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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Appling and the government offer two different visions for why this Court should hold that a statement about a discrete asset is a "statement respecting the debtor's . . . financial condition." 11 U.S.C. § 523(a)(2)(A). Appling offers the extreme version. He claims (at 2, 13) this Court *must* interpret the statute that way, because "respecting" *unambiguously* proves that Congress intended the broadest conceivable breadth. "Respecting" doesn't sometimes, or even usually, have this meaning, he insists—it *always* does. *Id.* at 18. Appling dismisses the "honest but unfortunate debtor" principle as a quaint "judicial aphorism," and claims this Court cannot even consider the history of the statute or strange results his rule produces. *Id.* at 37.

The government offers the "light" version. It doesn't seem to claim the statute is unambiguous. And while it piggybacks on many of Appling's arguments, it lacks his verve. Moreover, unlike Appling, the government recognizes (at 2, 9, 30) the importance of the "honest but unfortunate debtor" principle. But the government's main objection, in the end, is its view that it would not make sense as a policy matter to distinguish statements about individual assets from statements about overall financial condition. So, in for a penny, the government goes in for a pound, arguing that Congress intended a broad-based exemption for fraudulent statements that relate to one's "financial circumstances," U.S. Br. 9—even though it ultimately admits that "[r]easonable people can debate the wisdom of [that] decision," *id.* at 33.

This Court should reject both approaches. The extreme version flouts the first rule of statutory construction—the meaning of words is informed by context. And the light version does not work, because there is, in fact, a perfectly sensible reason for Congress to differentiate fraudulent statements about an individual asset. As the government itself has told this Court before, Congress adopted Section 523(a)(2) to address a particular abuse by credit agencies involving financial statements listing *numerous* assets and liabilities to describe an *overall* (or net) position. *See infra* at 16-18. There is no evidence of any creditor abuse when it comes to debtors lying about an individual asset to secure property or services, no reason to think that debtors are vulnerable in that single-asset situation, and no evidence that Congress ever thought it needed to "balance the scales" in favor of debtors who engage in that unmitigated kind of fraud.

Accordingly, this Court should decline to dramatically shift the balance in favor of fraudulent debtors by adopting the broad-based rule Appling and his amici urge—excusing fraudulent statements about anything related to a debtor's finances.

I. THE TEXT POINTS TOWARD A RULE LIMITED TO STATEMENTS *ABOUT* A DEBTOR'S OVERALL FINANCIAL STATUS

Appling claims (at 2, 13) that there is one, and only one, possible reading of "statement respecting . . . financial condition." But this case is not that simple. While the language *could* be read to mean any statement "related to" one's finances (Appling's position), it can also mean any statement "about"

one's overall financial status (ours). A fair reading of the text points to the narrower construction.

A. "Respecting" Also Is Used To Describe The Subject Of A Statement

Appling acknowledges that his position ultimately rests on a single word—"respecting." His "foundational point," he says (at 18), is that "the word 'respecting' has a broadening effect when used as a preposition in a statute," "add[ing] breadth to the object it modifies" wherever it appears.

That foundation does not hold up. Indeed, Appling himself acknowledges that one common definition of "respecting" is "about." *Id.* (quoting *Webster's New Twentieth Century Dictionary* 1542 (2d ed. 1967)). And when "respecting" is used as "about," it simply describes the *subject* (here, "financial condition") of its object (here, "statement"), however broad or narrow that subject may be. *See, e.g.*, *About*, *adv.*, *prep.*, *adj.* and *conj.*, Oxford English Dictionary (online ed.), http://www.oed.com (last visited Apr. 9, 2018) ("Of a discourse, text, film, etc.; on the subject of, dealing with."). So, too, with many of the similar definitions of "respecting," such as "concerning" and "regarding," that Appling himself concedes (at 18) are relevant here.

