest conduct would be protected from discharge even if they had not been reduced to a judgment by the time the bankruptcy proceedings commenced. Pub. L. No. 57-62, 32 Stat. 797, 798 (1903).

At the same time, Congress amended a different portion of the Act, Section 14 (codified at 11 U.S.C. § 32), to provide that a debtor would not be entitled to discharge *at all*—for *any* debts, not just fraudulently obtained ones—if the debtor had "with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained," or "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining property on credit." 32 Stat. at 797-98. This wholesale prohibition on discharge applied on top of the more targeted prohibition in Section 17(2).

An unintended loophole in Section 14, however, led Congress, in 1926, to introduce the "statement respecting . . . financial condition" language implicated in this case. By that time, it had become common for commercial credit agencies like R.G. Dun & Co. and the Bradstreet Company to obtain "statement[s] of assets and liabilities" from debtors, then either publish the statement itself or a credit rating based on that statement for the use of creditors who subscribed to the agencies' services. *J.W. Ould Co. v. Davis*, 246 F. 228, 229 (4th Cir. 1917). As a result, the question arose as to what happened when a creditor relied on that report—a statement that did not come directly from the debtor, but instead indirectly via the credit agency's publication. Was a debt procured as a result of such a statement nondischargeable because it was a product of fraud?

In several cases, debtors had made "false representations of solvency . . . to commercial agencies," rather than directly to their creditors. *Id.* at 230. The debtors argued that because they had not given their false financial statement to the person from whom they actually obtained the credit, Section 14, by its terms, did not apply. Most courts agreed, holding that "the ordinary statement of financial condition made to a *mercantile agency* for general circulation among its inquiring subscribers would not be within the statute," *In re Russell*, 176 F. 253, 258 (2d Cir. 1910) (emphasis added), and that creditors who had relied on the (misinformed) credit agencies rather than obtaining information from the borrower directly would therefore be unable to prevent discharge of the fraudulently obtained debt.

To close this loophole, a number of influential groups, including the American Bar Association and others, suggested amending the statute in 1925 to preclude discharge by any person who had "[o]btain[ed] money or property on credit by making or publishing or causing to be made or published in any manner whatsoever a materially false statement in writing." *Revision of the Bankruptcy Law: Hearing on H.R. Res. 353 Before the H. Comm. on the Judiciary,* 68th Cong. 45 (1925) (statement of Joseph B. Jacobs, Member of Bankruptcy Committee of the Commercial Law League). That language was drafted "as broad as [its authors] could do it, in order to make it as effective" as possible. *Id.* at 47. The legislator who ultimately introduced the fix in the House was concerned to ensure that it "does not cover too much ground," *id.*, though, and the provision was eventually narrowed to apply only to a debtor who "ma[de] or publish[ed] or caus[ed] to be made or published . . . a materially false statement in writing *respecting his financial condition*," Pub. L. No. 75-696, § 14, 52 Stat. 840, 850 (1938) (emphasis added).

This is where the "statement . . . respecting . . . financial condition" language in the Bankruptcy Code appears to have originated. And, to be clear, it was added to protect creditors *against* the discharge of debts procured through fraud where a creditor relied upon a false financial statement prepared by a debtor and (unintentionally) repeated by a credit agency as to the debtor's overall financial status.

3. Fixing one unanticipated problem led to another. Over time, the provision put in place to address a specific fraudulent practice by *debtors* (submission of false financial statements to credit reporting agencies in order to manufacture favorable credit ratings) gave rise to an unsavory practice by *creditors*. Some creditors began to threaten that they would bring forward financial statements that had only arguably been false, or as to which the debtor may have simply made an honest mistake, unless the debtor agreed to repay the debt to that particular creditor in full. And because of Section 14's rule that a debtor who had made a false financial statement in writing for the purpose of obtaining property on credit would be denied *all* discharge, debtors often agreed to the creditors' demands as to the individual debt even where they would very likely have prevailed had the issue been fully litigated. *Limiting the Use of False Financial Statements As A Bar To Discharge In Bankruptcy*, H.R. Rep. No. 86-1111, at 2 (1959).

By 1959, the House Committee on the Judiciary reported that the prospect of having all discharge denied if a false financial statement were brought to light had given "[a]n unscrupulous lender armed with a false financial statement . . . a powerful weapon with which to intimidate a debtor into entering an agreement in which the creditor agrees not to oppose the discharge in return for the debtor's agreement to pay the debt in full after discharge." *Id.* And, indeed, to take advantage of the blanket discharge rule, some creditors had "condoned, or even encouraged, the issuance of statements [by debtors] omitting debts," which they could later use to force the debtor into agreeing to more favorable terms. *Id.* Congress therefore revised the statute "to eliminate as a ground for the *complete* denial of a discharge the obtaining of money or credit through false financial statements issued by a nonbusiness bankrupt," thus making Section 14's complete-discharge rule inapplicable to consumer debt. *Id.* at 1 (emphasis added).

The 1960 amendment, however, failed to eliminate this practice. As this Court recognized in *Field*, even without the blanket-discharge provision, consumer finance companies still sometimes found it advantageous to elicit incomplete financial statements "by their borrowers for the very purpose of insulating their own claims from discharge." 516 U.S. at 76-77. For that reason, a congressional Commission appointed to suggest changes to the bankruptcy laws recommended "that the false financial statement exception to discharge be eliminated for consumer debts." H.R. Rep. No. 95-595, at 131 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6092. Congress, however, declined to go that far, recognizing "that there are actual instances of consumer fraud, and that creditors should be protected from fraudulent debtors." *Id.* But it did decide to "balance the scales more fairly." *Id.*[1]

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[1] As this Court recognized in *Field*, the Committee charged with overseeing this revision described the problem as follows:

> It is a frequent practice for consumer finance companies to take a list from each loan applicant of other loans or debts that the applicant has outstanding. . . . The forms that the applicant fills out often have too little space for a complete list of debts. Frequently, a loan applicant is instructed by a loan officer to list only a few or only the most important of his debts. Then, at the bottom of the form, the phrase "I have

4. So, as part of the Bankruptcy Code of 1978, Congress separated the "false financial statement exception," *id.*, into a new subpart of the statute—codified at 11 U.S.C. § 523(a)(2)(B)—which addressed the use of written "statements respecting . . . financial condition." 11 U.S.C. § 523(a)(2)(B)(ii). The new provision moderated the rule against discharge in these circumstances by requiring a creditor to show that it had "reasonably relied" on the false financial statement and that the debtor had made the statement with "intent to deceive." *Id.* § 523(a)(2)(B)(iii)-(iv). At the same time, Congress added to the end of Section 523(a)(2)(A) the clause at issue in this case—"other than a statement respecting . . . financial condition"—which ensured that such statements would be subject to the added requirements in Section 523(a)(2)(B).

The relevant provisions of Section 523 enacted in 1978 have remained materially unchanged since.

II. THIS CASE

A. Factual Background

Lamar, Archer & Cofrin, LLP (Lamar), is a law firm established in 1982 in Atlanta, Georgia. In 2004, Appling hired Lamar and another law firm (Gordon), to represent Appling in connection with litigation against the former owners of a business he had recently purchased. Pet. App. 21a. Appling agreed to pay Lamar and Gordon for their services on an hourly basis with fees due monthly. *Id.* As the litigation

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> no other debts" is either printed on the form, or the applicant is instructed to write the phrase in his own handwriting.

516 U.S. at 77 n.13 (quoting H.R. Rep. No. 95-595, at 130).

proceeded, however, Appling fell behind in his payments for the services he received. *Id.*

By March 2005, Appling owed Lamar more than $60,000 and Gordon roughly $18,000 in unpaid legal fees. *Id.* Lamar informed Appling that if he were unable to bring fees current, Lamar would be forced to terminate its representation in an appropriate manner. *Id.* at 21a-22a. The parties met in Gordon's offices on March 18, 2005, to discuss the situation. *Id.* at 22a. At the meeting, Appling told Lamar and Gordon that he had consulted an accountant, and that he would soon be filing an amended tax return, entitling him to a tax refund of approximately $100,000—enough to cover current and anticipated legal fees. *Id.* at 22a, 54a. Based on that representation, Lamar and Gordon agreed to continue their representation of Appling. *Id.* at 41a, 61a.

