

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

8 - - - - -
9 Washington, D.C.
10 Tuesday, April 17, 2018

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

14
15 APPEARANCES:

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

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

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

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

2 (11:18 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument -- well, we're still here.

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: And we'll hear
7 argument in Case 16-1215, Lamar, Archer &
8 Cofrin versus Appling.

9 Mr. Garre.

10 ORAL ARGUMENT OF GREGORY G. GARRE

11 ON BEHALF OF THE PETITIONER

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

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

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

1 "financial condition," of a term of art, and
2 essentially to substitute the word "finances"
3 for it.

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

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

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

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

1 status.

2 And, again, Respondent's
3 interpretation of "respecting" essentially
4 eliminates that term as a term of limitation
5 and as a term of art and substitutes the word
6 "finances" for it. So a statement about any
7 individual input, any individual asset, any
8 individual liability suddenly becomes a
9 statement respecting financial condition.

10 And I think there are three central
11 problems with -- with -- with Respondent's
12 interpretation of "respecting."

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

25 And here in context, reading

1 "respecting financial condition" to mean a
2 statement about financial condition makes
3 perfect sense. To say something is about means
4 it refers to the subject of the object. Here,
5 the object is the statement and here the
6 subject is financial condition, one's overall
7 financial status.

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

13 JUSTICE KAGAN: Could you tell me, Mr.
14 -- Mr. Garre, what do you think the difference
15 is between "relating to" and "about"?

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

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

1 JUSTICE KAGAN: Yeah --

2 MR. GARRE: I mean, it's a term of
3 great breadth.

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

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

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

1 season. Or he -- he almost hit the ball just
2 -- he was almost just as likely to hit the ball
3 as he was to not hit it. That's a statement
4 about batting average.

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

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

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

23 So the "about" would be answered in
24 both ways.

25 MR. GARRE: Well, I think, first of

1 all, are you referring to the subject --

2 JUSTICE SOTOMAYOR: And "respecting"
3 would be answered in both ways.

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

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

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

21 (Laughter.)

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

1 And when you say "tell me about," what
2 usually that means is "all about." But let's
3 try it with the word "statement," which is in
4 the statute. Make a statement about his
5 batting average. Make a statement respecting
6 his batting average.

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

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

14 JUSTICE BREYER: No, not tell me.
15 Make --

16 MR. GARRE: Make?

17 JUSTICE BREYER: -- a statement about
18 his batting average.

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

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

23 MR. GARRE: He hit the ball more than
24 he struck out versus he was -- that's a
25 statement respecting batting average, versus he

1 was robbed of a hit in the seventh inning by a
2 great catch. That's not a statement respecting
3 --

4 JUSTICE BREYER: I'll take it -- I'll
5 take it under consideration.

6 (Laughter.)

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

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

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

25 Now this case couldn't be -- possibly

1 be viewed in that way because it was clear that
2 this was a statement about only a single asset
3 and it was a statement in spite of his
4 financial condition.

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

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

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

24 MR. GARRE: Sure. And this is -- you
25 know, can come up in any number of situations

1 dealing with collateral, whereas it's not
2 uncommon for someone to know that another
3 person is in dire financial straits but,
4 nevertheless, to accept collateral in exchange
5 for property or services as a means of paying
6 for that.

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

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

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

25 So I think that that's why this case

1 is truly the case about a statement about a
2 single asset, a -- a tax refund, that the
3 debtor in this case lied about.

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

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

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

22 And so Congress passed a specific rule
23 that dealt with written financial statements.

24 JUSTICE GORSUCH: Mr. Garre, I'm not
25 sure I understand how that helps you even on

1 its own terms, assuming I'd be willing to look
2 at it, of course.

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

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

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

16 JUSTICE GORSUCH: Good. How?

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

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

1 liabilities, right?

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

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

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

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

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

25 And, here, the situation is the

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

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

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

13 MR. GARRE: It's --

14 JUSTICE GORSUCH: I own a genuine
15 Vermeer.

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

20 JUSTICE GORSUCH: Ever?

21 MR. GARRE: -- financial condition.

22 JUSTICE GORSUCH: Categorically?

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

25 JUSTICE GORSUCH: All right. Let's

1 say I don't --

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

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

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

8 JUSTICE GORSUCH: Yeah.

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

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

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

19 JUSTICE BREYER: But it's in context.
20 Doesn't it?

21 MR. GARRE: It would --

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

25 MR. GARRE: Right.

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

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

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

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

21 MR. GARRE: Yes. I think --

22 JUSTICE GORSUCH: Why isn't that --
23 why -- why isn't everyone in the room
24 understanding exactly what that means, which
25 is, okay, I don't have a lot else, but I've got

1 this.

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

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

12 MR. GARRE: Right.

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

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

21 Congress also differentiated between
22 assets and liabilities and financial conditions
23 in other provisions, where it listed those
24 terms separately in 11 U.S.C. 1103(c)(2) and
25 1106(a)(3).