Appling dismisses (at 20) any consideration of the alternative meanings of "respecting" as "a game of dictionary hide-and-seek." But consulting dictionary definitions and considering which meaning makes sense in context is the bread and butter of textualism. *See Environmental Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) ("most words have different shades of meaning and consequently may be variously construed" (citation omitted)); Antonin

Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 356, 418 (2012). We do not suggest (as Appling erroneously claims (at 20 (emphasis added)) "that 'respecting' *cannot* mean 'related to.'" Our point is simply that it does not *always* mean "related to," and that—in the context here—the more natural meaning is "about."

Appling is also wrong (at 18) that "respecting" has the same broad, "related to" meaning wherever it is used "throughout American law." In *Hancock v. Train*, for example, this Court rejected the argument that a state "requirement that all air contaminant sources secure an operating permit is a [state] 'requirement respecting control and abatement of air pollution.'" 426 U.S. 167, 183 (1976) (quoting 42 U.S.C. § 1857f (1976)). Reading this language in context, the Court held that only the "state-established air quality and emissions standards" themselves—not every other requirement *related to* them—qualified as "'requirement[s] respecting control and abatement of air pollution.'" *Id.*

Nor do the cases Appling cites establish that "respecting" must mean "related to." *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), did not rely on a plain, unambiguous meaning of "with respect to" in interpreting the Voting Rights Act (VRA)'s "standard, practice, or procedure *with respect to* voting" language. 52 U.S.C. § 10304(a) (emphasis added). To the contrary, the Court was cognizant that, as Justice Stevens later explained, "a narrow reading of the text of the [VRA] might have confined the coverage of § 5 to changes in election practices that limit individual voters' access to the ballot." *Morse v. Republican Party of Va.*, 517 U.S. 186, 204 (1996) (opinion announcing the judgment of

the Court). And it was only after the Court concluded that "Congress intended § 5 to have 'the broadest possible scope' reaching 'any state enactment which altered the election law of a covered State in even a minor way'" (*id.*) that the Court decided that a "related to" meaning made sense in context. Here, by contrast, the statutory history and background principles clearly point to a narrow construction. *See* Part II, *infra*.

Appling's reliance (at 18) on *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is similarly misplaced. While *Lemon* has attracted much commentary in this Court, it is safe to say that is has never been viewed as a model for plain-meaning construction, much less for interpreting a reticulated statutory code. The very paragraph on which Appling relies declares that "[t]he language of the Religion Clauses of the First Amendment is at best opaque," and the Court goes on to determine the meaning of the Clause by looking to its purposes. *Id.* at 612. The same goes for the "Property Clause" cases. *See* Resp. Br. 19. They do not turn on the notion that "respecting" is always unambiguous, but rather on the context and history of the Clause. *See, e.g.*, *Kleppe v. New Mexico*, 426 U.S. 529, 539-40 (1976).

In short, these cases simply show "respecting" *can* mean "related to"—which no one disputes. They do not establish Appling's "foundational point" (at 18) that "respecting" *always* has the broadest, "related to" meaning, no matter the context.

B. Context Refutes Appling's Expansive Interpretation Here

Context strongly points to the conclusion that here "respecting" means *about*, not *related to*.

1. The first clue is that "respecting" modifies "financial condition." Both Appling (at 25) and the government (at 12-13) admit that "financial condition" describes a debtor's "*overall* financial status." (Emphasis added.) The Bankruptcy Code itself defines "insolvent" in terms of "financial condition" (11 U.S.C. § 101(32)(A)), and makes clear that Congress does not equate "financial condition" with "assets" or "liabilities" *(id.* § 1106(a)(3) (authorizing trustees to "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor"). The Code thus proves that Congress uses "financial condition" as a relative term to describe an overall state—not any single item, but rather a net of positive and negative inputs.