Bills continued to go unpaid. And, in November 2005, Lamar and Appling met to discuss the outstanding legal fees again. At the meeting, Appling told Lamar that his accountant had improperly handled the amended return. *Id.* at 22a-23a, 57a. As a result, Appling claimed, he had been forced to refile the return himself, and so had not yet received his refund. *Id.* at 23a, 57a. Appling assured Lamar, however, that he still expected to receive an amount sufficient to cover all of his mounting legal fees. *Id.* at 23a. Once again, Lamar continued its representation of Appling on the basis of his assurances, ultimately obtaining a settlement of Appling's dispute that significantly lowered Appling's remaining financial obligations to the former owners of his business. *Id.* at 41a, 48a-49a, 61a-62a.

It turned out, however, that Appling had lied about his tax return. In June 2005, Appling did sign and submit an amended tax return. *Id.* at 22a, 48a. But that return sought a refund of roughly $60,000, not the approximately $100,000 he had touted. *Id.* Moreover, Appling received the refund in October 2005—before the November 2005 meeting at which he claimed to have not yet received the refund (and asked Lamar and Gordon to continue their representation anyway). *Id.* at 22a, 48a-49a. And, contrary to his stated intent, Appling never paid any of the refund money he did receive to Lamar or Gordon, but instead spent it elsewhere. *Id.* at 23a.

When Lamar learned the truth in June 2006 that Appling had received the refund and used it on his own business, rather than paying his outstanding legal fees as he had promised, it understandably believed it had been swindled. Lamar demanded payment of all outstanding fees within 14 days. *Id.* And when Appling failed to satisfy Lamar's demand, Lamar sued Appling in Georgia state court, obtaining a judgment in October 2012 for the amount of the outstanding legal fees—$104,179.60. *Id.*

Three months later, Appling and his wife filed for bankruptcy under Chapter 7 of the Bankruptcy Code. Their petition sought to discharge all of their personal debts, including the $104,000 judgment Lamar had obtained against Appling, while retaining exempt assets (*i.e.,* assets Appling and his wife would be allowed to keep) worth more than $550,000. *See id.*; Chapter 7 Voluntary Petition (Form B6C), *In re R. Scott Appling*, No. 13-30083 (Bankr. Ct. M.D. Ga. Jan. 18, 2013), ECF No. 1 (identifying more than $550,000 in property claimed as exempt).

B. Procedural History

1. In April 2013, Lamar initiated an adversary proceeding in the bankruptcy court for the Middle District of Georgia, seeking a determination that Appling's $104,000 debt to Lamar was not dischargeable under 11 U.S.C. § 523(a)(2)(A) because it was obtained by fraud. Appling moved to dismiss the complaint, arguing, among other things, that the prohibition on discharging such debts did not apply because the alleged false statements about his tax refund were "statement[s] respecting [his] . . . financial condition." Pet. App. 70a (omission in original) (quoting 11 U.S.C. § 523(a)(2)(A)).

The bankruptcy court denied Appling's motion. *Id.* at 67a-81a. Agreeing with the majority view in the courts of appeals on how to interpret the phrase "respecting the debtor's . . . financial condition," the court held that the anti-discharge exception is limited to "'communications that purport to state the debtor's overall net worth, overall financial health, or equation of assets and liabilities.'" *Id.* at 71a (citation omitted). Because Appling's alleged misrepresentations about "a single asset, the tax refund," were not representations about his "overall financial condition or net worth," the "other than" clause in Section 523(a)(2)(A) was inapplicable. *Id.* at 73a, 76a.

2. Following a two-day trial, the bankruptcy court issued findings of fact and conclusions of law resolving the adversarial proceeding. *Id.* at 45a-66a. The court found that Appling had "knowingly made a false representation with intent to deceive when he represented" that his tax refund would be "approximately $100,000" and, later, that "he had not yet received the refund." *Id.* at 54a, 58a. The court

accepted Appling's testimony that he had told Lamar and Gordon that the tax return had not yet been prepared by the time of the March 2005 meeting. *Id.* But based on Appling's shifting accounts and the testimony of others, the court found that Appling had lied when he told them at that meeting that his accountant had estimated that the refund would be upwards of $100,000. *Id.* at 54a-55a. The court also found that Appling had lied at the November 2005 meeting when he said he had not received the refund, pointing to the conflicting testimony of Appling's wife about that meeting. *Id.* at 58a-59a; *see id.* at 55a.

The bankruptcy court further found that Lamar relied on Appling's representations about the tax refund in providing services, was justified in so doing, and was harmed thereby. *Id.* at 62a-66a. The court rejected Appling's argument that Lamar could not have justifiably relied on Appling's lies about the tax refund because it was "fully aware of [Appling's] precarious financial condition" more generally, as a result of financial information about Appling's business provided to Lamar in the course of the representation. *Id.* at 61a-62a. Accordingly, the court held that Lamar's claim against Appling is not dischargeable under Section 523(a)(2)(A). *Id.* at 66a.

3. Appling appealed the bankruptcy court's decision to the district court. Like the bankruptcy court, the district court concluded that "[a] statement pertaining to a single asset is not a statement of financial condition." *Id.* at 29a. Because Appling's false statements concerned a "single asset," rather than his "financial condition" (*i.e.*, his "net worth, overall financial heath, or equation of assets and liabilities"), the court affirmed. *Id.* at 30a. In so holding, the court affirmed the bankruptcy court's

findings that Appling lied as to the tax refund. *Id.* at 32a-35a. The court also rejected Appling's argument that Lamar's supposed knowledge of Appling's overall "financial problems" precluded any reasonable reliance on Appling's lies about the tax refund itself. As the court observed, "[p]oor overall financial health does not inherently preclude the receipt of a substantial tax refund." *Id.* at 39a-40a.

4. Appling appealed again, and the Eleventh Circuit reversed. *Id.* at 1a-19a. In interpreting Section 523(a)(2)(A), the court of appeals acknowledged that "'financial condition' likely refers to the sum of all assets and liabilities," or "one's overall financial status." *Id.* at 7a-8a. Nevertheless, the court opined, "it does not follow that the phrase 'statement *respecting* the debtor's . . . financial condition' covers only statements that encompass the entirety of a debtor's financial condition at once." *Id.* at 8a (alteration in original) (citation omitted). The term "respecting" is "defined broadly," the court said, to mean "relates to" or "impacts." *Id.* at 8a-9a. And because a statement about a single asset represents "a partial step toward knowing whether the debtor is solvent or insolvent," the court held that such a statement unambiguously qualifies as a "statement respecting . . . financial condition." *Id.* at 9a.[2]

This Court granted certiorari.

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[2] Judge Rosenbaum concurred. She concluded that the statutory language was at least ambiguous, but nevertheless agreed with the majority based on her policy views. Pet. App. 18a (Rosenbaum, J., concurring in the judgment).

SUMMARY OF ARGUMENT

The text of Section 523(a)(2)(A), as well as other traditional indicia of Congress's intent, compel the conclusion that a statement about a single asset is not a "statement respecting . . . financial condition."

I. Starting with the text, it is undisputed that "financial condition" has a well-accepted meaning: one's *overall* financial status. Congress's use of the term "financial condition" therefore indicates that Congress was focused on overall financial status in Section 523(a)(2)(A). Yet, interpreting "respecting . . . financial condition" to include anything "*related to* financial condition" eviscerates that choice. Because "everything is related to everything else," *California Div. of Labor Standards Enf't v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring), almost every statement that could support the extension of credit—even a statement about a single asset that makes no representation about the debtor's overall financial health—qualifies as a "statement respecting . . . *financial condition*." The Eleventh Circuit's construction of "respecting" thus negates the limitations inherent in the accepted meaning of "financial condition" as a relative term that refers to one's overall financial status.