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

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

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

22 Now the government itself on page 18
23 of its brief recognizes that that is a common
24 situation, someone making statements about
25 one's finances to -- to obtain credit. And yet

1 the consequence of Respondent's and the
2 government's rule is to wipe that out as a
3 basis for discharge.

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

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

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

21 And I think one would look skeptically
22 to a rule that would wipe out the application
23 of that age-old rule in a commonly recurring
24 context, which is statements made about
25 finances. And that's --

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

5 MR. GARRE: Yeah.

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

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

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

22 MR. GARRE: Right. Because that --
23 that's -- that goes to ability to pay, not
24 overall financial condition. And, again -- and
25 it goes to why we asked for collateral in loans

1 commonly. Collateral is not --

2 JUSTICE KAGAN: I'm sorry.

3 MR. GARRE: I was going to say, when
4 you -- it's not uncommon for people to have --
5 be in dire financial straits but yet go to get
6 loans on the basis of collateral. That's the
7 pay day^ situation the government refers to.
8 Ability to pay is a different concept than
9 financial condition.

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

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

20 MR. GARRE: Well, I -- I think the
21 "I'm above water" tells you about your
22 financial condition. The "I" -- because it
23 tells you about your overall financial status.
24 The "I have a bank act with a billion dollars
25 in it" tells you you have a lot of money. It

1 doesn't tell you anything about your debts.
2 Really rich people sometimes have really big
3 liabilities. Ask Bernie Madoff. And so that
4 does not give you a sense of overall financial
5 status.

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

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

23 And, again, I mean, just referring --
24 returning to that problem briefly, there you
25 had a situation of a certain class of creditors

1 that were abusing written financial statements
2 that included assets and liabilities and duping
3 creditors -- debtors into making false
4 statements. So you had blameworthy creditors
5 and essentially blameless debtors. In that
6 situation, Congress said you should -- we
7 should rebalance the scales and not discharge
8 those debts, unless they meet certain
9 additional requirements in (B). This Court
10 recognized that in *Field versus Mans*, which
11 makes it a little bit different than the
12 typical legislative history case.

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

23 So, in this case, there's no -- no
24 reason to think that Congress would have wanted
25 to balance the scales any differently. And,

1 instead, there's every reason to think that
2 Congress would have intended the baseline rule
3 that has always applied in this context to
4 apply to this situation, which is that a debt
5 procured by fraud is not dischargeable.

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

15 The -- the bankruptcy court found that
16 the deceit was obvious. That's at page 60a of
17 the petition appendix. So why would have
18 Congress have intended to -- for a debtor
19 engaged in obvious deceitful conduct against a
20 creditor who's entirely blameless, to allow the
21 debtor to discharge that debt? When you think
22 about the consequences of the kind of behavior
23 that that would promote, there's no reason to
24 think Congress would want to promote that kind
25 of behavior, certainly not when one looks at --

1 JUSTICE GINSBURG: Why wouldn't the
2 result be to get people, especially law firms,
3 to do -- do things in writing?

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

14 If Congress really had that objective,
15 Justice Ginsburg, it wouldn't have limited the
16 writing requirements to statements about
17 financial condition. It would have applied it
18 generally.

19 Under their rule, they say that
20 statements about professional qualifications or
21 the values of assets are -- are different. But
22 if Congress was really concerned about having
23 writing -- things in writing for evidentiary
24 purposes, it would apply that across the board.

25 So I don't think there's any real

1 traction to the notion that the -- the statute
2 should be interpreted in light of this unstated
3 objective to simply generate more reliable
4 evidence in proceedings.

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

13 Given that, this case falls within the
14 baseline rule that that debt is not
15 dischargeable. The only way that Respondents
16 and the government can pull that out of there
17 is to give "respecting" the broadest
18 conceivable breadth in terms of relating to and
19 then, once you get to that point, to ask this
20 Court essentially to impose judicial limits on
21 the breadth of that term because even they, I
22 think, appreciate that if "respecting" really
23 means "related to" here, then this is really
24 going to swallow up the whole thing.

25 I mean, they -- they say that the

1 statement has to be about an asset, the
2 Respondent does, but why isn't a statement that
3 I run a hedge fund a statement relating to
4 one's financial condition? Certainly, someone
5 might -- would reasonably view it that way.

6 Why isn't a statement that I graduated
7 first in my class from Harvard Business School
8 a statement respecting financial condition?
9 Certainly, it would be related to that.

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

17 Ability to pay something by committing
18 an asset to pay a debt is different than one's
19 overall financial status. You can be deeply in
20 debt but still have an asset that you commit to
21 paying a debt.