Had Congress intended to craft an exception that applied to statements about individual assets, it could have referred to assets separately (as it did in 11 U.S.C. §§ 1103(c)(2) and 1106(a)(3)) or used a term like "finances," "financial circumstances," or "financial information," which would sweep in individual items without regard to overall status. "But 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*, 138 S. Ct. 784, 787-88 (2018). Like any other word or term of art, Congress's use of "financial condition" must be given effect.

Appling dismisses this point (at 26) as "merely" demonstrating "that there are different ways to write statutory language that yield similar meaning." But this Court has often pointed to similar considerations in rejecting an interpretation. *See, e.g., Levin v. United States*, 568 U.S. 503, 514-15

(2013); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7-8 (2000); *cf. Cutter v. Wilkinson*, 544 U.S. 709, 728 (2005) (Thomas, J., concurring) ("The [Establishment] Clause prohibits Congress from enacting legislation 'respecting an *establishment* of religion'; it does not prohibit Congress from enacting legislation 'respecting religion'"). Moreover, Appling offers no cogent explanation of why Congress would have selected a distinctive term like "financial condition," only to erase the very thing that makes it distinctive.

Appling's interpretation strips "financial condition" of meaning as a relative term—describing an *overall* state—because any statement about an asset (or input) qualifies, regardless of whether it says anything about the other side of the equation. Under Appling's rule, a statement that "I have a quarter in my pocket" is a "statement respecting financial condition" because any asset (or liability) ultimately, and directly, impacts one's overall financial status. In the same vein, under Appling's reading of "respecting," a statement that "Bryce Harper struck out in the ninth" would be a "statement respecting batting average," as would a statement that "Bryce was robbed of a home run by a leaping catch at the wall." And a statement that "He missed the last two questions on his math test" would be a "statement respecting GPA." But in ordinary parlance, that makes no sense.[1]

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[1] Appling's lead example (at 1)—a statement that "she just won $500,000 in the lottery"—reveals that the lucky winner secured a windfall on the income side of the balance, but it still says nothing about her *overall* financial status. *Cf.* Ric Edelman, Commentary, *Why So Many Lottery Winners Go*

The government (at 8) responds that, "A statement about a patient's disease is one respecting the patient's medical condition." But a disease is *itself* a condition. *See Disease*, Oxford English Dictionary, *supra* ("A condition of the body . . . in which its functions are disturbed or deranged"). So a statement that "He has cancer" is naturally understood as a "statement respecting medical condition." By contrast, a discrete asset (or liability) is not a condition. Accordingly, the relevant analogy is whether a statement that "I weigh 170 pounds," or "I am male," is a "statement respecting medical condition." Both weight and gender can relate to or impact one's medical condition depending on other factors. But just mentioning someone's weight or gender would not, in any ordinary usage, be a "statement respecting medical condition."

Appling claims (at 1, 13, 26, 27) that "financial condition" still has a "bound[ing]" effect on his reading. But only in the sense that a statement about something that has nothing to do with finances isn't covered. Yet the relevant question is whether, under Appling's reading of "respecting," "financial condition" means anything different than "finances," "financial circumstances," or the like. And the answer is plainly no. "Financial condition" does no work as a relative term. By contrast, reading "respecting" to mean *about* gives effect to both "respecting" *and* "financial condition."

2. Other parts of the Bankruptcy Code reinforce the narrower reading. When Congress originally enacted the "respecting . . . financial condition"

Broke, Fortune, http://fortune.com/2016/01/15/powerball-lottery-winners/ (last visited Apr. 9, 2018).

language in 1926, it adopted another provision—just two pages later—penalizing the falsification of records "affecting or *relating to* the *property or affairs of* a bankrupt." Pub. L. No. 69-301, §§ 6, 11, 44 Stat. 662, 663-64, 665 (1926) (emphases added). And in 1978, in the bill adopting Section 523(a)(2)(A), Congress enacted a provision waiving non-bankruptcy requirements "*relating to* financial condition" in certain circumstances. 11 U.S.C. § 1142(a) (emphasis added); *see also* Pub. L. No. 95-598, §§ 523, 1142, 92 Stat. 2549, 2590, 2639 (1978).

