No. 16-1215

IN THE
# Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,
*Petitioner*,

v.

R. SCOTT APPLING,
*Respondent*.

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

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## BRIEF OF *AMICUS CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership, which includes about 300,000 companies, is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. Both parties consented to the filing of this brief by email from their counsel of record.

## SUMMARY OF ARGUMENT

The Bankruptcy Code generally bars debtors who gain property through fraud from discharging the resulting debt. 11 U.S.C. § 523(a)(2)(A) has a limited exception to that rule: a debt for property obtained by a false "statement respecting the debtor's . . . financial condition" *is* dischargeable. Most of the Courts of Appeals to address the question have held that the exception only applies to statements about a debtor's overall financial health. But not the Eleventh Circuit, which held that the phrase "statement *respecting* . . . financial condition" covers any statement *relating to* a debtor's financial status, even including a statement about a single asset. That was error for three reasons.

I. First, the text, history, and background principles of the Bankruptcy Code show that a "statement respecting . . . financial condition" must be a statement about the debtor's financial condition as a whole. As the Eleventh Circuit acknowledged and the Bankruptcy Code elsewhere confirms, "financial condition" refers to a financial gestalt like net worth, not individual items on a balance sheet. The Eleventh Circuit nevertheless concluded that the term "respecting" had such a broad meaning that § 523(a)(2)(A) encompasses any statement that "relates to" financial condition. But "respecting" also means "about," and that is the only meaning that makes sense of the rest of the statute, the narrow evil it was meant to prevent, and the longstanding principle excluding dishonest debtors from the benefits of bankruptcy.

II. Congress also would not casually invade the traditional state responsibility over contract law. But that is what the Eleventh Circuit did by fashioning a national super-Statute of Frauds with a de facto writing requirement on all consumer credit contracts.

III. Last, Congress would not lightly saddle American small businesses with a novel mandate to create and store mountains of paperwork containing sensitive customer information. Yet that is what the Eleventh Circuit's rule does. In particular, the lower court demanded that creditors secure written statements from customers if any credit decisions depend on oral statements that relate to the customer's financial condition in some way. That would be a major shift in the way business is done in America, and many small businesses would be unable to comply. As a result, the Eleventh Circuit's rule would magnify the already significant credit risks for small business. Because nothing in the text, history, or policy of the Bankruptcy Code suggests that Congress intended to impose such burdens on small business, this Court should reverse the Eleventh Circuit's unfortunate decision below.

## ARGUMENT

### I. The Eleventh Circuit's fraudster-friendly extension of Section 523(a)(2)(A) to misrepresentations about a single asset is unfaithful to the text, history, and background principles of the Bankruptcy Code.

The traditional tools of statutory construction reveal that § 523(a)(2)(A) creates a narrow exception for misstatements about a debtor's overall financial condition—not a broad exemption for any falsehood that relates in some way to financial status. Judge

Owen's opinion in *In re Bandi*, 683 F.3d 671 (5th Cir. 2012), and Judge Ebel's opinion in *In re Joelson*, 427 F.3d 700 (10th Cir. 2005), illustrate the correct way to use those tools to interpret "a statement respecting . . . financial condition."

*Text.* Starting with the text, the term "financial condition" has a plain meaning "commonly understood in commercial usage": it refers to a debtor's overall financial status, not a particular line on a balance sheet. *Bandi*, 683 F.3d at 676. The Bankruptcy Code's use of "financial condition" to define "insolvency" cements that meaning. In particular, "'insolvent' *is* a 'financial condition' . . . defined by reference to debts as compared to property." *Id.*; *see* 11 U.S.C. § 101(32)(A) (defining "insolvent" as the "financial condition such that the sum of [an] entity's debts is greater than all of such entity's property"). That use of the term "financial condition" to refer to "the entity's net worth" suggests that it "also relates to a debtor's net worth or overall financial condition" in § 523(a)(2)(A). *Joelson*, 427 F.3d at 707; *see also* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("'[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.'" (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