22 If I could reserve the remainder of my
23 time.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Hughes.

2 ORAL ARGUMENT OF PAUL HUGHES

3 ON BEHALF OF THE RESPONDENT

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

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

16 But in the context of this statute,
17 Section 523(a)(2), those sorts of trivial
18 examples structurally cannot exist. And that's
19 because, in addition to demonstrating -- when a
20 -- when a plaintiff comes forward with this
21 sort of claim, in addition to identifying the
22 -- the statement that the plaintiff alleges is
23 fraudulent, the plaintiff must also identify
24 why that statement was material to its
25 decision-making, why the plaintiff actually

1 relied on that statement, and why the plaintiff
2 at minimum was justified in doing so.

3 And so those requirements, those
4 necessary requirements of a Section 523(a)(2)
5 claim, necessarily and substantially limit the
6 universe of claims that could be within the
7 realm of statements respecting financial
8 condition.

9 And Congress was well aware that it
10 was crafting a statute about fraud. It well
11 knew of all of these other limitations that
12 cabined the universe of -- of the potential
13 kinds of claims. And so that precludes any
14 court from having to consider these sorts of
15 trivial examples.

16 JUSTICE GORSUCH: Well, let's -- let's
17 take Mr. Garre's example of the Harvard
18 Business School graduate. I graduated from
19 Harvard Business School. And someone might
20 reasonably rely on that and take it to be
21 material and significant. But does it relate
22 to financial condition, overall financial
23 condition? Doesn't that term have to mean
24 something?

25 MR. HUGHES: So a few things about

1 that, Your Honor. First, to directly answer
2 your question, we think that the clearest test
3 is to ask: Does the statement describe what
4 would be a line item on one's balance sheet or
5 income statement?

6 We think that's a very easy way to
7 understand what a direct --

8 JUSTICE GORSUCH: Okay. All right.
9 So you'd rule it out on the basis that it has a
10 to be at least something that would appear on a
11 financial statement. All right. A lot of
12 trivial things appear on financial statements,
13 right? I have this, that, little asset. I own
14 a car. It's a secondhand car. It's not worth
15 a whole lot, but it would appear on a financial
16 statement. That would be enough in your --
17 under your rule?

18 MR. HUGHES: Well, yes, Your Honor.
19 And what would deal with that example is the
20 materiality requirement. But, again, their
21 rule is if you make that --

22 JUSTICE GORSUCH: Well, no, no, it was
23 reasonably relied on for the purpose of the
24 loan or the services rendered or whatever, as
25 collateral, surely, of course, it was. But it

1 doesn't have anything to do with overall
2 financial condition. It just means I own a
3 very bad car.

4 MR. HUGHES: Well, the question would
5 be the reliance theory there, Your Honor. And
6 if they're relying on it, that statement,
7 because it says something about your financial
8 condition, I think that would be very clear
9 evidence that it goes to financial condition.

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

13 The only question here is if you make
14 that identical statement not in the context of
15 a balance sheet, but standing alone, does all
16 of a sudden (2)(A) apply? And we think that
17 rule doesn't make any sense because it's the
18 identical misstatement if you include a
19 misstatement about a -- a worthless car on your
20 balance sheet and you make that identical
21 statement standing alone because the -- the
22 loan officer comes and asks you the next day:
23 By the way, do you have any additional
24 automobiles we should -- we should know about?

25 The rule they set up is, if you put it

1 on the balance sheet, (2)(B) applies, but if
2 you say it standing alone, all of a sudden
3 (2)(A) applies. That's all form and no
4 substance.

5 The rule -- the difference -- the
6 distinction between (2)(A) and (2)(B) should
7 not turn on what the packaging of the
8 misstatement is, if it occurs on a balance
9 sheet or if it occurs independently standing
10 alone; it should look to what the -- what the
11 actual substance of the statement is.

12 And when the substance of the
13 statement is one that goes to financial status,
14 then it's a (2)(B) claim because it's a
15 statement that's respecting financial
16 condition.

17 And, again, it's clear that that is
18 this case. One need look no further than their
19 amended complaint in the bankruptcy court.
20 This is at the Eleventh Circuit's appendix,
21 page A38. And they say what -- why was the tax
22 information material? And they say: "It was
23 material information regarding his and his
24 company's financial status and abilities."

25 Their theory of materiality and

1 reliance was that this statement was material,
2 and they're relying upon it because it went to
3 his financial status, his ability to pay.
4 That's the identical reliance theory that the
5 bankruptcy court adopted at Petition Appendix
6 62A.

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

18 The reality, when -- when a creditor
19 relies for this actual reason, that is what
20 should govern the (2)(A)/(2)(B) analysis. Or
21 else, again, you lead to these bizarre results,
22 as I said, it shouldn't matter the truthful
23 packaging.

24 Again, as -- as --

25 JUSTICE GINSBURG: Your -- your --

1 your understanding shrinks what would once fit
2 under (2) (A). So what remains under (2) (A)
3 when you don't have a writing requirement?

4 MR. HUGHES: So, Your Honor, a
5 substantial amount remains under (2) (A), as 34
6 years of Fourth Circuit practice have shown,
7 and that's because most of the claims -- most
8 plaintiffs under Section 523(a) (2) are not
9 lenders.