The fact that Congress actually used "relating to" in nearby provisions of these Acts strongly suggests that Congress intended a different meaning when it used "respecting" in Section 523(a)(2). As this Court has held, when "Congress includes particular language in one section of a statute but omits it in another . . . , 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).

In response, Appling suggests (at 20 n.3) that Congress just threw some unnecessary linguistic variety into the Bankruptcy Code to spice things up for readers. But that is not a sound model of interpretation, especially where, as here, the words have different meanings that may be used to express different concepts. *See Corley v. United States,* 556 U.S. 303, 315 (2009) (applying *Russello* rule despite government's insistence that alternative words were "virtually synonymous . . . in this statutory context" (alteration in original) (quoting government's brief)).

Appling and the government also ignore Congress's use of "property or affairs of a bankrupt" in addressing falsifications about *individual assets*,

rather than "financial condition." They cannot seriously contend *these* two phrases are synonymous, yet under their interpretation, the phrase "statement respecting the debtor's . . . financial condition" is just as broad as the phrase "affecting or relating to the property or affairs of a bankrupt." That makes a mockery of the *Russello* rule.

While basically just ignoring these important textual differences, Appling points (at 24-25) to Congress's use of the phrase "statement *of* financial condition" elsewhere. But our interpretation *accounts* for that difference. "Statement of financial condition" is a term of art referring to a "balance sheet." *See Statement of Financial Condition*, Black's Law Dictionary 1629 (10th ed. 2014) ("See balance sheet."); *Balance Sheet*, *id.* at 170 ("[a]lso termed *statement of financial condition*"). And we do not claim that the carve-out in Section 523(a)(2)(A) is limited to formal balance sheets. Instead, by using "respecting" rather than "*of*" to modify "financial condition," Congress ensured that the exception would extend beyond balance sheets to less formal or detailed statements about a debtor's overall financial status, such as statements of net cash flows (like those solicited and then abused by some credit agencies). *See* Opening Br. 8, 24-25; *infra* at 16-18. To qualify, however, the statement must still refer to an *overall* (or net) financial state.

For this reason, Appling is wrong when he says (at 1, 13, 29) that our interpretation gives no effect to "respecting." It does. And what distinguishes our interpretation from Appling's is that it gives effect to "respecting" *as well as* "financial condition."

II. THE HISTORY AND PURPOSE OF SECTION 523(a)(2)(A) CONFIRM THAT CONGRESS DID NOT INTEND TO EXCUSE ALL ORAL LIES RELATED TO FINANCES

When one opens the lens to consider the particular abuse at which Section 523(a)(2)(A) is aimed and the longstanding background rule against which Congress acted, it is no wonder that Appling is so insistent (at 2) that this Court cannot go "beyond the text itself." *See also id.* at 14, 36.

A. The "Related To" Rule Creates An Implausibly Large Exception That Even Appling And His Amici Do Not Defend

In order to provide a textual basis for a rule under which he can prevail, Appling relies (at 18) on the most expansive definitions of "respecting"—"relation to," "relating to," and so forth. But that interpretation creates an implausibly broad exception favoring fraudsters, taking an unthinkably big bite out of Section 523(a)(2)(A).

Indeed, this Court has previously explained that when Congress adopted Section 523(a)(2)(A), it was informed by the "widely accepted distillation of the common law of torts" laid out in the Restatement (Second) of Torts, which was "published shortly before Congress passed the Act." *Field v. Mans*, 516 U.S. 59, 70 (1995). Yet "[u]nder the broad interpretation [of 'statement respecting financial condition'], debts incurred as a result of many of the fraudulent statements cited in the Restatement (Second) of Torts could not be excepted from discharge under § 523(a)(2)(A)." *In re Joelson*, 427 F.3d 700, 710 (10th Cir. 2005) (citation omitted) (listing examples of false statements).