By contrast, interpreting "respecting . . . financial condition" to mean "*about* financial condition" or "*concerning* financial condition" gives effect both to Congress's use of the "financial condition" limitation and also its use of "respecting" to describe the subject of the statement in question. Appling himself acknowledges that "respecting" can mean "about," "concerning," or the like. Using that meaning, the statute captures not only a detailed accounting of one's overall financial status (such as a formal financial statement) but also less conventional descriptions of one's overall liquidity or a general statement like, "Don't worry, I am above water," without sweeping in every statement about a discrete pecuniary item (asset or liability) that does not actually concern one's overall financial status.

Sometimes, of course, Congress does use the phrase "related to." Indeed, Congress used that formulation elsewhere in the Bankruptcy Code and elsewhere in the 1926 enactment that first introduced the "statement respecting . . . financial condition" language to the federal bankruptcy laws. But the very fact that Congress used that "related to" formulation elsewhere in the same statutes, while choosing to use "respecting" in the provision at issue here, reinforces the conclusion that Congress intended "respecting" to mean something other than "related to." So does the common sense fact that Congress would have been unlikely to intend "statement respecting . . . financial condition" to have a meaning that would gravely undermine Section 523(a)(2)(A)'s anti-discharge rule where property or services were procured by fraud.

II. The text alone is sufficient to compel reversal of the Eleventh Circuit's decision, but the longstanding background principles against which Congress acted and the history of the statutory language in question further reinforce that Congress could not have intended the Eleventh Circuit's interpretation. As this Court has observed time and time again, the bankruptcy laws evince a "basic policy . . . of affording relief only to an 'honest but unfortunate debtor.'" *Cohen*, 523 U.S. at 217 (quoting *Grogan*, 498 U.S. at 287)). Congress undoubtedly was well aware of that principle when it enacted the language at issue, and there is no indication that it intended the major departure from that rule that the Eleventh Circuit's reading would effectuate.

Instead, as this Court has already recognized, in adopting the language at issue, Congress simply sought to address a particular practice engaged in by some consumer finance companies as to a particular type of representation—"false financial statements." *Field*, 516 U.S. at 76. Interpreting Section 523(a)(2)(A) to except only statements *about* "financial condition" fully serves that interest, without undermining the background rule against which Congress legislated. Interpreting Section 523(a)(2)(A) to except all fraudulent statements *related to* "financial condition," by contrast, would reward a broad class of fraudsters (like Appling) far removed from the particular circumstances Congress sought to address. The Eleventh Circuit's decision would essentially free debtors to lie about their finances in order to dupe individuals or business into extending them credit, property, or services. Talk about hiding an "elephant in a mousehole."

III. Appling's and the government's remaining arguments also fail. First, the notion that Congress intended a broad interpretation of "statement respecting . . . financial condition" in order to obtain more "reliable evidence" in bankruptcy proceedings is sheer speculation. There is no evidence that Congress had either "reliability" or "evidentiary" concerns in mind when it adopted the amendments at issue. Nor is there any indication that Congress wanted to achieve such objectives by penalizing victims like Lamar who can show that they justifiably relied on intentionally false statements concerning specific assets. This argument only underscores the problems inherent in relying on supposed, unstated legislative purposes to construe a statute's meaning.

Second, Congress did not seek to ratify any lower court interpretation that "statement respecting . . . financial condition" included every statement related to any specific asset or liability. The vast majority of pre-1978 cases applying the predecessor provision involved false financial statements about a debtor's overall financial condition—and thus are consistent with Lamar's interpretation of Section 523(a)(2)(A). Moreover, the few cases Appling identifies in which pre-1978 courts adopted a broader interpretation arose under a version of the bankruptcy laws in which proving that a debtor had made a false "statement respecting . . . financial condition" was a basis for *denying* discharge, rather than granting it. Thus, to the extent Congress sought to codify any case law in 1978, as Appling argues, it would have sought to affirm the then-existing rule that misrepresentations about specific assets would *bar* discharge.

Finally, the government's suggestion of "line-drawing problems" provides no basis for departing from the text either. Answering the question presented of whether a single asset qualifies as a "statement respecting . . . financial condition" will not create any line-drawing problems. Moreover, there is no evidence of any line-drawing problems in the circuits that have construed the statute narrowly in the way Lamar has proposed. Under either interpretation, the application of Section 523(a)(2)(A) will be case-specific. But the line-drawing problems this Court should be concerned about come from trying to articulate and enforce a meaningful "related to" limit, as the Eleventh Circuit's interpretation would require the courts to do. This Court's own experience confirms the difficulty of *that* task.

ARGUMENT

I. THE ELEVENTH CIRCUIT MISREAD THE TEXT OF SECTION 523(a)(2)(A)

"[I]nterpretation of the Bankruptcy Code starts 'where all such inquiries must begin: with the language of the statute itself.'" *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (citation omitted). Here, the relevant language is "statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A). The question is whether a statement concerning a specific asset qualifies as a "statement respecting the debtor's . . . financial condition." The Eleventh Circuit held that the statute unambiguously answers that question in the affirmative. Pet. App. 12a. That was error.

A. Congress's Use Of "Financial Condition" Is Telling

There is no dispute that lies about individual assets come within the general rule in Section 523(a)(2)(A) that the Bankruptcy Code "does not discharge an individual debtor from any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). Thus, there is no question that Section 523(a)(2)(A) prohibits the discharge of the debt at issue, unless the last clause of the provision— "other than a statement respecting the debtor's or an insider's financial condition"—exempts Appling's lies from the general rule.[3]

Even as to the meaning of the "other than" clause, there is significant common ground among the parties, the Eleventh Circuit, and the government. Neither Appling, the Eleventh Circuit, nor the government has disputed that "financial condition" is a term of art that refers to one's overall financial health or status. *See* Appling CA11 Br. 16; Pet. App. 8a-9a; U.S. Invitation Amicus Br. 14. As the Eleventh Circuit noted (Pet. App. 7a), the Bankruptcy Code itself uses "[f]inancial condition" to define "insolvent." Pet. App. 7a; *see* 11 U.S.C. § 101(32)(A) ("insolvent" means "*financial condition* such that the sum of such entity's debts is greater than all of such entity's property" (emphasis added)). "Financial condition" is thus different from a term like "finances," which refers not to an overall *status* but to individual financial items. *See, e.g.*, *Finance*, *Oxford English Dictionary* (online ed.), http://www.oed.com (last visited Feb. 26, 2018) ("*pl.* The pecuniary resources . . . of a company or an individual."); *Finances*, *Merriam-Webster.com* (online ed.), https://www.merriam-webster.com/dictionary/finances (last visited Feb. 23, 2018) ("money or other liquid resources of a government, business, group, or individual").

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3 The Bankruptcy Code defines "insider" to include a "relative of the debtor or of a general partner of the debtor;" "partnership in which the debtor is a general partner;" "general partner of the debtor, or;" "corporation of which the debtor is a director, officer, or person in control." 11 U.S.C. § 101(31)(A). Because Appling is a debtor, this case does not concern an "insider."

"Financial condition" was a familiar term long before the Bankruptcy Code's adoption in 1978. At the time the "statement respecting . . . financial condition" language was first integrated into federal bankruptcy law in 1926, reference materials explained that a business's "financial condition" "considered (a) balance between assets and liabilities, and nature of each, (b) relation of current assets to current liabilities and turnover of stock, (c) insurance carried, (d) method of paying debts, (e) proportion of capital invested and borrowed," and so forth. Richard P. Ettinger & David E. Golieb, *Credits and Collections* 95 (2d ed. 1917), https://ia802604.us.archive.org/20/items/creditsandcolle01goligoog/creditsandcolle01goligoog.pdf.