10 Most plaintiffs have a variety of
11 fraud claims that are entirely outside the loan
12 context. And so just to look at this Court's
13 recent 523(a) (2) cases, two years ago, the
14 Court considered Husky International
15 Electronics about fraudulent conveyance, which
16 was a (2) (A) case.

17 Prior to that, the Court looked at
18 Cohen v. de la Cruz, which was a case about a
19 fraudulent scheme to overcharge rents, in
20 violation of state law. That was a (2) (A)
21 case.

22 Prior to that, in Grogan, with
23 securities fraud, that was a (2) (A) case. All
24 of these cases that deal with fraud entirely
25 outside the lending capacity come up as (2) (A)

1 cases.

2 And as we've said, for 34 years, our
3 approach has governed in the Fourth Circuit,
4 and (2) (A) is -- is very much alive and well
5 there.

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

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

16 MR. HUGHES: No, it still can exist
17 for fraud with lenders, particularly when
18 somebody is making a statement at the time of
19 obtaining debt as to a future promise. And
20 there, the fraudulent claim would not be what
21 about their financial condition, but something
22 that they are going to do in the future,
23 perhaps how they use the proceeds of a loan or
24 if they're going to convey ownership interests
25 of the person who's giving them the loan.

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

12 And we think it would be a bizarre
13 result if those protections could be
14 circumvented by a rule, such that if the lender
15 asks for everything but overall financial
16 condition, if they just ask for the three most
17 important assets and the three most important
18 debts, all of a sudden those protections would
19 cease to apply, even though the -- the creditor
20 is getting the identical information that they
21 want from getting a holistic balance sheet.

22 So the context of this statute, we
23 think, very clearly indicates why Congress
24 would prefer for an approach that applies to
25 statements about single assets, every bit as

1 much as a statement about an overall balance
2 sheet.

3 In addition to -- to that particular
4 purpose, the very example that Congress gave in
5 enacting the statute was a list of debts, only
6 something on the debtor's balance sheet.

7 And Congress had cited to a bankruptcy
8 court decision, In re Hill, where Bankruptcy
9 Judge Bare very clearly explained that the kind
10 of example that Congress had in mind was not
11 the kind of document from which overall net
12 worth could be obtained.

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

17 Beyond that, we know that Congress had
18 in mind that (2)(B) would have real effect.
19 And that's because the 1970 Bankruptcy
20 Commission, when it issued its report in 1973,
21 it recommended doing away with this exemption
22 to bankruptcy in its entirety. It found that
23 on the whole it was doing more harm than good
24 to the public.

25 Now Congress said we're not going to

1 go that far. We're going to strike a
2 compromise, and lenders will be able to exempt
3 debts from discharge in these circumstances.

4 CHIEF JUSTICE ROBERTS: And they --
5 they all read the Bankruptcy Commission report?

6 MR. HUGHES: Well, it was -- it was
7 entered into the record, Your Honor.

8 CHIEF JUSTICE ROBERTS: It was entered
9 into the record? Oh, then I'm sure they all
10 read it.

11 (Laughter.)

12 MR. HUGHES: Your Honor, though, to be
13 clear, our principal argument rests on the text
14 of the statute. And we think that that
15 resolves this case. We -- we don't submit that
16 going to these other sources are -- are
17 necessary.

18 We think the text is clear, but to the
19 extent that there's any possible ambiguity, we
20 -- we don't believe there is any, but we think
21 all of these other points line up behind it
22 because along the same line, prior to the 1978
23 recodification, five circuits had looked at
24 materially identical language, and they all
25 reached the same result.

1 Again, we think the text is the most
2 compelling basis for the Court to decide this
3 case, but the fact that the text, the
4 legislative history, the -- the statutory
5 lineage and the clear purpose all line up the
6 same direction, we think indicates why the
7 Eleventh Circuit was absolutely correct in its
8 decision with this case.

9 JUSTICE SOTOMAYOR: May I go back to
10 the argument Mr. Garre did? He said the
11 Congress was seeking to protect debtors where
12 credit companies were telling them to omit a
13 particular item.

14 MR. HUGHES: Yes, Your Honor.

15 JUSTICE SOTOMAYOR: How does this rule
16 protect those creditors?

17 MR. HUGHES: How --

18 JUSTICE SOTOMAYOR: Because, if the
19 debtor provides the balance sheet in writing
20 but omits something that the creditor asks,
21 tells them it's not -- it's unimportant, why
22 does the writing requirement save the debtor?
23 It doesn't really.

24 MR. HUGHES: Well, Your Honor, that's
25 because --

1 JUSTICE SOTOMAYOR: It doesn't save
2 the debtor.

3 MR. HUGHES: Your Honor, in (2) (B),
4 there were two particular protections. One was
5 the writing requirement, and you're correct,
6 the writing requirement would not apply. But
7 the other distinction between (2) (A), which
8 does the work in that case, is the reasonable
9 reliance requirement.