Even the Eleventh Circuit had to acknowledge that "'[f]inancial condition' likely means one's overall financial status." Pet. App. 7a. Yet the lower court inverted that meaning by interpreting "statement[s] *respecting* . . . financial condition" to include falsehoods that merely "*relate to*" financial condition in some way, including (but by no means limited to) statements about particular assets divorced from the debtor's overall financial picture. *Id.* at 8a-9a (emphases added). In essence, the Eleventh Circuit plucked the broadest dictionary definition of "respecting," *id.* at 9a, without considering whether the broadest definition fit the statutory context.

But "respecting" does not always mean "relating to"; it can simply mean "about." *See, e.g.*, *Respecting, Webster's New Twentieth Century Dictionary Unabridged* (2d ed. 1977); *see also* BIO 14 (acknowledging this definition). And so it does here. That meaning is far more consistent with the agreed meaning of "financial condition," because it limits the exempt statements to those that actually address a debtor's overall financial picture.

To see why "respecting" must mean "about" rather than "relating to" in this context, consider a request for a "cookbook respecting sandwiches." One might expect a volume on the Reuben or bánh mì. But no one would anticipate a tome on *mustard*. Yet, by the Eleventh Circuit's logic, that would fit the bill because mustard "relates to" sandwiches, in that it is sometimes a sandwich ingredient. The Eleventh Circuit's interpretation of "statement respecting . . . financial condition" makes no more sense of its text than a mustard book would in this example.

*History*. The history behind § 523(a)(2)(A) confirms that the Eleventh Circuit's open-ended interpretation is incorrect. The roots of § 523(a)(2)(A) stretch back over a hundred years, and Congress has, over time, modified the Bankruptcy Code's anti-fraud provisions to seek a fairer balance between the interests of creditors and debtors. *See Field v. Mans*, 516 U.S. 59, 64–65, 76–77 (1995). Shortly after the turn of the century, for instance, federal bankruptcy law barred discharge of *all* debts if a debtor had obtained *any* property by way of certain materially false statements. Act of Feb. 5, 1903, ch. 487, 32 Stat. 797, 797–98, §§ 4, 17(a)(2). Seeking to mitigate the harsh consequences of the complete nondischargeability rule (precluding the discharge of *all* debts, if the debtor procured *any* single debt by fraud)—especially in the face of unscrupulous activity by creditors—Congress in 1960 amended that provision to provide that only those *particular* debts incurred through a debtor's false written statement "respecting his financial condition" were nondischargeable. *Field*, 516 U.S. at 65; Act of July 12, 1960, Pub.L. No. 86–621, 74 Stat. 408, 409, § 2. The legislative history suggests that Congress intended the provision to cover more comprehensive statements akin to financial statements. *Joelson*, 427 F.3d at 709. In fact, the Senate Report on the bill states that its purpose was "to limit the use of *false financial statements* as a bar to discharge in bankruptcy." S. Rep. No. 86-1688, at 1 (1960) *as reprinted in* 1960 U.S.C.C.A.N. 2954, 2954 (emphasis added).

The 1960 amendment did not accomplish all of Congress's aims. Predatory lenders still sometimes encouraged false financial statements from "their borrowers for the very purpose of insulating their own claims from discharge." *Field*, 516 U.S. at 76–77; *see also Swint v. Robins Fed. Credit Union*, 415 F.2d 179, 184 (5th Cir. 1969) ("[Creditor] induced a sworn statement that the earlier itemized list was complete when it knew it was not. The affidavit being knowingly false was a trap which afforded a perfect paper record on which to circumvent discharge if the debtor defaulted."). The 1978 amendment thus targeted this practice, providing an additional hurdle for creditors to clear. *See Field*, 516 U.S. at 66 (recognizing that the 1978 amendment "added a new element of reasonable reliance" to the written fraud provision). The 1978 amendment also added the exception at issue here to the oral fraud provision, so that statements about a debtor's overall financial condition would fall under the heightened requirements applicable to written fraud.