Likewise, "financial condition" was commonly used to refer to one's overall financial status. For example, in the 1920s, credit agencies like the Bradstreet Company mailed forms to businesses "respectfully request[ing] that you furnish us a statement of your financial condition, on the within form," accompanied by a form on which the company requested various financial information, including assets, liabilities, insurance coverage, and other similar information. Robert H. Montgomery, *Auditing Theory And Practice* 398 (3d ed. 1921), https://play.google.com/books/reader?id=5fFCAAAAIAAJ (reproducing a sample form from the Bradstreet Company); *see also id.* at 397 (noting that "[t]hese forms are supplied to practically every business concern, and are therefore more familiar to the average business man than any others"). And, as discussed (*see supra* at 8-9), it was the widespread use of the reports that credit agencies produced from these wide-ranging statements about "financial condition" that prompted the addition of the "statement respecting . . . financial condition" language to the bankruptcy laws in the first place.

Congress's use of "financial condition," as opposed to something like "finances" or "financial information" (either of which would cover a broad universe of items regardless of one's *overall* state), therefore is telling—and, like the rest of the statute, must be given effect. *See Cooper Indus., Inc. v. Aviall Servs., Inc.,* 543 U.S. 157, 167 (2004) (applying "the settled rule that we must, if possible, construe a statute to give every word some operative effect"); *United States v. Standard Brewery Co.,* 251 U.S. 210, 218 (1920) ("It is elementary that all of the words used in a legislative act are to be given force and meaning . . . . It is not to be assumed that Congress had no purpose in inserting them or that it did so without intending that they should be given due force and effect.").

B. The Eleventh Circuit's Open-Ended Construction Of "Respecting" Does Not Withstand Scrutiny

Of course, Section 523(a)(2)(A) does not refer to "financial condition" in isolation. It says "statement respecting . . . financial condition." The Eleventh Circuit was right to consider the surrounding text, but ultimately it drew the wrong conclusion from context. Zeroing on the use of "respecting," the Eleventh Circuit pointed to dictionary definitions and various uses of "respecting" in which the word is used broadly to mean "'[w]ith regard or relation to.'" Pet. App. 8a. Based on such sources, it concluded that anything that "'relates to' or 'impacts' a debtor's overall financial condition," or provides even "a partial step toward knowing whether the debtor is solvent or insolvent," unambiguously qualifies as a "statement respecting . . . financial condition." *Id.* at 9a. That construction does not withstand scrutiny.

1. The Eleventh Circuit's nearly myopic focus on "respecting" violates at least two fundamental principles of statutory construction: first, "the words of a statute must be read in their context," *Utility Air Regulatory Grp. v. EPA,* 134 S. Ct. 2427, 2441 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000)); and, second, "all of the words used in a legislative act are to be given force and meaning," *Standard Brewery,* 251 U.S. at 218; *accord Cooper Indus., Inc.,* 543 U.S. at 167; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167, 174 (2012) ("Context is a primary determinant of meaning"; "If possible, every word . . . is to be given effect").

Here, Congress used "respecting" alongside "financial condition"—a relative term that refers to one's overall financial status, not any particular asset or liability. By failing to read "respecting" in context, the Eleventh Circuit adopted a construction of the statute that renders Congress's use of "financial condition" largely meaningless. Under that view, any statement *related to* one's finances, or that *impacts* one's finances, qualifies as a "statement respecting . . . financial condition"—regardless of whether it says anything about one's *overall* financial status. Pet. App. 9a. That reading thus renders Congress's use of "financial condition" indistinguishable from a formulation like "respecting the debtor's *finances*" or "respecting the debtor's *assets or liabilities*."

"But"—as this Court recently observed in a similar context—"Congress didn't choose those other words. And respect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own." *Murphy v. Smith*, ___ S. Ct. ____, No. 16-1067, 2018 WL 987346, at *2 (U.S. Feb. 21, 2018); *see also, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) (holding that a statute should not be construed so as to render a term "insignificant"). The Eleventh Circuit's construction effectively replaces "financial condition" with "financial information" or the like.

2. This would be a far more difficult case if the Court had to pick between giving effect to Congress's use of "respecting" or its use of "financial condition." But it doesn't. Although it is true that "respecting" *can* be "defined broadly," Pet. App. 8a, it isn't always used that way. "Respecting" is often used to mean "about." *Respecting, Webster's New Twentieth Century Dictionary Unabridged* (2d ed. 1977); *see also Thorndike Comprehensive Desk Dictionary* (1957) ("With respect to; about; concerning"); *Webster's New World College Dictionary* (4th ed. 2010) ("concerning; about"). In a similar vein, "respecting" can mean "with reference to" or "as regards," thereby indicating the subject or focus of a given statement. *Respecting, prep.*, *Oxford English Dictionary* (online ed.), http://www.oed.com (last visited Feb. 22, 2018); *see also Webster's Collegiate Dictionary* (1925) ("1. Considering; in view of. 2. With regard to; concerning."). Appling himself recognizes these additional meanings. BIO 14 (citing *Webster's New Twentieth Century Dictionary* 1542 (2d ed. 1967) (defining "respecting" to include "concerning," "about," "regarding," and "in regard to")).

A "statement respecting . . . financial condition," on that reading, is a statement that is "about," or that makes "reference to," the debtor's overall financial state or well-being. And, indeed, that is how this Court has understood the phrase in the past, recognizing that Congress was concerned with "lies *about* financial condition." *Field v. Mans*, 516 U.S. 59, 76-77 (1995) (emphasis added). That definition would include the kinds of "financial statements" used by creditors on which Congress evidently was focused (both in 1926 and when it adopted the amendments at issue in 1978) requiring loan applicants to provide a detailed listing of various financial data (rather than to simply identify a discrete asset or liability). It would also include less formal or detailed descriptions of financial status, such as a representation about one's credit score or net monthly cash flow, or a statement that "I am in good financial shape." But it would not include statements, like the lies at issue here, that were not "about" or made no "reference to" the debtor's overall financial condition, but instead described only a single specific asset.

A statement about a single asset, such as a car pledged as collateral on a loan, might well be material to the decision to extend credit in a given case. But a statement about a single asset cannot naturally be described as a statement about one's *overall* financial status. This case itself illustrates the point. When it came to the statute's reliance element, Appling argued that Lamar could not have reasonably relied on Appling's lies about his tax refund because Lamar supposedly knew about Appling's "poor financial condition" and "financial problems" based on Lamar's knowledge of Appling's business. Pet. App. 39a; *see id.* at 39a-40a; *id.* at 61a-62a. The two may be connected, but as the district court observed, "[p]oor overall financial health does not inherently preclude receipt of a substantial tax refund." *Id.* at 40a.

Importantly, this interpretation—unlike the Eleventh Circuit's—gives meaningful effect to *both* "respecting" *and* "financial condition." "Respecting" broadens the scope of statements about one's overall financial status or health that qualify beyond a classic financial statement or balance sheet. For example, the statement could be a credit application that contains a detailed list of various financial data that show liquidity, a general reference to one's financial health like "I am solvent," or any number of other statements providing a more holistic snapshot of one's financial status. But under this interpretation, Congress's decision to use "financial condition," as opposed to "finances" or "financial information," is still respected. *See Murphy*, 2018 WL 987346, at *2.

3. The statutory history of the "statement respecting . . . financial condition" language bolsters this construction. As discussed above, Congress first used that phrase in the 1926 Act. In that same Act, Congress added a separate provision imposing a penalty for falsifying records "affecting or *relating to* the property or affairs of a bankrupt." Pub. L. No. 69-301, § 11, 44 Stat. 662, 665 (1926) (emphasis added). That Congress chose to use the "respecting . . . financial condition" language in the anti-discharge provision of the 1926 Act—instead of the broader "affecting or relating to the property or affairs of a bankrupt" language used in Section 11—underscores that Congress intended a narrower meaning there. Congress also used the phrase "relating to financial condition" elsewhere in the 1978 Bankruptcy Code, *see* 11 U.S.C. § 1142(a), underscoring that Congress did not intend "respecting . . . financial condition" to mean "*relating to* financial condition."

As this Court has explained, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). And the "'[n]egative implications raised by disparate provisions are strongest' in those instances in which the relevant statutory provisions were 'considered simultaneously when the language raising the implication was inserted,'" *Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008) (citation omitted), as is the case here.