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

20 And so the reasonable reliance
21 requirement is what -- what takes care of those
22 cases.

23 JUSTICE ALITO: Would you respond to
24 -- to Mr. Garre's argument that the statement
25 here concerns ability to pay and not financial

1 condition?

2 MR. HUGHES: Well, it's hard for me to
3 see the distinction between those two, Your
4 Honor, because I think people are concerned
5 about ability-to-pay statements because they go
6 to financial condition, vice versa, financial
7 condition statements are -- are relevant to
8 condition -- to ability to pay.

9 But, again, as the government says,
10 ability to pay is a very important part of this
11 test. We have two separate amicus briefs who
12 identify a separate way to look at financial
13 condition, which is not just balance sheet
14 solvency but is equitable solvency, which goes
15 to ability to pay.

16 So I think another way to look at this
17 case is a statement that shows ability-to-pay
18 liquidity is a statement that goes to financial
19 condition. I think it's very hard to
20 disaggregate those two.

21 And this is obviously a statement
22 about ability to pay. And so I think that does
23 confirm that it is a statement respecting
24 financial condition.

25 Now, I think the one distinction that

1 they try to make at page 14 of the yellow brief
2 is that there was a model code that -- back in
3 1926 that looked to statements respecting
4 financial condition and the means of ability to
5 pay, and they try to suggest that since only
6 statement respecting financial condition was
7 plucked from that model code, that means of
8 ability to pay is something different.

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

22 So the distinction that they try to
23 make in the yellow brief at page 14 is -- is
24 about those third-party ability of means to
25 pay. When you take the third parties out, I

1 don't think there's much distinction between
2 financial condition and the ability to pay.

3 JUSTICE GINSBURG: What about the
4 argument that you would be putting a burden on
5 small businesses that deal informally? You
6 would be putting a recordkeeping requirement on
7 them for a statement like: I've got this tax
8 refund.

9 MR. HUGHES: Well, so, Your Honor,
10 this rule has applied for 34 years in the
11 Fourth Circuit, and neither Petitioner nor its
12 amici have come up with a shred of evidence any
13 untoward policy on small business or any other
14 sector of the economy.

15 And I think we know exactly why,
16 because the NFIB amicus brief cites its own
17 report. And its report, at page 8, concludes
18 that bankruptcies are not significant problems
19 for small business. It goes through all the
20 other problems that small businesses have in
21 obtaining payment, and it says bankruptcies are
22 relatively insignificant.

23 And then that same report, at page 6,
24 explains why, beyond that, that small
25 businesses stand to benefit more from expansive

1 roles that protect debtors for the very reason
2 that small business owners are more likely to
3 be debtors in bankruptcy cases than the general
4 population.

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

16 CHIEF JUSTICE ROBERTS: Well, you
17 know, we get -- we get these arguments a lot.
18 This rule has been there for 30 years, and
19 there are no problems. I mean, there are a lot
20 of factors go into whether or not your --
21 there's no empirical evidence. It's not like
22 there's a daily report about what charges have
23 been made and then the cases have been settled
24 or anything like that.

25 The fact that there haven't been that

1 many reported decisions, which I assume is the
2 basis for your statement it hasn't been a
3 problem, doesn't really tell you all that much
4 in cases like this.

5 MR. HUGHES: Well, I think, Your
6 Honor, the -- the point that we make is a more
7 limited one, which is to say if the sky were
8 falling in the Fourth Circuit, there would be
9 some evidence or some outcry from these very
10 substantial jurisdictions. There would be some
11 indication that there was a problem that --
12 that came from this rule.

13 So we're using this -- the -- the
14 absence of evidence in the Fourth Circuit to
15 simply say that any view of a policy concern is
16 substantially overblown, because there hasn't
17 been any identification of even a single case
18 where there have been imposition of
19 recordkeeping obligations that have been deemed
20 improper or any sort of improper cost on small
21 businesses.

22 And, again, I think when we look to
23 NFIB evidence, that shows exactly why. This is
24 just not a problem that, in the aggregate, was
25 of concern to small businesses; and, rather,

1 Congress was looking at this as consumer
2 protection, how it dealt with consumer lending
3 in the aggregate, and that's why it drafted the
4 broad statute that it did to preclude any kinds
5 of circumvention, because, again, a rule to the
6 contrary would -- would lead to a result where
7 if, you know, Appling had not just said I'm
8 getting a 100,000 refund, but I'm getting a
9 100,000 refund and therefore my head is above
10 water, that all of a sudden (2) -- (2)(B) would
11 apply.

12 That's just all form over substance,
13 and there's no reason to think that -- that
14 Congress would have actually done that. So we
15 think our rule accords with what actual
16 creditor behavior is, and that should be the
17 rule of decision that Congress was concerned
18 about substances.