*Background principles of bankruptcy.* The interpretation of § 523(a)(2)(A) must also account for the longstanding background principles embedded in the Bankruptcy Code: a fresh start for the honest borrower without a free ride for the dishonest debtor. "[A] central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). "But," as the Court has also emphasized, "in the same breath that we have invoked this 'fresh start' policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the honest but unfortunate debtor." *Id.* at 286–87; *see also, e.g.*, *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918) ("The federal system of bankruptcy is designed not only to distribute the property of the debtor, . . . but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life."); *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554–55 (1915) ("It is the purpose of the bankrupt act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."). That policy against offering the benefits of bankruptcy to dishonest debtors echoes the ancient maxim: "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong." *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889).

Extending § 523(a)(2)(A) to any statement that relates in some manner to a debtor's financial status would turn that policy on its head. "[V]irtually every statement by a debtor that induces the delivery of goods or services on credit relates to his ability to pay." *Joelson*, 427 F.3d at 713. Thus, the uncabined interpretation adopted below "would permit many dishonest debtors to avoid the consequences of oral fraud." *Id.* It would "take a very clear provision to convince anyone of anything so odd." *Field*, 516 U.S. at 68.

In fact, the Eleventh Circuit's rule would not only benefit many more dishonest borrowers, but also borrowers who are *more dishonest*. It may be understandable for a debtor giving an oral account of his financial status to "simply forget a particular asset or liability when listing all of [his] assets and liabilities." *Joelson*, 427 F.3d at 707. Section 523(a)(2) appropriately extends "more leeway (and more dischargeability) to a debtor who errs in stating his or her *overall position* orally." *Id.* (emphasis added). But a borrower "who makes a specific oral misrepresentation as to a particular asset" has little excuse, since he "had a particular subject called specifically to mind." *Id.*

Because the longstanding policy of the Bankruptcy Code supports the same interpretation as the plain text and the history of § 523(a)(2)(A), this Court should reject the Eleventh Circuit's contrary rule.

## II. The Eleventh Circuit transformed Section 523(a)(2)(A) into a national super-Statute of Frauds in derogation of traditional state responsibility.

This Court should also reject the Eleventh Circuit's rule because it implausibly interprets the statute as invading a core area of traditional state responsibility. As petitioner has explained, the Eleventh Circuit's conclusion that Congress intended its construction to encourage creditors to insist upon statements in writing—and thereby achieve some unstated "reliability" or "evidentiary" objective—is contradicted by the text of the statute and other indicia of Congress's intent. But there is another, perhaps even more fundamental problem with this interpretation.

Until the decision below, each State had the prerogative to decide for itself when a writing requirement for creditors was appropriate, and when it was likely to cause more mischief than it prevented. *See Monetti, S.P.A. v. Anchor Hocking Corp.*, 931 F.2d 1178, 1182 (7th Cir. 1991) (under *Erie*, "the administration of the [S]tatute [of Frauds] [is] . . . a matter of primary concern to the states rather than to the federal government"). Generally, most States found the writing requirement to be more trouble than it's worth, except in a handful of enumerated situations covered by a Statute of Frauds. *See* Restatement (Second) of Contracts § 110 (1981) (identifying the five core agreements subject to Statutes of Frauds as: (1) executorships; (2) suretyship contracts; (3) contracts in consideration of marriage; (4) contracts for the sale of an interest in land; and (5) contracts not capable of performance within one year); *see also* Pet. App. 13a (recognizing that the Statute of Frauds only "*sometimes* requires that proof be in writing as a prerequisite to a claim for relief" (emphasis added)). Even then, state courts construed those circumstances narrowly.[2]

The decision below casually flattened all that. Explicitly invoking the Statute of Frauds, the