Appling himself has recognized that Congress knows how to say "relating to" when it wants to. *See* BIO 16-17 (noting that the Airline Deregulation Act "preempts state laws '*relating to* rates, routes, or services of any air carrier'" (emphasis added in original) (citation omitted)). That only reinforces the point that, if Congress really had wanted to go so far as exempting any statement "relating to" financial condition, it would have said so. But Congress instead chose to exempt from discharge only "statement[s] respecting . . . financial condition." The Eleventh Circuit's construction negates that choice.

4. The Eleventh Circuit's construction also contravenes the rule that "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." Scalia & Garner, *supra*, at 63. Here, the "clear purpose of [Section 523(a)(2)(A)], as gathered from the words alone," is to protect *creditors* from the frauds perpetrated upon them by debtors who have lied in order to gain property or services from them. *Id.* Obviously the last clause of the provision carves out

an exception, but the question is *how big* an exception? As between two possible interpretations—one producing a targeted exemption for statements about one's overall financial status and another creating a major loophole for statements in any way related to one's finances—the former is plainly the one that furthers the "document's purpose."

If a "statement respecting . . . financial condition" includes anything "related to" a debtor's finances, little will be left to be covered by Section 523(a)(2)(A)'s general rule—under which debts for "money, property, services, or an extension, renewal, or refinancing of credit . . . obtained by . . . a false representation" are generally nondischargeable. That is because, as Justice Scalia observed in a similar vein, "everything is related to everything else." *See California Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (concurring) ("[A]pplying [ERISA's] 'related to' provision according to its terms would be a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else."); *see also Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 149 (2009) (quoting same with approval). The Eleventh Circuit's interpretation gives the "other than" carve-out an implausibly broad reach and transforms a general rule barring the discharge of debts procured through fraud into a license to lie to the moon about one's finances.

After all, what representation leading to the extension of credit or property, for example, is *not* in some way "related to" the debtor's financial condition? As one court put it, "it is difficult to conceive of any false representation regarding an asset or a particular financial condition that could justifiably induce 'an extension, renewal or refinancing of credit' that would not also be a 'statement respecting the debtor's . . . financial condition' under the broad interpretation." *Barnes v. Belice (In re Belice)*, 461 B.R. 564, 577 n.8 (B.A.P. 9th Cir. 2011) (alteration in original) (citation omitted). "And yet the plain language of § 523(a)(2) contemplates on its face the existence of such representations, even if the broad interpretation renders them all but inconceivable." *Id.*

Appling has suggested that a debtor might lie about his job qualifications or the purpose of a particular payment, and that those statements would not fall within the Eleventh Circuit's rule. BIO 15 n.1. But the Eleventh Circuit, for its part, was non-committal on such a statement. S*ee* Pet. App. 12a. And it is hardly obvious that lying about one's ability to make money, or the purposes for which one's money is going to be used, is not "related to" one's financial condition under the Eleventh Circuit's construction, which sweeps in statements that refer to anything "impact[ing]" one's financial status—in "part[]." *Id.* at 9a. In any event, drawing those lines would provide bankruptcy courts—and attorneys—with full-time employment for years to come.

Of course, where Congress actually says "related to," as it did in the ERISA preemption provision that prompted Justice Scalia's "everything is related to everything else" quip in *California Division of Labor Standards Enforcement* (519 U.S. at 335 (concurring)), and in the contrasting provision of the 1926 Bankruptcy Act discussed above (*supra* at 29-30), the courts must attempt to interpret that phrase as best they can. But as this Court's own ERISA preemption jurisprudence attests, that endeavor is hardly a walk in the park. And where Congress has *not* used "related to" language, and where the language Congress actually used can be naturally read to have a more limited reach, there is no reason to presume that Congress intended to embark on the "project doomed to failure" of finding the outer limits of "related to." *California Div. of Labor Standards Enf't*, 519 U.S. at 335 (Scalia, J., concurring).

That is especially true where, as here, adopting an open-ended "related to" construction would defeat the central anti-fraud rule embodied by the statute at issue. Even if courts ultimately decided that statements about job qualifications and spending plans were somehow not "related to" a debtor's financial condition, it would remain the case that *most* statements made in an effort to secure credit, property, or services—indeed, anything related to finances—would come within the "other than" carve-out under the Eleventh Circuit's decision. For that reason, construing "statement respecting . . . financial condition" to mean anything that is "related to" or "impacts" finances would impermissibly cause the exception to take a huge bite out of Section 523(a)(2)(A)'s general anti-discharge rule. *See Regents of the Univ. of Cal. v. Public Emp't Relations Bd.,* 485 U.S. 589, 600 (1988) (declining to read exception in a way that "would swallow the rule").

C. The Court Can, And Should, Give Effect To All The Words Congress Used

For these reasons, the better, more natural, and correct construction of Section 523(a)(2)(A) is that "respecting . . . financial condition" means "about" or "with regard to" a debtor's overall financial status or health. That construction gives effect to both

Congress's use of "respecting" and "financial condition," it honors Congress's choice not to use the "affecting or relating to" language that it employed elsewhere, and it furthers the "document's purpose" as an anti-fraud provision (Scalia & Garner, *supra*, at 63). The text of the statute by itself, therefore, compels reversal of the Eleventh Circuit's decision.

II. THE CENTURIES-OLD "HONEST DEBTOR" PRINCIPLE AS WELL AS THE HISTORY OF THE PROVISION AT ISSUE REINFORCE THE CONCLUSION THAT THE ELEVENTH CIRCUIT MISREAD SECTION 523(a)(2)(A)

The Court need go no further to resolve this case. But in any event, other considerations reinforce the conclusion that Congress did not intend the construction reached by the Eleventh Circuit.

A. This Court Does Not Lightly Assume That Congress Intends A Bold Departure From Existing Practice

When Congress adopted the provision at issue in 1978, it did not write on a blank slate. It acted against the backdrop of the settled understanding that the bankruptcy laws embody a "basic policy . . . of affording relief only to an 'honest but unfortunate debtor.'" *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (citation omitted). As the United States has explained to this Court, "[t]he policy against discharging debts incurred by fraud is deeply embedded in the bankruptcy law, and has been recognized in every bankruptcy statute since the Act of March 2, 1867." U.S. Amicus Br. 13, *Grogan v. Garner*, 498 U.S. 279 (1991), 1990 WL 10022411.

Congress was unquestionably aware of that deeply entrenched policy when it enacted the Bankruptcy Code in 1978. And "[i]t is not lightly to be assumed that Congress intended to depart from [such a] long established policy." *United States v. Wilson*, 503 U.S. 329, 336 (1992). That is especially true here, where the question boils down to whether the perpetrator of a fraud should receive the bankruptcy law's aid in resisting his victim's effort to be made whole. It is, at the least, "unlikely that Congress . . . would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud." *Grogan*, 498 U.S. at 287. Certainly there is nothing in the record that suggests that Congress viewed the 1978 amendments as an occasion for a radical rethinking of and departure from the time-honored "honest but unfortunate debtor" principle.

To be sure, Congress wanted to carve an exception to the longstanding anti-fraud principle as embodied in Section 523(a)(2)(A). But the Eleventh Circuit's interpretation takes a sledgehammer to that principle. Under the Eleventh Circuit's interpretation, fraudsters can swindle innocent victims for money, property, or services by lying about their finances, then discharge the resulting debt in bankruptcy, just so long as they do so orally. Pet. App. 8a-9a. Any debts procured through lies that "relate to" or "impact" one's financial situation in anyway, even in part, are protected. *Id.* Thus, lies about whether one owns an asset offered for collateral, lies about how much that asset is worth, lies about whether the asset is unencumbered, lies about the existence (or nonexistence) of specific debts, and so on—any such statement, so long as it was made orally, is exempt from the anti-discharge rule.

"[S]uch a bold departure from traditional practice would have surely drawn . . . explicit statutory language and legislative comment." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 137 (2005) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994)); *see also Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). But neither Appling nor the Eleventh Circuit have pointed to, and we are not aware of, any indication in the legislative record Congress had any major shift like this in mind, or that some sudden groundswell to come to the aid of fraudulent debtors had developed on Capitol Hill.