If truly given effect, a "related to" reading of "respecting" would leave little of Section 523(a)(2)(A)'s general rule against the discharge of debts obtained by "false pretenses, a false representation, or actual fraud." When, after all, would a creditor ever justifiably rely on a statement that was *not* somehow *related to* the borrower's financial condition? Neither Appling nor the United States has an answer. Instead, after pushing the broadest "related to" meaning of "respecting" to find a textual hook for their rule, they quickly shift gears and invent atextual limits to cabin their rule's breadth and the damage it would inflict.

The limiting principle Appling floats (at 23 (emphasis added)) is that a statement "respecting financial condition" must describe a "debtor's *assets or debts*, either individually or in the aggregate." But why would a "related to" rule stop at "assets or debts"? Appling seems to recognize (at 27) that other statements—like "a debtor's statement that she is a licensed architect"—are "related to" the debtor's financial condition (as they surely are), but under his rule such statements do not qualify. Thus, the statement "Joe lost $50 at the poker table last night" is a statement sufficiently "related to" Joe's financial condition to qualify under Appling's rule, while the statement "Joe runs a hedge fund" or "plays in the NBA" is not. That is nonsense.

Of course, if Congress had actually used "relating to" in Section 523(a)(2)(A), like it did in nearby provisions, the Court would have to search for "a cutoff at some point where the connection [is] thin to the point of absurd." *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 149 (2009). In that circumstance "[the Court] simply *must* go beyond the unhelpful text and

the frustrating difficulty of defining its key term." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (emphasis added). But Congress did not use "relating to" here—it used "respecting." And as explained, in the context here "respecting" can supply its own limitation ("about"), obviating the need for this Court to invent lines separating the too-absurd from the not-quite-too-absurd.[2]

The government takes a similar approach. It recognizes (at 18) that "[s]tatements respecting a debtor's finances are of course common in credit transactions"—which alone confirms the significant impact of a rule that covers statements "related to" finances. But after arguing that "respecting" means "related to," it appears (at 19) to categorically rule out false statements about things like professional qualifications (*e.g.,* "She has an MBA from Harvard") that invariably are *related to* the debtor's financial condition, even though they do not refer to any particular asset or liability.

Then the government adds (at 11) a new wrinkle: To be a statement "respecting financial condition," the statement must *also* be "offered as evidence of ability to pay a debt." Neither the Eleventh Circuit

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[2] Appling's discussion (at 33-35) of Fourth Circuit case law is therefore beside the point. *See also* U.S. Br. 19-20. We do not dispute that courts are *capable* of simply inventing (and declaring) limits on "relatedness." Our point is that the Court should reject an interpretation that requires such judge-made lines when the statute can be read to avoid that enterprise. Moreover, even accepting the Fourth Circuit's own limits, its construction still excuses a broad swath of lies about finances (and individual assets) that Congress did not intend to bless.

nor Appling has advanced this test. For good reason. While the "ability to pay" a particular debt certainly can be related to one's "financial condition," the two are not necessarily interchangeable. For example, in the prototypical situation in which a borrower commits a specific piece of property as collateral for a loan, the borrower may be up to the gills in debt, yet still able to pay the loan if the collateral is sound.

Moreover, when Congress adopted the "respecting . . . financial condition" language in 1926, a "uniform false statements" law enacted in several States made it a crime to make a "false statement in writing . . . respecting the financial condition, *or means of ability to pay*" for the purpose of obtaining credit. Richard P. Ettinger & David E. Golieb, *Credits and Collections* 193 (2d ed. 1917) (emphasis added) (describing uniform act and quoting New York law). Yet when Congress adopted the language at issue here, it explicitly limited its scope to statements "respecting . . . financial condition."