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[2] *See, e.g.*, *In re Marriage of Takusagawa*, 166 P.3d 440, 446 (Kan. Ct. App. 2007) ("The clear trend over the years has been toward a narrowing interpretation of the statute of frauds."); *Birdwell v. Psimer*, 151 S.W.3d 916, 919 (Tenn. Ct. App. 2004) ("[The one-year] provision within the statute of frauds is to be construed very narrowly by the courts, since the courts should generally try to give effect to a contract rather than defeat it"); *Sherman v. Haines*, 652 N.E.2d 698, 700 (Ohio 1995) ("For over a century, the 'not to be performed within one year' provision of the Statute of Frauds, in Ohio and elsewhere, has been given a literal and narrow construction."); *White Lighting Co. v. Wolfson*, 438 P.2d 345, 351 (Cal. 1968) (refusing to apply the statute of frauds to an entire contract because doing so would "transgress the policy of restricting the application of the statute of frauds exclusively to those situations which are precisely covered by its language"); *Steen v. Kirkpatrick*, 36 So. 140, 141 (Miss. 1904) (stating that a "rule of strict construction applies to that clause of the statute of frauds relating to agreements 'made upon consideration of marriage,' so that, to fall within that clause, the agreement must be strictly in consideration of marriage, and not merely made in contemplation of marriage").

Eleventh Circuit thought its interpretation would "giv[e] 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. But as a practical matter, the Eleventh Circuit's writing requirement would govern just about *any* credit transaction—not just those involving financial statements or the like—because any such transaction can result in bankruptcy. In effect, the Eleventh Circuit superimposed a federal super-Statute of Frauds that renders much of the state doctrine obsolete.

But Congress doesn't lightly intrude on core state concerns like the rules of contract. And this Court has construed federal statutes narrowly to ensure that Congress doesn't accidentally trample "areas of traditional state responsibility." *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014); *see also Jones v. United States*, 529 U.S. 848, 858 (2000) (construing the federal arson statute strictly because "arson is a paradigmatic common-law state crime"). It would "take a very clear provision to convince anyone of anything so odd" as a nationalized Statute of Frauds. *Field* at 516 U.S. 68. At the very least, a Congress that doesn't hide elephants in mouseholes wouldn't sneak a major intrusion on traditional state prerogatives into a subparagraph in the Bankruptcy Code by imposing a near-universal writing requirement. *Cf. Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

## III. The Eleventh Circuit's misinterpretation would saddle small business with significant and unwarranted burdens that Congress never intended.

The Eleventh Circuit thought its nationalized writing requirement would be no big deal. *See* Pet. App. 13a ("[A] lender concerned about protecting its rights in bankruptcy can easily require a written statement from the debtor before extending credit."). It thought wrong. For the hundreds of thousands of small businesses that would be affected, it is a serious threat to the way business is done. As a practical matter, small businesses cannot remain actively "concerned about protecting [their] rights in bankruptcy" in every consumer contract. *Id.* Even if they could, it is not plausible to expect small businesses to demand or keep the sort of comprehensive written records about all customer statements that would become necessary under the Eleventh Circuit's expansion of § 523(a)(2)(A). But in the absence of such records, that expansion would create serious new credit risks for businesses. For those reasons, the Eleventh Circuit's rule would have drawn a strenuous objection from the small business community had it been proposed in Congress. But it was not, and this Court should not insert it here.

### A. Demanding that small businesses create and keep comprehensive written records of all customer statements that induce credit is impractical.

Small businesses extend credit on a surprisingly vast scale. The Eleventh Circuit's rule would create a correspondingly vast new paperwork mandate that small businesses could not hope to satisfy.

Roughly *half* of small businesses report extending some form of credit. *NFIB Nat'l Small Business Poll: Getting Paid* 3 (2001).[3] Some offer formal installment payment plans or layaway. *Id.* Others use informal arrangements, such as "half this month, half next." *Id.* And many use basic trade credit, more commonly known as "invoicing." *Id.* No matter what form of credit is used, they all entail exposure to bankruptcy risk. Because many small businesses cannot afford legal counsel in bankruptcy proceedings, they are unable to prevent that bankruptcy risk from becoming unrecoverable bankruptcy loss.