B. The Statute's History Underscores That Congress Intended Only A Narrow Exception To Settled Practice

The absence of any evidence that Congress intended a bold shift in the centuries-old background principle that bankruptcy protection is reserved for the "honest but unfortunate debtor" is not surprising. As this Court itself has already explained, Congress had something entirely different—and far more targeted—in mind: it added the provision at issue to address a specific abuse by some creditors who were exploiting the use of "financial statements" in connection with consumer loan applications. *Field*, 516 U.S. at 76-77 & n.13. In other words, the history of the 1978 changes in Section 523(a)(2)(A) shows that Congress in fact intended to take a scalpel, not a sledgehammer, to the anti-fraud rule.

In *Field*, the Court described how Congress added the exception for "statements respecting . . . financial condition" to Section 523(a)(2)(A) in order to "moderate the burden on individuals who submitted false financial statements." 516 U.S. at 76. It did so "not because lies about financial condition are less blameworthy than others, but because the relative equities might be affected by practices of consumer finance companies, which sometimes have encouraged such falsity by their borrowers for the very purpose of insulating their own claims from discharge." *Id.* at 76-77. Congress was thus focused on a creditor practice that specifically involved written financial statements, as demonstrated by the House Report's discussion of the changes to Section 523(a)(2) under the heading "False financial statements." H.R. Rep. No. 95-595, at 129 (1977). And even there, Congress's response was not to immunize debtors who had intentionally defrauded genuinely blameless creditors, but instead merely to increase the particular showing the creditor would need to make as to that specific category of fraud.

To be sure, Congress did not limit its 1978 amendment to only classic financial statements; its "statement respecting . . . financial condition" language also encompasses less formal statements about a debtor's overall financial health, such as a statement that the debtor is credit-worthy. Originally, that broader phrase was necessary to ensure that the 1926 amendments would extend to debtors who caused credit agencies to publish a (falsely) positive credit rating of the debtor, without publishing the debtor's full financial statement. *See supra* at 8-9. And moving forward, that language prevented creditors from circumventing Congress's intent by simply re-styling their forms or framing their inquiries in a slightly different way to request the overall picture without the detail.

But there is no basis to conclude that, in targeting a specific abusive practice by some creditors in requiring applicants for consumer loans to complete written financial statements in the hopes that they would inaccurately complete the forms, Congress intended to sweep in a broad class of statements—such as statements referring to a single asset—as to which there was *no* evidence of creditor abuse and thus no reason to depart from the "basic policy . . . of affording relief only to an 'honest but unfortunate debtor.'" *Cohen*, 523 U.S. at 217 (citation omitted).

III. APPLING'S AND THE GOVERNMENT'S REMAINING ARGUMENTS LACK MERIT

None of Appling's or the Government's remaining arguments for adopting the Eleventh Circuit's interpretation withstands scrutiny.

A. Congress Did Not Decide To Excuse Certain Oral Frauds To Promote More "Reliable Evidence"

Appling claims (BIO 18-19) that his construction advances a supposed "legislative purpose" of creating "more reliable" evidence of frauds by "encourag[ing] creditors to rely on written statements." To get creditors to use written statements more frequently, the theory goes, Congress simply withdrew protection for creditors who are victimized by frauds perpetrated by oral statements. The Eleventh Circuit likewise opined that, while its rule "may seem harsh after the fact, especially in the case of fraud, . . . it gives creditors an incentive to create writings before the fact, which provide the court with reliable evidence upon which to make a decision." Pet. App. 13a.

There are several glaring flaws with this "legislative purpose" (BIO 18) argument. To begin with, Appling has identified no evidence that this *was* in fact the legislature's purpose. In neither his Brief in Opposition here, nor his court of appeals brief below, did Appling point to anything in the legislative record indicating that Congress desired to encourage more statements in writing by refusing protections to creditors who have been defrauded by oral misrepresentations. Nor did the Eleventh Circuit. It invoked the "Statute of Frauds" and "Uniform Commercial Code" as evidence of that the "law sometimes requires proof be in writing as a prerequisite to a claim for relief," Pet. App. 13a, but cited nothing in the legislative record indicating that Congress had any such purpose in mind here. This "purpose" argument therefore suffers from all of the flaws inherent in construing a statute to advance a purpose or background principle that Congress never identified. *See* Scalia & Garner, *supra*, at 56-57.

Moreover, if Congress truly desired that creditors only rely on written statements, there is no apparent reason why it would have withdrawn anti-discharge protection for oral statements "related to" a debtor's finances but preserved anti-discharge protection for whatever slim category of other oral statements remain covered by Section 523(a)(2)(A) on Appling's reading. Why, in other words, maintain an anti-discharge provision at all for debts procured through fraudulent oral statements? Or why would Congress insist on more "accura[te]" proof of a lie about one's finances than a lie about one's "job qualifications" or the "purpose and recipient of a payment" (BIO 15 n.1, 18)? There is no apparent reason why oral falsehoods about the former would be any more difficult to prove than oral falsehoods about the latter.[4]

Furthermore, to the extent that the Eleventh Circuit and Appling rely on some general notion that a fraud must be proved by a written instrument, they are mistaken. The Statute of Frauds and Uniform Commercial Code, which the Eleventh Circuit invoked, do impose "the requirement of a writing" (Pet. App. 13a), but only for a limited category of contracts, and only for purposes of policing the *enforceability* of such contracts. Lamar is not seeking to enforce a "contract" here; it is seeking to prevent the discharge of a confirmed debt obtained by fraud. And there is not, and never has been, a general rule of law or practice that "fraud" must be proved by the existence of a written instrument, whether for the purpose of creating more "reliable evidence" or to create an "incentive" to reduce frauds to writing. *Id.* Indeed, "fraud" is routinely—and convincingly—proved through oral testimony. That testimony must be tested through cross-examination or the like, as it was here. But there is no general rule that a fraud must be committed to writing to be cognizable by law.

A carve-out to an anti-fraud provision in the Bankruptcy Code also is hardly the place that

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[4] Under our view, by contrast, Congress's focus on false financial statements made in writing simply reflects the fact that the specific abusive practice on which it was focused involved such statements. *See Field*, 516 U.S. at 76 (explaining that Congress's decision to use slightly different reliance standards in Section 523(a)(2)(A) and (B) was "tied to the peculiar potential of financial statements to be misused not just by debtors, but by creditors who know their bankruptcy law").

Congress would start if it wanted to encourage greater reliance on written records. After all, the withdrawal of protection for oral statements only matters in circumstances where a creditor justifiably relied on the statement in question and can prove all of the other elements of its claim (including that the falsity was intentional and material). *See Field*, 516 U.S. at 68, 74-75 (describing elements required to establish applicability of Section 523(a)(2)(A)'s anti-discharge provision). And if a creditor's reliance on a given oral misrepresentation is otherwise justifiable, there is virtually no chance that the creditor will nevertheless decide *not* to rely on that oral statement, and to instead demand that the statement be made in writing, because of some remote fear that the borrower will turn out to be scamming it and will seek to discharge the resulting debt in bankruptcy. Appling's reading, in other words, will not have *ex ante* effects on creditor conduct. Instead, its only effect will be to deny recoveries to creditors who justifiably relied on statements that borrowers made for the express purpose of defrauding them—a result there is absolutely no reason to believe Congress intended. *See Grogan*, 498 U.S. at 287.

Finally, to the extent that the Eleventh Circuit believed that creditors should be required to protect themselves by demanding that all statements with an impact on finances be reduced to writing, it improperly substituted its own policy preferences for those of Congress. It was also mistaken in believing that creditors could "easily" comply with its preferred course. Pet. App. 13a. Even assuming bigger and more sophisticated commercial entities would be aware of the existence and judicial construction of Section 523(a)(2), and could protect themselves by demanding that statements related to finances be made in writing, the Eleventh Circuit's interpretation would represent a fundamental change for small businesses and individuals who may not always have the sophistication or leverage to demand that any finance-related statements be made in writing. *See In re Soderlund*, 197 B.R. 742, 746 (Bankr. D. Mass. 1996) (noting that a broad reading of "statement respecting . . . financial condition" would allow "egregious frauds . . . to be perpetrated upon naïve lenders," who "would mostly likely be amateur lenders—friends, family, and the like—rather than banks and other institutional lenders").