The government's "ability to pay" test also would only complicate the Section 523(a)(2) analysis. Even the government acknowledges (at 14) that under its rule, the same exact words can be a "statement respecting financial condition," or not. How does one tell the difference? Not clear. The government initially seems to suggest that what matters is the *debtor*'s intent (at 9, 14), but then indicates (at 15) that what matters is why the *creditor* "viewed the debtor's allegedly false representation as relevant." If the former, then the government's claim (*id.*) that its test does not require new factual evidence about subjective intent is wrong; if the latter, then it is hard to see how a recipient's after-the-fact decision about how to use a particular statement can dictate

whether the debtor made a false statement "respecting financial condition" or not.[3]

The good news is that all this can be avoided by simply adopting the rule Congress enacted and holding that a statement about an individual asset is *not* a "statement respecting financial condition," regardless of *why* the statement was offered.

B. The Statutory History And "Honest Debtor" Rule Confirm That Congress Intended Only A Narrow Exception

The problems inherent in the sheer breadth of Appling's interpretation come into even starker relief in the light of the longstanding policy against discharging debts incurred through fraud and the specific problem that Congress targeted when it enacted Section 523(a)(2) in 1978.

1. As we have explained (Opening Br. 35-36), if there is one pole star that Congress has followed when it legislates in this area, it is that bankruptcy law should favor only the "honest but unfortunate debtor." In response, Appling belittles (at 18, 36-37) that principle as nothing more than an "hoary" "aphorism," and his law professor amici go further and essentially ask this Court to hold that the "fresh start" principle trumps everything.

That would be a truly radical development. As the government has previously told this Court in *Grogan v. Garner*, 498 U.S. 279 (1991), the policy against discharging debts incurred by fraud is "deeply embedded" in bankruptcy law. U.S. *Grogan*

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[3] The government's "ability to pay" test gets even stranger when it comes to "eligibility for [a] benefit." U.S. Br. 11 n.2.

Br. 13, 1990 WL 10022411. And based on that textually-grounded congressional policy, this Court has repeatedly held that ambiguities in Section 523(a)(2) should be resolved in a way that favors "the interest in protecting victims of fraud" over "the interest in giving perpetrators of fraud a fresh start." *Grogan*, 498 U.S. at 287; *see also Cohen v. de la Cruz*, 523 U.S. 213, 223 (1998) (same); *Kelly v. Robinson*, 479 U.S. 36, 48-49 (1986). There is no basis for any different approach here.

Unlike Appling, the government acknowledges the Bankruptcy Code's "general policy of affording relief only to an 'honest but unfortunate debtor.'" U.S. Br. 2 (citation omitted). Because all agree that the "statement respecting financial condition" language creates an exception to that policy in at least *some* circumstances, however, the government concludes (at 30) that this background rule cannot come into play at all. But just because Congress chose to make an exception doesn't mean it abandoned this foundational concern altogether. *See Maracich v. Spears*, 570 U.S. 48, 60 (2013). In choosing between two permissible constructions, the "honest debtor" principle is still probative in determining *how far* Congress intended to go.

2. So is the history of the statute. As we have explained (Opening Br. 7-12, 36-38), the record going back to 1926 makes clear that Congress adopted the "respecting financial condition" language to capture written financial statements and credit scores published by credit reporting agencies purporting to summarize an overall financial condition. Indeed, Congress deliberately tightened earlier drafts of the provision so that it would cover such overarching financial statements without "cover[ing] too much

[other] ground." *Revision of the Bankruptcy Law: Hearing on H.R. Res. 353 Before the H. Comm. On the Judiciary*, 68th Cong. 45, 47 (1925).

The 1978 enactment shared a similar focus, if for a different reason. As the government explained in *Field v. Mans*, Section 523(a)(2) was enacted "to address a problem of creditor abuse that had arisen with respect to fraud claims *based on technically incomplete written financial statements*." U.S. *Field* Br. 6 (emphasis added). Specifically, Congress responded to reports that some consumer finance companies were requiring written financial statements listing detailed information about applicants' overall financial health in order to dupe applicants into simply *omitting* debts or other requested items. The consumer finance companies would then use that omission—which rendered the financial statement false—to insulate their claims from discharge. *See* Opening Br. 36-37; *Field*, 516 U.S. at 76-77 & n.13. But there is no evidence of complaints about similar creditor abuses in cases in which credit or services were extended based on representations about only a *single* asset (or item of collateral)—an entirely different scenario.