Under the Eleventh Circuit's rule, all of those credit arrangements would be subject to the new super-Statute of Frauds requiring "a written statement from the debtor before extending credit." Pet. App. 13a. Indeed, the lower court casually assumed that the lender could procure a written statement "easily." *Id.*

That assumption is far too rosy. First, most small businesses would be unlikely to learn about such a bankruptcy rule absent sophisticated counsel. Not knowing about the "incentive to create writings before the fact," those small business owners would suffer consequences that are "harsh after the fact." Pet. App. 13a.

Even for small businesses with savvy counsel, getting a written statement from a customer is often

[3] http://www.411sbfacts.com/files/gettingpaid[1].pdf.

impractical, particularly for small companies that do business over the phone. At least in Main Street America, extracting such a statement can also be offensive to customers who understand—consistent with the general law of contracts—that their spoken word is their bond. And the Eleventh Circuit addressed none of the obvious practical problems with that "incentive," *id.*, such as where to store the resulting mountains of written statements, how to avoid turning each customer transaction into an administrative inquisition, or even how to pay for the additional employee time and storage space necessary to create and keep those statements.

In the real world, statements about financial circumstances are routinely made among businesses and their customers, especially when it comes to the extension of money or services. And while large banks and Fortune 500 corporations might typically demand financial statements in writing as part of a formal application process, many (if not most) small businesses are not set up that way. Often, such assurances are made on a more informal basis made possible by the relationships between small businesses and their customers. Indeed, the ability to act nimbly and without such red tape can be the key to a small business's success. The Eleventh Circuit's ruling is founded on a flawed assumption about how small businesses interact with their customers.

Small businesses can be particularly ill-equipped to handle a paperwork mandate for potentially sensitive customer information. "[L]ittle agitates small business owners more reflexively than the mention of paperwork." *NFIB Nat'l Small Business*

*Poll: Paperwork and Record-Keeping* 2 (2003).[4] That is because many small business owners must bear that burden personally—over half of small businesses report assigning primary responsibility for maintaining customer records to themselves or family members. *Id.* at 2-3. And that record-keeping doesn't come cheap. Owners estimate that their expenses for creating and maintaining customer records amount to nearly $43 per hour. *Id.* at 4.

The Eleventh Circuit also ignored the ominous privacy risks of storing so much customer data. *See* Identity Theft Resource Center, *2017 Annual Data Breach Year-End Review* ("The number of U.S. data breach incidents tracked in 2017 hit a new record high" with "55 percent of the overall total number of breaches" coming from the business sector).[5] In this very case, for example, the lower court would have had the petitioner store sensitive information about respondent's tax return. A rule requiring small businesses to collect reams of such data would paint a target on their backs for hackers. Already, the federal government and Fortune 500 companies have suffered numerous data breaches despite their sophisticated and expensive security measures. *See, e.g.*, Government Accountability Office, *Information Security: OPM Has Improved Controls, But Further Efforts Needed* 5 (GAO-17-614) ("In July 2015, OPM reported that a . . . cyber incident targeting its databases containing background investigation records was estimated to have compromised security

[4] http://411sbfacts.com/files/paperwork.pdf.

[5] https://www.idtheftcenter.org/images/breach/2017Breaches/2017AnnualDataBreachYearEndReview.pdf.

clearance background information of about 21.5 million individuals.").[6]

The Eleventh Circuit's rule would make small businesses more attractive to hackers, but with only a fraction of the data security defenses. Small business owners would have to fear not only consumer lawsuits over data breaches, but costly enforcement actions by government agencies as well. *See, e.g.*, NFIB, *FTC's Evolving Data Security Rules: An Impossible Strict Liability Standard* (Jan. 9, 2017)[7]; *see also Paperwork and Record-Keeping* 7 (noting small business concerns over "the potential for suits and violation of laws" due to the "possibility of mishandling documents"). Even if small businesses could comply with what the Eleventh Circuit demanded, surely this is not what Congress had in mind for § 523(a)(2)(A).