There is no indication that Congress intended to expose everyday creditors and ordinary Americans in that manner—whether in the name of protecting fraudsters or pursuing some unstated goal of improving the supposed quality or reliability of evidence in bankruptcy proceedings.

B. Congress Did Not Ratify A Supposedly Pre-Existing Broad Interpretation Of The Language At Issue

Appling has also suggested that when Congress enacted Section 523(a)(2)(A) in 1978, it meant to ratify the courts' supposedly "uniform[]" understanding that the phrase "statement respecting . . . financial condition" included statements about individual assets. BIO 24-25 (emphasis omitted). That argument also should be rejected.

As discussed above, Congress initially adopted the "statement respecting . . . financial condition" language in 1926 in response to debtors' efforts to evade the existing anti-discharge requirements by causing credit reporting agencies to publish balance sheets or credit scores that incorrectly described their overall financial health. *See supra* at 8-9. And in the half century between that enactment and the passage of the Bankruptcy Code in 1978, the vast majority of cases that addressed the application of that provision involved similar financial statements describing the borrower's *overall* financial health.[5]

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[5] *See, e.g.*, *Gardner v. American Century Mortg. Inv'rs (In re Gardner),* 577 F.2d 928, 929 (5th Cir. 1978) (no discharge where both assets and liabilities were falsified on financial statement); *In re Weinroth*, 439 F.2d 787, 788 (3d Cir. 1971) (addressing effect of false financial statement prepared by an accountant); *Palter v. Lake Sales, Inc. (In re Palter),* 435 F.2d 120, 121 (9th Cir. 1970) (no discharge when debtor submitted financial statement overstating his net profit by 100%); *Clancy v. First Nat'l Bank*, 408 F.2d 899, 903 (10th Cir.) (no discharge where debtor submitted a joint financial statement for himself and his wife that failed to disclose other substantial loan obligations), *cert. denied*, 396 U.S. 958 (1969); *In re Barbato*, 398 F.2d 572, 574 (3d Cir. 1968) (false financial statement); *Schweizer v. City Loan Co. (In re Schweizer)*, 271 F.2d 95, 96-97 (7th Cir. 1959) (discharge should not have been granted where debtor failed to list debts to family members in financial statement); *In re Marcus,* 253 F.2d 685, 687 (2d Cir. 1958) (no discharge under Section 14 where corporation issued false financial statement); *Rogers v. Gardner*, 226 F.2d 864, 866 (9th Cir. 1955) (no discharge under Section 14 where debtor provided false financial statement misrepresenting net worth); *Cunningham v. Elco Distribs., Inc.* 189 F.2d 87, 90 (6th Cir. 1951) (no discharge where debtor falsified ownership of real estate on a financial statement); *Yates v. Boteler,* 163 F.2d 953, 959-60 (9th Cir. 1947) (no discharge where debtor caused Dun & Bradstreet to publish false estimate of net worth); *In re Lovich*, 117 F.2d 612, 614-15 (2d Cir. 1941) (financial statement to Dun & Bradstreet that had false liabilities and false net worth would have barred discharge if the statement was not issued by an agent without bankrupt's knowledge); *In re Keller*, 86 F.2d 90, 91 (2d Cir. 1936) (discharge barred where debtor falsified assets and liabilities on a financial statement); *In re Lilyknit Silk Underwear Co.,* 64 F.2d 404, 405-

Appling has cherry picked a few cases in which, he says, courts interpreted the anti-discharge provision to also include statements about individual assets. Some of the cases cited by Appling do not actually engage with the issue, *see Tenn v. First Hawaiian Bank*, 549 F.2d 1356, 1357-58 (9th Cir. 1977) (per curiam), and others actually undermine his interpretation, *e.g., Albinak v. Kuhn (In re Manufacturers Trading Corp.)*, 149 F.2d 108, 110 (6th Cir. 1945). But the more salient point is that, if Congress was aware of any lower court case law in this area in 1978, it would have been familiar with the

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06 (2d Cir. 1933) (no discharge barred where debtor issued to Dun & Co. a financial statement overstating assets); *In re Sewell*, 361 F. Supp. 516, 518 (S.D. Ga. 1973) ("The false statement by which a bankrupt obtains credit which will bar discharge must be a financial statement as distinguished from mere misrepresentations."); *In re Solari Furs*, 263 F. Supp. 658, 663 (E.D. Mo. 1967) (false financial statement given to credit rating agency was a false statement respecting the financial condition of the partnership); *In re Lomax*, 233 F. Supp. 889, 891 (M.D.N.C. 1964) (no discharge where debtor intentionally omitted a substantial portion of his liabilities in his financial statement); *In re Lepley,* 227 F. Supp. 983, 986 (W.D. Wis. 1964) (finding no reliance on financial statement that failed to identify certain liabilities); *In re Simms*, 202 F. Supp. 911, 912 (E.D. Va. 1962) (considering effect of false financial statement following 1960 amendments); *In re Johnson*, 114 F. Supp. 396, 402 (N.D. Tex. 1953) ("The bankrupt knowingly made a materially false financial statement to Dun & Bradstreet, Inc."); *Beneficial Fin. Co. v. Machie,* 263 A.2d 707, 709-10 (Conn. Cir. Ct. 1969) (debt nondischargeable when financial statement omitted several debts); *Beneficial Fin. Co. v. Lathrop*, 207 So. 2d 220, 221-22 (La. Ct. App. 1968) (debt nondischargeable when procured through false financial statement); *Personal Fin. Co. v. Bruns*, 84 A.2d 32, 33 (N.J. Super. Ct. App. Div. 1951) (finding debt was not subject to discharge where it had been obtained through a false financial statement).

mine run of cases—such as those cited in note 5—that involved false financial statements.

Moreover, Appling's statutory ratification argument suffers from a perhaps even more basic flaw. At the time that the cases cited by Appling were decided, finding that a statement was one "respecting . . . financial condition" was a basis for *denying* discharge rather than allowing it. *See* 11 U.S.C. § 32(b)(3) (1926); Pub. L. No. 86-621, § 2, 74 Stat. 408, 409 (1960); BIO 25. Thus, in all the older cases that Appling invokes—even the ones that actually involved fraudulently procured debts tied to statements about specific assets—the courts held that the debts in question could not be discharged. The fact that some courts may have erred in construing the phrase in a way that *furthered* the "honest but unfortunate debtor" policy is hardly a basis to conclude that Congress intended to abandon that policy when it amended Section 523(a)(2)(A) in 1978.

The floor statement on which Appling relies in arguing that Congress "intended to codify current case law" in 1978 therefore is hardly evidence that Congress intended all such debts procured by fraud to suddenly become dischargeable (even assuming a floor statement is evidence of *Congress's* intent to begin with). 124 Cong. Rec. H11,089 (Sept. 28, 1978), as reprinted in 1978 U.S.C.C.A.N. 6436, 6453 (quoted in BIO 27). To the contrary, a codification of "current case law" would have affirmed the then-existing rule that debts procured through misrepresentations about specific assets were *not* subject to discharge.

C. It Is The Eleventh Circuit's Interpretation, Not Lamar's, That Invites "Line-Drawing Problems"

Finally, the government argues that the narrow interpretation of Section 523(a)(2)(A) will "entail substantial line-drawing problems." U.S. Invitation Amicus Br. 18. That is incorrect. To begin with, the only question presented here is whether a statement about a single asset qualifies as a "statement respecting . . . financial condition." As the circuit conflict on this issue underscores, that is the question on which the courts have struggled in applying Section 523(a)(2)(A) and that tends to come up most frequently. Answering that question in the negative will not create any line-drawing problems: either a statement about a single asset qualifies, or it doesn't.

