No. ____________

IN THE

Supreme Court of the United States

ROBERT G. HILLSMAN,

Petitioner,

v.

MARK J. ESCOTO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Did the Ninth Circuit err in holding, contrary to decisions of its sister circuits, that 11 U.S.C. Section 523(a)(2)(A) requires that, in order to prevail on an objection to discharge where the debtor obtained an extension of an existing debt via fraud, the plaintiff must not only demonstrate the statutory elements of that section, but additionally demonstrate that the debt would have been collectible but for the fraud?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioner Robert Hillsman and Respondent Mark Escoto.

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OPINIONS BELOW

On February 27, 2018, the United States Court of Appeals for the Ninth Circuit issued its unpublished decision[1] affirming the judgment of the Ninth Circuit Bankruptcy Appellate Panel. A copy of that opinion is attached as Appendix A, 1a. The Ninth Circuit's ruling follows the issuance of prior decisions by the Ninth Circuit Bankruptcy Appellate Panel on May 15, 2015 (attached as Appendix B, 4a[2]) affirming the decision of the United States Bankruptcy Court, District of Nevada on July 1, 2016 (attached as Appendix C, 25a), following a prior decision of the Ninth Circuit Bankruptcy Appellate Panel (attached as Appendix D, 55a[3]) reversing and remanding the original decision of the United States Bankruptcy Court, District of Nevada, in favor of Respondent, Debtor, Mark Escoto (attached as Appendix E, 73a[4]).

JURISDICTIONAL STATEMENT

This is an appeal from the decision of the Ninth Circuit Court of Appeals affirming final judgment in favor of the Debtor, Mark Escoto, on Appellant Robert Hillsman's objection to discharge. The bankruptcy court had jurisdiction pursuant to 28 U.S.C. § 157 (b)(2)(B) (determination of claims) and (b)(2)(I) (determinations as to the

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[1] *In re Escoto*, 713 F. Appx. 722 (February 27, 2018).

[2] *In re Escoto,* 2017 WL 1075046 (9th Cir. BAP March 21, 2017).

[3] *In re Escoto,* 2015 WL 2343461 (9th Cir. BAP May 15, 2015).

[4] *Hillsman v. Escoto (In re Escoto),* 544 B.R. 212 (Bankr. Nev. 2014).

dischargeability of particular debts). Hillsman invokes this Court's jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

This appeal concerns the application of 11 U.S.C. Section 523(a)(2)(A), which provides that:

> (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 … 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….

PRELIMINARY STATEMENT

While the First, Fifth, Sixth, Seventh, and Tenth Circuits follow the plain language of 11 U.S.C. Section 523(a)(2)(A), the Ninth Circuit imposes an additional "proximate cause" requirement outside of the statutory requirements. Section 523(a)(2)(A) provides that where a forbearance or extension of an existing loan is obtained by fraud, the debt is not dischargeable. The bankruptcy court found that Escoto obtained an extension of his debt to Hillsman by fraud. However, the Ninth Circuit held that Hillsman was also required to prove that the debt was fully collectible at the time the extension was fraudulently obtained, a requirement not contained in Section 523(a)(2)(A), and not imposed by the majority of the Circuits.

STATEMENT OF THE CASE

The bankruptcy court found that Hillsman had established each of the elements appearing in Section 523(a)(2) necessary to defeat Escoto's discharge; however, applying the Ninth Circuit's holding in *Siriani v. Northwestern National Insurance Co., of Milwaukee, Wisconsin* (*In re Siriani*), 967 F.2d 302 (9th Cir. 1992), the bankruptcy court held that Hillsman had failed to demonstrate "the existence of valuable collection remedies which lost value during the period of forbearance." (attached as Appendix B, 6a, 7a.)