3. Without denying any of that, Appling claims that interpreting "statement respecting financial condition" to cover only statements about a debtor's overall financial circumstances would fail to capture creditor abuses described in the legislative history to the 1978 Act that involved financial forms with truncated spaces for listing debts but "contain[ed] no listing of assets" and were "not a balance sheet from which net worth [could] be obtained." Resp. Br. 50 (alterations in original) (citation omitted).

But that's simply incorrect. Contrary to this argument that the forms in question revealed no information about the debtor's overarching financial status, those forms contained information about not only outstanding debts but also the borrower's income. As a Federal Trade Commission attorney testified during the 1975 hearings, "[t]he most important component of the [credit] application" was "a determination of the consumer's net cash flow position, computed by totaling all periodic obligations . . . and subtracting the figure thus obtained from monthly net income." *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32*, 94th Cong. 759 (1976) (1975 Hearings) (statement of David H. Williams); *see also* H.R. Rep. No. 95-595 at 168 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963 (citing that testimony).[4] This is a prototypical assessment of "financial condition" for the low-income borrowers that were the subject of the abuse on which Congress was focused—and our rule captures it, without sweeping in everything else.

4. This statutory history alone answers the government's argument (at 30) that there is "no sound policy rationale" for distinguishing false statements about overall financial status from statements about individual assets, and that our rule is thus "haphazard" (at 17). As the government itself told this Court in *Field v. Mans*, Congress enacted the statute to address a particular "pattern of abuse by consumer finance companies" (*Field* Oral

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[4] In the specific case Appling highlights (at 50), the borrower reported a "Net Wkly. Sal."—*i.e.,* Net Weekly Salary—of $125, and the form had a space to report the "Surplus" of income over expenses and debts. 1975 Hearings at 1001.

Arg. Tr., 1995 WL 605987, at *26 (Oct. 2, 1995)), and that practice had nothing to do with the situation where a debtor lies about an *individual* asset.

Moreover, the "relative equities," *Field,* 516 U.S. at 76, tip in favor of creditors where, as here, (a) the creditor has not deliberately *invited* a false statement, and (b) a debtor lies about an *individual* asset of which he has knowledge as opposed to simply submitting an incomplete list of *many different* assets or debts. There is no practice of debtors being duped into lying about a single asset.

Appling nevertheless surmises (at 50-51) that, if this Court adopts our rule, "devious creditors" would simply make piecemeal requests—for example, asking "for a list of assets on Monday and then a list of debts on Tuesday." This concern is purely manufactured for litigation. Neither Appling nor the government identifies a single example of such behavior in the hundreds of cases that have applied the narrow rule we advocate. Not one. And that is because any creditor who attempted to manipulate the discharge rules in that manner would be hard pressed to establish justifiable reliance—and would likely find itself paying the debtor's attorney's fees under 11 U.S.C. § 523(d) to boot.

C. Appling's Remaining Attempts To Distort The History And Purpose Of Section 523(a)(2) Fail

1. Lacking evidence that Congress was concerned with false statements about individual assets in either 1926 or 1978, Appling and his amici focus instead on a handful of judicial decisions in the half-century in between that they say require this Court to hold that Congress intended a broad

interpretation of "statement respecting financial condition." *See* Resp. Br. 42-45; U.S. Br. 23-24. For several reasons, that ratification theory fails.