Instead, the interpretation that invites line-drawing problems is the Eleventh Circuit's, given the indefinite nature of "related to." *See supra* at 31-33. Neither Appling nor the government offers any concrete test for deciding where "relatedness" ends when it comes to a debtor's finances. Just where is the stopping point? And the government's new test that the statement must be "offered by the debtor as evidence of his ability to pay" (U.S. Invitation Amicus Br. 14) will only complicate matters. Not only is this element absent from the statute, but it introduces an additional, subjective layer to the inquiry. The same statement might, or might not, qualify as a "statement respecting . . . financial condition," depending on how the debtor *intended* his or her lie to be understood. Congress avoided these problems by simply requiring a creditor to show that the debt was "obtained by" the fraud. *See* 11 U.S.C. § 523(a)(2)(A); *Field*, 516 U.S. at 73-75.

In any event, there is no evidence in the case law from the circuits that have adopted the "narrow" interpretation of Section 523(a)(2)(A) that this interpretation has proved unworkable in practice. And any uncertainties at the margin in applying this construction will pale in comparison to attempting to articulate and then police the outer limits of a "relating to" finances test. *See supra* at 31-33. The government's line-drawing argument therefore provides no reason to transform the targeted exception that Congress adopted in Section 523(a)(2)(A) to address a particular abusive practice into a major departure from the centuries-old rule that the bankruptcy laws are designed to protect the "honest but unfortunate debtor."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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February 26, 2018

ADDENDUM

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Bankruptcy Act of 1898, ch. 541

CHAP. 541—An Act To establish a uniform system of bankruptcy throughout the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * *

CHAPTER III.

BANKRUPTS

* * *

SEC. 14. DISCHARGES, WHEN GRANTED.—a Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

b The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.

c The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

* * *

SEC. 17. DEBTS NOT AFFECTED BY A DISCHARGE.—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

* * *

11 U.S.C. § 32 (1932)

§ 32. Discharges; when granted. (a) Any person may, after the expiration of one month and within twelve months, subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending, if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

(b) The judge shall bear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard; and investigate the merits of the application and discharge the applicant, unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) destroyed, mutilated, falsified, concealed, or failed to keep books of account, or records, from which his financial condition and business transactions might be ascertained; unless the court deem such failure or acts to have been justified, under all the circumstances of the case; or (3) obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing, or causing to be made or published, in any manner whatsoever, a materially false statement in writing respecting his financial condition; or (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property, with intent to hinder, delay, or defraud his creditors; or (5) has been granted a discharge in bankruptcy within six years; or (6) in the course of proceedings in bankruptcy, refused to obey any lawful order of or to answer any material question approved by the court; or (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: *Provided*, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this paragraph (b), would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt: *And provided further*, That the trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do by the creditors at a meeting of creditors called for that purpose on the application of any creditor.

(c) The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge. (July 1, 1898, c. 541 § 14, 30 Stat. 550; Feb. 5, 1903, c. 487, § 4, 32 Stat. 797; June 25, 1910, c. 412, § 6, 36 Stat. 839; May 27, 1926, c. 406, § 6, 44 Stat. 663.)

11 U.S.C. § 35 (1932)

§ 35. Debts not affected by a discharge. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (first) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (second) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another or for alimony due or to become due, or for maintenance or support of wife or child, or for sednction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (third) have not been duly scheduled in time for proof and allowance, with the name of tbe creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (fourth) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity; or (fifth) are for wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of commencement of the proceedings in bankruptcy; or (sixth) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment. (July 1, 1898, c. 541, § 17, 30 Stat. 550; Feb. 5, 1903, c. 487, § 5, 32 Stat. 798; Mar. 2, 1917, c. 153, 39 Stat. 999; Jan. 7, 1922, c. 22, 42 Stat. 354.)

11 U.S.C. § 32 (1964)

§ 32. Discharges; when granted.

(a) The adjudication of any person, except a corporation, shall operate as an application for a discharge: *Provided*, That the bankrupt may, before the hearing on such application, waive by writing, filed with the court, his right to a discharge. A corporation may, within six months after its adjudication, file an application for a discharge in the court in which the proceedings are pending.

(b) After the filing fees required to be paid by this title have been paid in full the court shall make an order fixing a time for the filing of objections to the bankrupt's discharge which shall be not less than thirty days after the first date set for the first meeting of creditors. Notice of such order shall be given to all parties in interest as provided in section 94 (b) of this title. If the examination of the bankrupt concerning his acts, conduct, and property has not or will not be completed within the time fixed for the filing of objections to the discharge the court may, upon its own motion or upon motion of the receiver, trustee, a creditor, or any other party in interest or for other cause shown, extend the time for filing such objections. Upon the expiration of the time fixed in such order or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard.

(c) The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under section 152 of Title 18; or (2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the case; or (3) while engaged in business as a sole proprietor, partnership, or as an executive of a corporation, obtained for such business money or property on credit or as an extension or renewal of credit by making or publishing or causing to be made or published in any manner whatsoever a materially false statement in writing respecting his financial condition or the financial condition of such partnership or corporation; or (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy had been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this title; or (6) in the course of a proceeding under this title refused to obey any lawful order of, or to answer any material question approved by, the court; or (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: *Provided*, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt.

(d) When requested by the court, the United States attorney, located in the judicial district in which the bankruptcy proceeding is pending, or such other attorney as the Attorney General may designate, shall examine into the acts and conduct of the bankrupt and, if satisfied that probable grounds exist for the denial of the discharge and that the public interest so warrants, he shall oppose the discharge of such bankrupt in like manner as provided in the case of a trustee.

(e) If the bankrupt falls to appear at the hearing upon the objections to his application for a discharge, or having appeared refuses to submit himself to examination, or if the court finds after hearing upon notice that the bankrupt has failed without sufficient excuse to appear and submit himself to examination at the first meeting of creditors or at any meeting specially called for his examination, he shall be deemed to have waived his right to a discharge, and the court shall enter an order to that effect. (July 1, 1898, ch. 541, § 14, 30 Stat. 550; Feb. 5, 1903, ch. 487, § 4, 32 Stat. 797; June 25, 1910, ch. 412, § 6, 36 Stat. 839; May 27, 1926, ch. 406, § 6, 44 Stat. 663; June 22, 1938, ch. 575, § 1, 52 Stat. 850; May 24, 1949, ch. 139, § 130, 63 Stat. 107; July 7, 1952, ch. 579, § 6, 66 Stat.

422; Sept. 2, 1957, Pub. L. 85-275, § 1, 71 Stat. 599; July 12, 1960, Pub. L. 86-621, § l, 74 Stat. 408.)

11 U.S.C. § 35 (1964)

§ 35. Debts not affected by a discharge.

(a)[1] A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality; (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due or for maintenance or support of wife or child, or for seduction of an unmarried female, or for beach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; (5) are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission

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1 So in original. There is no subdivision (b).

basis, whole or part time, whether or not selling exclusively for the bankrupt; or (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment. (July 1, 1898, ch. 541, § 17, 30 Stat. 550; Feb. 5, 1903, ch. 487, § 5, 32 Stat. 798; Mar. 2, 1917, ch. 153, 39 Stat. 999; Jan. 7, 1922, ch. 22, 42 Stat. 354; June 22, 1938, ch. 575, § 1, 52 Stat. 851; July 12, 1960, Pub. L. 86-621, § 2, 74 Stat. 409.)

11 U.S.C. § 101

§ 101. Definitions

* * *

(32) The term "insolvent" means—

(A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—

(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and

(ii) property that may be exempted from property of the estate under section 522 of this title;

(B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than the aggregate of, at a fair valuation—

(i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A)(i) of this paragraph; and

(ii) the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of the kind specified in subparagraph (A) of this paragraph, over such partner's nonpartnership debts; and

(C) with reference to a municipality, financial condition such that the municipality is—

(i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or

(ii) unable to pay its debts as they become due.

* * *

11 U.S.C. § 523

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

* * *

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive . . . .

* * *