This action involves an objection to the dischargeability of a $200,000.00 loan made by Hillsman to fund Escoto's litigation against the contractor and others who built Escoto's residence (the "Construction Defect litigation") (attached as Appendix B, 6a.) The loan was due in three years or upon settlement of the Construction Defect litigation, whichever came first. *Id.* Escoto settled with Christopher Homes in a mediation held on July 16, 2008, approximately four months after the Hillsman loan. (attached as Appendix E, 98a, 103a.) As a result of the settlement, Escoto received $118,000.00 in late 2008. (attached as Appendix E, 102a, 103a.) Escoto reached a second settlement with Executive Plumbing in October of 2009. (attached as Appendix E, 103a.) As a result of the second settlement, Escoto received $142,000.00 in April 2010. (attached as Appendix E, 104a). The bankruptcy court concluded that Escoto had a duty to disclose the settlements, that he failed to disclose, and, as a result, that Escoto obtained an extension of the debt by fraud. (attached as Appendix E, 104a.)

Thus, although all statutory elements of § 523 (a)(2) were satisfied, the bankruptcy court held for Escoto on the sole basis that Hillsman had not demonstrated the loss of a valuable collection remedy that he possessed on March 10, 2011. (attached as Appendix E, 100a.)

Hillsman appealed, and on May 15, 2015, the Ninth Circuit Bankruptcy Appellate Panel ("BAP") reversed and remanded. The BAP found that "Escoto's settlement of the construction defect litigation triggered Hillsman's right to immediate repayment of Escoto's debt. Escoto's concealment deprived Hillsman of the ability to exercise that right, and Escoto thereby effectively procured a forbearance." (attached as Appendix E, 83a.) In light of the finding "that Escoto effectively obtained an extension of credit when he failed to disclose the settlement and thereby prevented Hillsman from immediately demanding repayment in accordance with the terms of the note" (attached as Appendix E,. 83a, 84a), the case was remanded for the bankruptcy court to "make additional or amended findings in order to determine" whether the missing element was established. (attached as Appendix E, 84a.)

After taking the matter under submission for close to a year, on July 1, 2016, the bankruptcy court again ruled in favor of Escoto, finding that Hillsman had not demonstrated the existence of "valuable collection rights" and the "amount by which these remedies lost value." (attached as Appendix B, 12a, 13a).

The bankruptcy court's decision in favor of Escoto was affirmed by the Ninth Circuit Bankruptcy Appellate Panel (attached as Appendix

B, 5a), and by the Ninth Circuit Court of Appeals. (attached as Appendix A, 1a).

The Ninth Circuit decision was filed on February 27, 2018. *Id.* Hillsman timely seeks review via petition for writ of mandamus filed within ninety days of that date.

REASONS FOR GRANTING THE WRIT

This Court Should Settle a Divisive Circuit Split Regarding the Proximate Cause Standard Under Bankruptcy Code Section 523(a)(2)(A).

Bankruptcy Code § 523(a)(2)(A) excepts from discharge "[a]ny debt…for money…or an extension, renewal, or refinancing of credit, to the extent obtained by…false pretenses, a false representation, or actual fraud." The bankruptcy court found unequivocally that Escoto obtained an extension of the loan by false pretenses, a false representation, or actual fraud.

Hillsman asks this Court to accept certiorari in order to settle a circuit split. The Ninth Circuit imposes an additional "proximate cause" requirement not contained in Section 523(a)(2)(A). However, the First, Fifth, Sixth, Seventh, and Tenth Circuits correctly hold that the plain meaning of the statute precludes imposition of such an additional, judicially-created requirement.

Siriani, 967 F.2d 302, 305 (9th Cir. 1992), and *Cho-Hung Bank v. Kim (In re Kim),* 62 F.3d 1511 (9th Cir. 1995), establish the Ninth Circuit's mandate[5] that, in addition to demonstrating the

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[5] The Eleventh Circuit appears to adopt a similar requirement, noting that an element of a claim under Section 523(a)(2)(A) is that "the creditor sustained a loss as a result of

statutory requirement of proximate cause-that the extension was obtained via fraud-the Plaintiff must additionally show that, but for the extension, the loan would have been collectible. The Ninth Circuit phrases this test as requiring that the Plaintiff demonstrate "that it had valuable collection remedies at the time of renewal, and that such remedies lost value during the renewal period." *Siriani*, 967 F.2d at 306.