19 Additionally, as I've said, our rule
20 captures the -- the only single example that
21 Congress gave. And, finally, I think our rule
22 is just plainly required by the -- the clear
23 text of the statute, that the word "respecting"
24 has a broadening function, there's been no
25 indication that it has anything but a

1 broadening function, and regardless if one
2 thinks it's relating to, respecting, about, all
3 of that broadening function leads to the very
4 same rule that the Eleventh Circuit adopted
5 below where statements about assets and
6 liabilities necessarily qualify.

7 JUSTICE SOTOMAYOR: Could -- could you
8 tell me how you think -- why you think your
9 rule is better than the Solicitor General's
10 suggestion?

11 MR. HUGHES: Well, our rule is -- is
12 superior for several reasons. It -- it
13 accomplishes Congress's goal of extending
14 debtor protection to this range of claims
15 because, but for our rule --

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

18 MR. HUGHES: Apart from the Solicitor
19 General's rule, I don't think our -- our
20 approach has any pragmatic difference. I've
21 thought through all the examples, and I can't
22 think of an example where our rule departs from
23 where the Solicitor General's rule would come
24 out. We think our rule is a bit -- is -- is
25 straightforward and -- and an easy one to

1 apply.

2 But I think, in all of these cases, if
3 you think of ability to pay as either
4 requirement of the rule --

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

8 MR. HUGHES: Sure. So --

9 JUSTICE SOTOMAYOR: I know they spoke
10 about context and purpose, and you didn't.
11 So --

12 MR. HUGHES: Yes, Your Honor, our rule
13 is that any statement that has a direct impact
14 on one's overall financial condition, which
15 Petitioner defines as the balance of assets and
16 liabilities, is a statement respecting
17 financial condition. So we think an easy way
18 to think of this is if it's a statement
19 describing a single line item on a balance
20 sheet or an income statement, that's what
21 qualifies.

22 The government's rule is they -- they
23 say it's, quote, "an affirmative representation
24 about a single asset if that representation is
25 offered as evidence of the debtor's ability to

1 pay." So they add that "if evidence of
2 debtor's ability to pay."

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

18 So I don't think there's any practical
19 difference between where we are and where the
20 Solicitor General is.

21 Thank you, Your Honor.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Sandberg.

25

1 ORAL ARGUMENT OF JEFFREY E. SANDBERG
2 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
3 IN SUPPORT OF THE RESPONDENT

4 MR. SANDBERG: Mr. Chief Justice, and
5 may it please the Court:

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

18 And the determination of whether a
19 statement is one respecting financial condition
20 or not will make a practical difference only
21 when the creditor has actually relied on it and
22 the reliance was, at a minimum, at least
23 justifiable.

24 And the creditor who has relied on a
25 statement about the value of a single asset,

1 such as here a tax refund, has done so for
2 exactly the same purpose that one would
3 customarily rely on a comprehensive financial
4 statement for, which is to form a judgment
5 about the debtor's creditworthiness for
6 purposes of consummating or not consummating a
7 particular transaction.

8 So "statement respecting financial
9 condition" is ultimately about the topic of the
10 statement. It's not about the significance of
11 the statement. So if I make a statement about
12 the status of a -- the project being financed,
13 say, I lied to the lender and say that we broke
14 ground, we're moving on to Phase II when, in
15 fact, there's not even a shovel that's hit the
16 dirt yet, that's not a statement respecting
17 financial condition; that's a statement
18 respecting something else.

19 I think it's also worth bearing in
20 mind that this phrase wasn't plucked out of the
21 ether in 1978. It had existed in prior
22 bankruptcy law dating back to 1926. And it had
23 been interpreted by courts over the years to
24 extend beyond statements about overall
25 financial condition to include statements about

1 particular assets under circumstances where a
2 creditor had relied on that statement and been
3 defrauded.

4 It's also worth bearing in mind that
5 the -- the focus of the legislative process in
6 the 1970s was the Commission's report. One of
7 the two bills that was before Congress in the
8 '70s was drafted by the Commission. The
9 Commission included four legislators of the
10 nine members, and the hearings were all about
11 what had happened before the Commission, what
12 the Commission was proposing. And it's
13 striking that the Commission had proposed to
14 eliminate the fraud exception to discharge
15 entirely for consumer debts, not just for false
16 financial statements, for all -- for all
17 consumer debts.

18 And Congress thought that that went
19 too far. But it ultimately preserved a rule
20 that this -- for the particular class of
21 statements that deal with financial condition,
22 the representation would need to be in writing
23 if the creditor sought to render that claim
24 non-dischargeable in the bankruptcy --

25 JUSTICE ALITO: You say that a

1 statement respecting the debtor's financial
2 condition encompasses an affirmative
3 representation about a single asset if that
4 representation is offered as evidence of the
5 debtor's ability to pay, right? So it's --

6 MR. SANDBERG: That's right.

7 JUSTICE ALITO: That goes -- it is the
8 intent of the person making the statement, the
9 subjective intent of the person making the
10 statement?