First, Appling and the government do not dispute that the vast majority of cases during those years involved false statements about overall financial status. We collected a sample of those cases in our opening brief (at 43 & n.5), but to be clear, there are many, many more. Those cases are all consistent with our construction, and if Congress was thinking of any lower court case law in 1978, it is surely that mountain of "financial statement" cases that it would have had in mind. Against that, Appling musters only a handful of cases of which there is absolutely no evidence that Congress was aware.

That alone dooms Appling's ratification theory. Whatever force this ratification principle may have in the abstract, this Court has held that it is "without significance" where "the record of congressional discussion preceding reenactment makes no reference to the" particular authorities at issue, "and there is no other evidence to suggest that Congress was even aware of the . . . interpretive position." *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (refusing to find ratification of an agency interpretation in such circumstances); *see also Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 299 (1995) (similarly declining to find ratification of pre-passage judicial decisions).

And here, there are additional reasons why presuming ratification makes no sense. Given that Congress was specifically concerned with creditor abuses involving statements about overall financial status, *see supra* at 16-18, Congress simply had no reason to search for any of the needles in the

haystack Appling has identified involving individual-asset statements. And even then, there is absolutely no basis to presume that Congress would have carried that construction forward when it sought to achieve an entirely different policy objective in the 1978 Act. In every single one of the pre-1978 cases Appling cites, a broad interpretation favored *creditors* as a basis for *denying* discharge.

2. Finally, Appling doubles down on the Eleventh Circuit's argument that Section 523(a)(2) should be read in light of a congressional "purpose of incentivizing greater reliance on written instruments." Resp. Br. 51. But the sole evidence he offers of that purpose is Section 523(a)(2)(B) itself. And, as explained, the history of that section makes clear that Congress did not enact it with some broad aim of encouraging the use of writings or the reliability of evidence, but rather to address a particular abusive practice involving financial statements about overall financial status. After all, if Congress really did have the broad "writing" purpose Appling suggests, there is no reason it would have stopped at written statements about *finances*. Appling does not even attempt one.

This case illustrates, moreover, the windfalls for fraudsters that attempting to promote "written statements" in such a blunderbuss way would create. On Appling's own account, he told Lamar at the very least that he was expecting a "potential[]" refund of "approximate[ly]" $100,000, based on what he had been told by his accountant. Resp. Br. 10 (quoting J.A. 115, 35). As the bankruptcy court noted, though, Appling's total tax paid in the years in question "was only $84,990." Pet. App. 55a. Given the size of his total tax, "[i]t is simply not plausible

to believe that" Appling's accountant told Appling that he had a "potential refund" of "approximately $100,000." *Id.* For all Appling's protestations now that a written statement might have made classic determinations about the sincerity and veracity of witness testimony unnecessary at trial, the fact is that even on *Appling*'s version of the story, it is clear that he told Lamar a $100,000 lie.[5]

Appling and the government also just ignore (or deny) the impact of their position on small businesses and regular folk. As the amicus National Federation of Independent Business has explained (at 12-16), in the real world businesses and individuals still rely on one's spoken word, especially when it comes to smaller or routine transactions involving the exchange of property or services based on a representation about an individual asset or item of collateral. There is no reason to think that Congress chose to advance the interests of fraudulent debtors over those of innocent creditors in that commonly recurring situation.

Instead, as the government itself told this Court in *Field*, "Congress intended that . . . as between an intentionally dishonest debtor on the one hand, and an unwary creditor on the other hand, that the

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[5] There is also no basis for Appling's closing suggestion (at 57-58) that he could prevail even under a narrower rule. This case has been litigated on the premise that Lamar relied on Appling's false statements about his tax return, because that's what Lamar in good faith did. *Cf.* Sup. Ct. R. 15.2. The fact that Lamar was aware of some of Appling's other financial information based on its representation of him in a business dispute does not convert his false statement about a single asset into a statement about his overall financial condition.

creditor should prevail, except where there had been a pattern of abuse in precode cases" (*Field* Oral Arg. Tr., 1995 WL 605987, at *25)—which, as discussed, is utterly lacking in the fact pattern here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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