As the bankruptcy court itself recognized, other circuits do not impose an additional "proximate cause" requirement on creditors seeking to except debts from discharge above and beyond the statutory requirement that the extension was granted in reliance on the debtor's fraud. Judge Nakagawa observed: "Other circuits do not share the Ninth Circuit's view on the requirement of establishing the loss of a valuable collection remedy, *see Wolf v. Campbell (In re Campbell)*, 159 F.3d 963, 966 (6th Cir. 1998), but this court is bound by *Siriani* and *Kim*."(attached as Appendix E, 76a).

The First Circuit rejected the Ninth Circuit's *Siriani* holding in *In re Goodrich*, 999 F.2d 22 (1st Cir. 1993). Recognizing that "some courts have read into the statute yet another requirement, not reflected in its explicit language, that the creditor show that it was *damaged* by the false statement", the court concluded that: "Congress enacted a detailed statute without an explicit damage requirement. In the face of conflicting policies for and against, there is no warrant for the court to add such a requirement." *Id.* at 25-26.

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the false representation." *In re Wood*, 245 F. App'x 916, 917–18 (11th Cir. 2007), *citing In re Bilzerian,* 153 F.3d 1278, 1281 (11th Cir. 1998).

The Fifth Circuit also explicitly rejects any additional proximate cause requirement arising from the Ninth Circuit's holding in *Siriani*. *In re Norris*, 70 F.3d 27, 29 n. 6 (5th Cir. 1995)(holding that, to the extent *Siriani* "may stand for the proposition that the renewal of a preexisting debt, without more, does not fall within the purview of the statute, we join the First and Tenth Circuits in rejecting such an approach").

The Sixth Circuit recognizes that the Ninth Circuit has construed section 523(a)(2)(A) "to require the creditor to establish damage through the loss of a valuable collection remedy. But several other circuits have declined to so hold, and we think they have the better side of the argument." *In re Campbell*, 159 F.3d 963, 966 (6th Cir. 1998). That court also noted that while "nondischargeability provisions are frequently construed in favor of debtors…that policy is not to be advanced at the expense of defrauded creditors. *See Grogan v. Garner,* 498 U.S. 279, 286–87, 111 S.Ct. 654, 659–60, 112 L.Ed.2d 755 (1991)." *Wolf v. Campbell*, 211 B.R. 14, 16 (E.D. Mich. 1997), *aff'd sub nom. In re Campbell*, 159 F.3d 963 (6th Cir. 1998). Such a result is compelled by the plain language of the statute. "In light of the clear language of the statute, in which Congress set forth a set of four discrete elements, the Court finds that a creditor need do no more than satisfy those elements to obtain a non-discharged judgment." *Id.*

The Seventh Circuit succinctly stated the basis for rejecting the *Siriani* standard as follows:

> The language of the district court's order suggests that its analysis was premised upon a conclusion that the

> Credit Union was no worse off than it would have been had it not refinanced McFarland's debt on the May 1991 note prior to her filing under Chapter 7. This implies the existence of a detriment requirement in the statute, but the text of § 523(a)(2)(B) contains no damage or detriment requirement, and the courts are not empowered to add one. *See In re Norris,* 70 F.3d 27, 29 n. 6 (5th Cir.1995) (noting that such a requirement would be surplusage in light of the two causation requirements in § 523(a)(2)(B)). For those who would resort to legislative history to reach this conclusion, the First and Tenth Circuits have concluded that the history attending the enactment of § 523(a)(2)(B) confirms our (and their) plain reading of the statute. *See Goodrich,* 999 F.2d at 25–27; *In re Gerlach,* 897 F.2d 1048, 1051 & n. 2 (10th Cir.1990). We do not reproduce their discussions here, for there is no need to examine legislative history where the words of a statute are clear. *Barnhill v. Johnson,* 503 U.S. 393, 401–02, 112 S.Ct. 1386, 1391, 118 L.Ed.2d 39 (1992); *United States v. Hudspeth,* 42 F.3d 1015, 1022 (7th Cir.1994) (en banc), *cert. denied,* 515 U.S. 1105, 115 S.Ct. 2252, 132 L.Ed.2d 260 (1995).