11 MR. SANDBERG: No, we see it as an
12 objective test -- test that turns on the
13 context in which the statement is made. So if
14 a creditor hearing that statement in the
15 context in which the statement was made -- and,
16 remember, what -- we're talking here about oral
17 statements because it only makes a
18 difference --

19 JUSTICE ALITO: Right.

20 MR. SANDBERG: -- for oral statements
21 really.

22 So, if the -- if the creditor says:
23 Tell me about your financial condition and the
24 debtor says: Here are the three significant
25 assets I own that you should know about, one of

1 them is a genuine Vermeer --

2 JUSTICE ALITO: So, if the debtor
3 makes the statement not intending it to be
4 evidence of -- to be taken as evidence of the
5 debtor's ability to pay, but it is taken in
6 that way by the creditor, that counts or a
7 reasonable creditor would take it that way?

8 MR. SANDBERG: I think a reasonable
9 creditor gets closest to the -- the right
10 approach. It's an objective test. In other
11 areas of the law this Court has looked to, in
12 discerning the purpose of a statement, has
13 applied an objective test, such as, for
14 example, whether an out-of-court statement is
15 testimonial or not.

16 And -- and we think that it's
17 important for it to be objective just so that a
18 creditor doesn't come into court when it files
19 its complaint in the adversary proceeding and
20 say: I didn't subjectively rely on it for
21 ability to pay; I relied on something else.

22 JUSTICE KAGAN: But Mr. --

23 JUSTICE GORSUCH: Your -- your test --
24 I'm sorry, please.

25 JUSTICE KAGAN: Mr. Hughes said that

1 there was really no practical difference
2 between your test with the evidence of
3 ability-to-pay language in it and his test
4 without it.

5 Do you disagree with that or agree
6 with that?

7 MR. SANDBERG: As I understand
8 Respondent's position, there -- there is no
9 practical difference in how it turns out.
10 We're really -- the point of our ability-to-pay
11 language is -- is to get at what we think
12 Congress was trying to do here.

13 And one can agree or disagree as a
14 general matter with its policy choice, but what
15 we think Congress was trying to do was treat
16 statements that go to a debtor's ability to pay
17 differently than -- than other types.

18 So a statement respecting financial
19 condition is -- is one made for the purpose of
20 shedding light on one's financial condition.
21 And why ever would a creditor care about that?
22 Because they want to know if they're going to
23 get their money back.

24 JUSTICE ALITO: What if it's a false
25 --

1 JUSTICE GORSUCH: Following up on --
2 sorry.

3 JUSTICE ALITO: What if it's a false
4 statement about an asset, but it isn't one that
5 would be taken by a reasonable creditor as
6 having any significant bearing on financial
7 condition?

8 MR. SANDBERG: Well, I think that that
9 statement probably would not be material or it
10 would not be one that the creditor would have
11 reasonably relied upon. By hypothesis, we're
12 talking about circumstances in which a creditor
13 has come into court and said: I was defrauded.
14 This statement that was made was so significant
15 that I made a different lending decision than I
16 would have.

17 But then they -- they turn -- when it
18 comes to the analysis of statement respecting
19 financial condition, they say: Oh, no, this
20 statement wasn't significant enough to go to
21 the debtor's overall financial condition. It
22 -- it just merely affected my decision about
23 whether to consummate the deal.

24 And I think that what Congress was
25 focused on in the 1970s for better or worse was

1 to affect real-world creditor behavior. And --

2 JUSTICE SOTOMAYOR: So why do we have
3 to look at the debtor's intent? Why don't we
4 just -- won't the elements of reasonable
5 reliance capture almost -- how can -- how can a
6 creditor reasonably rely on a statement that
7 wasn't -- that couldn't have been intended as
8 --

9 MR. SANDBERG: I think that's right.
10 I don't think we are looking to the debtor's
11 intent under our approach. I think we're
12 looking at what an objective observer coming at
13 things from the creditor's side of the
14 transaction would understand the statement to
15 have been made for. Was it to shed light on
16 the debtor's ability to -- to pay or not?

17 JUSTICE GORSUCH: We've been focusing
18 on the balance sheet. And that's where your
19 focus has been. Is it an asset? Would it
20 appear on a financial statement?

21 But what about an income statement or
22 a representation about a future stream of
23 income that wouldn't appear on a balance
24 statement but might appear on an income
25 statement? I understood there to be a little

1 daylight between your -- your position and your
2 colleagues' on that.

3 MR. SANDBERG: I think our approach
4 would cover those statements because we think
5 that they are financial representations that go
6 to ability to pay. I'm not sure whether
7 Respondent's counsel would say that their
8 approach doesn't sweep that in. I think they
9 also have referred to income or debt
10 statements, in addition to balance sheets.

11 And in that sense, where -- the
12 government's approach isn't tethered to any --
13 the formality of the particular document or
14 what would appear on any particular document.
15 It's really about the purpose to which the
16 statement --

17 JUSTICE GORSUCH: You talked about
18 assets or liabilities. That -- that doesn't
19 necessarily represent income, future income
20 streams.