### B. The Eleventh Circuit's rule would exacerbate the already serious credit risks to small business.

Because small businesses are so often creditors in the ordinary course of business, a rule that would make debts procured by fraud generally *non*dischargeable would be a real problem. Unsurprisingly, small businesses suffer nonpayment due to bankruptcy at high rates. Thirty-six percent of small businesses reported lost revenue due to customer bankruptcy over a five-year period. *Getting Paid* 6. Of those, three out of five "lost money to a personal bankruptcy," *id.*, which is the sort affected by

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[6] https://www.gao.gov/assets/690/686400.pdf.

[7] https://www.nfib.com/content/legal-blog/marketing/ftcs-evolving-data-security-rules-an-impossible-strict-liability-standard/.

the Eleventh Circuit's fraudster-friendly interpretation of § 523(a)(2)(A). NFIB has about 300,000 members, with billions of dollars of total revenue. *See* U.S. Small Business Administration, *Small Business GDP: Update 2002-2010*, at 1 (2012)[8] (estimating that "[s]mall businesses produced 46 percent of the private nonfarm gross domestic product"). With odds of bankruptcy nonpayment that high, the total losses are staggering.

Even when bankruptcy losses strike a single small business, the effects can be severe. This case provides a perfect illustration. The petitioner is a law firm with only four attorneys.[9] It continued to perform extensive legal work based on respondent's promise that the overdue fees would be paid out of his imminent tax refund. The bankruptcy court and district court found that petitioner reasonably relied on respondent's assurances. Yet the Eleventh Circuit held that those assurances were meaningless, and let respondent walk away from his fraudulently induced debt, scot-free, inflicting a serious harm on an innocent creditor. The loss amount here—more than $100,000—would be a material hit for just about *any* company. But for small businesses, in particular, a $100,000 or even smaller loss can be debilitating if not devastating. *See* Pet. Br. 14.

This does not just concern law firms. Any small business could find itself in similar straits. For example, suppose a contractor agrees to perform renovations for a homeowner based on the

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[8] https://www.sba.gov/sites/default/files/rs390tot_1.pdf.

[9] *See* Lamar, Archer, & Cofrin, LLP, http://www.laclaw.net/attorneys.html.

homeowner's false representations that he will pay for the work with the proceeds from the imminent sale of non-existent stock. After the contractor sinks hundreds or thousands of dollars' worth of materials in the project—and as much or more in hourly wages—the Eleventh Circuit would allow the homeowner to discharge any claim the contractor may have against the homeowner simply because the homeowner's false representation about a specific asset related in some sense to his financial condition.

So too the owner of a valuable antique clock who convinces a skilled horologist to perform painstaking restoration on the false promise that the horologist would be compensated from the sale of an antique watch the owner has no right to sell. Or a body shop proprietor who spends thousands of dollars restoring vintage cars, expecting to be repaid with the proceeds of the customer's falsified overtime pay. The possibilities are endless for small businesses to fall victim to these classic common-law fraud scenarios "lying at the heart of" the nondischarge provisions. *Joelson*, 427 F.3d at 710. Yet the Eleventh Circuit's construction of § 523(a)(2)(A) block them all from the protection of the Code's anti-discharge rule.

In short, Congress probably would not choose to penalize innocent small-business owners to protect dishonest debtors, and it should "take a very clear provision to convince anyone of anything so odd." *Field*, 516 U.S. at 68. Section 523(a)(2)(A) doesn't come close. The Eleventh Circuit improperly substituted its own view of what makes sense for the Bankruptcy Code and, worse, it did so based on fundamentally flawed assumptions about how business works on Main Street.

## CONCLUSION

For these reasons, the judgment of the Eleventh Circuit should be reversed.

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Respectfully submitted,

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