Matter of McFarland, 84 F.3d 943, 947 (7th Cir. 1996).

The Tenth Circuit rejects the proposition that courts should "preclude discharge only to the extent an objecting creditor can prove damages-reduction in the ultimate recovery on the debt caused by forbearance," recognizing that such a requirement is contrary to the plain language of the statute. *In re Gerlach*, 897 F.2d 1048, 1051 (10th Cir. 1990).

In considering whether to review this issue, is it appropriate for this Court to consider the large number of decisions struggling to make sense out of the Ninth Circuit's standard. While Section 523(a)(1)(A), "governing nondischargeability for false statements, has spawned a fair amount of case law, inter-circuit conflicts and considerable confusion", *In re Goodrich*, 999 F.2d 22, 24 (1st Cir. 1993), the additional requirement imposed by the Ninth Circuit has, in particular, spawned a plethora of decisions, which seem to heighten the court-made standard as time passes.

In 1992, the Ninth Circuit held that the "proximate cause" standard was met where the "valuable collection remedy" lost was merely "the power to perfect its security interest, that declined in value when the bankruptcy filing prevented it from perfecting that interest." *Pagnini*, 2012 WL 5489032, at *5.

In 1995, in *Kim*, 62 F.3d 1511, the valuable collection remedy standard was met where the creditor had "the power to sue the debtors in state court when the bank renewed the loan, but that power declined in value when the debtors filed the bankruptcy petition." *In re Pagnini*, 2012 WL 5489032, at *5 (9th Cir. B.A.P Nov. 13, 2012).

By 2012, the proximate cause barrier had grown. In *Pagnini,* the debtor convinced the lender to release its interest in a Bentley automobile, refinancing the balance of the amount owed by offering as collateral a 1950 Ford. The refinance was obtained by fraud, as the debtor represented that the Ford was in the same condition as when appraised for over $38,000-in fact, the Ford was dissembled and missing the engine, radiator and transmission, which debtor had sold. While all of the statutory elements of Section 523(a)(1)(A) were met, the court held that, under *Siriani*, the debt was dischargeable since the creditor was unable to demonstrate that it would have received a greater recovery if the Bentley had not been released. *Id.*

By 2017, the standard had become so difficult to apply that neither the bankruptcy court nor the Ninth Circuit Bankruptcy Appellate Panel was able to correctly predict what the Ninth Circuit would do. In *In re Ifeorah*, 683 F. Appx. 621, 624 (9th Cir. 2017), the debtor fraudulently obtained an extension of his obligation to make lease payments, promising that the landlord could retain kitchen equipment *which the debtor did not own.* In parsing the extent to which the resulting damages were nondischargeable, the Ninth Circuit (overruling the holdings of both the bankruptcy court and the Ninth Circuit Bankruptcy Appellate Panel) held that the amount due on the date of the fraud *was dischargeable*, that rent deferred after the extension as part of the settlement *was not dischargeable* up until the date a balloon payment was due, that the deferred rent due after the default but prior to the demand to vacate *was dischargeable*, and that the unpaid rent from the demand to quit until the actual eviction *was not dischargeable*, and that the damages from the loss of the kitchen equipment *were dischargeable*.

In its 2018 decision in this case, the Ninth Circuit created an even higher standard, holding that an unsecured creditor must "introduce adequate evidence as to [the debtor's] assets and liabilities (and the priority of [the creditor's] claim *vis-à-vis* other creditors)" in order to prove the portion, if any, of the debt which will be excepted from discharge. (attached as Appendix A, 4.)

In short, the establishment of an extra-statutory judicial requirement is not only contrary to the plain meaning rule, but such an amorphous standard serves to create confusion and spawn additional litigation, while protecting dishonest debtors contrary to the intent of Congress as evidenced by the statute.

CONCLUSION

For the reasons stated above, it is respectfully requested that this Court grant Certiorari in the instant matter.

Respectfully submitted this 25th day of May, 2018.

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