21 MR. SANDBERG: That's right. The
22 articulation of the government's test that my
23 colleague read sort of baked into it the
24 premise of this case, which was a statement
25 about a single asset.

1 And so I don't know that this Court
2 would need to think about the entire universe
3 of representations in -- in order to resolve
4 it, but certainly a statement that is not just
5 about an asset or a liability but is about an
6 income or an expenditure would also fall within
7 our approach.

8 So -- and as to why the Congress may
9 have required statements to be in writing, it's
10 true that it could have said much more in the
11 legislative history than -- than it did, but we
12 know one thing for a fact from the face of the
13 statute. And everyone agrees about it.

14 Congress did require statements to be
15 in -- in writing if they're respecting
16 financial condition in order for the creditor
17 to prevail. Congress could have written in
18 (2) (A) a statement in writing respecting
19 financial condition, but it didn't. It said
20 statement respecting financial condition.

21 And then, in (2) (B), it imposed a
22 writing requirement. And we think the -- the
23 only way to -- to give -- we don't see how
24 under Petitioner's approach it would be
25 sensible to distinguish between statements that

1 -- that go to the whole and statements that go
2 to some or most or -- or one.

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

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Five minutes, Mr. Garre.

8 REBUTTAL ARGUMENT OF GREGORY G. GARRE
9 ON BEHALF OF THE PETITIONER

10 MR. GARRE: Thank you, Mr. Chief
11 Justice.

12 The rule advanced by Respondent and
13 the government would essentially wipe out the
14 application of 523's baseline rule in the
15 consumer finance or simple collateral
16 situation.

17 The government says itself on page 18
18 of its brief that statements respecting
19 debtors' finances are, of course, common in
20 credit transactions. And under the rule that
21 you've just heard today, any false statements
22 about finances are going to result in a debt
23 that's not dischargeable, if they're made
24 orally, which, as the National Federation of
25 Independent Businesses has told this Court,

1 statements about finances are still made orally
2 in common transactions throughout the United
3 States by small businesses and regular folks.

4 And there's just absolutely no
5 indication that Congress intended to put
6 creditors who are blameless in a situation
7 where the debts created by deceitful debtors
8 are going to be entirely discharged under this
9 rule.

10 The Fourth Circuit case law only
11 proves that the Fourth Circuit has invented
12 artificial limits on Respondent's "related to"
13 principle. What -- what that case law doesn't
14 show is all the debts about false statements,
15 about individual assets that are being
16 discharged in the Fourth Circuit and putting
17 creditors in hardship situations that Congress
18 did not intend to be discharged. So I don't
19 think the Fourth Circuit case law really gets
20 them anywhere.

21 The -- the problem in this case is
22 completely different than the problem that
23 Congress had in mind. We're talking about
24 debtors and creditors make a false statement
25 about a single asset in the classic kind of

1 collateral situation, where a -- there's no
2 reason to think that the creditor is
3 blame-worthy in any way and where the debtor is
4 entirely deceitful.

5 In that situation, there's no
6 evidence, neither in the text or the history,
7 that Congress intended to weigh the balance in
8 favor of debtors there and excuse debtors by
9 discharging debts procured by fraud.

10 The ability-to-pay concept is just
11 different than financial condition. Collateral
12 on a \$1,000 loan, you may be able to use that
13 collateral to pay the loan, but that has no
14 bearing on your overall financial situation.

15 Lots of people who are in dire
16 financial situations make statements about
17 collateral in order to make loans. And a
18 lender might look at the statement about a
19 piece of property as evidence of an ability to
20 pay, but that is not evidence of one's overall
21 financial condition.

22 And one thing, ironically, that I
23 didn't hear from either Respondent or the
24 government today is any real argument based on
25 the text of the statute, either respecting,

1 which they've relied upon up to this point, or
2 financial condition. Nor did I hear them
3 dispute that "financial condition" does refer
4 to one's overall financial status.

5 And I didn't hear any explanation as
6 to how their "related to" interpretation of
7 "respecting" doesn't negate that term as a term
8 of art and term of limitation.

9 The last thing I would say is if this
10 Court does adopt a new test in this area, and
11 there have been, you know, competing versions
12 of possibilities for this Court, we would urge
13 this Court to vacate the decision below and to
14 remand.

15 For one thing, there's -- there's a
16 dispute among the parties about exactly why
17 Respondent made a false statement about the tax
18 refund, whether Lamar was relying on its
19 overall financial status.

20 The courts below heard that and
21 rejected the Respondent's position that he
22 advanced today. And I would urge you to look
23 at pages 60 to 61 of the Petition Appendix and
24 39 and 40 of the Petition Appendix, where the
25 courts below held that we relied on the

1 statement about his tax refund and not his
2 overall financial condition.

3 And because we relied on a statement
4 about a single asset and not a statement about
5 his overall financial condition, and because
6 that statement was indisputably false, the debt
7 at issue in this case should not be discharged
8 under the command of Congress.

9 If there are no further questions.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel. The case is submitted.

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

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