No. 16-1215

In the Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP, PETITIONER

v.

R. SCOTT APPLING

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
JEFFREY E. SANDBERG
Assistant to the Solicitor General
MARK B. STERN
KAREN SCHOEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Bankruptcy Code bars an individual debtor from receiving a discharge of any debt for "money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by * * * false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's * * * financial condition." 11 U.S.C. 523(a)(2)(A). A debt that arises from a fraudulent statement "respecting the debtor's * * * financial condition" is nondischargeable only if the statement is in writing and additional requirements are met. 11 U.S.C. 523(a)(2)(B). The question presented is as follows:

Whether a debtor's statement concerning one of the debtor's assets, offered as evidence of the debtor's ability to pay a debt, is a "statement respecting the debtor's * * * financial condition" within the meaning of Section 523(a)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulation:

In the Supreme Court of the United States

No. 16-1215

LAMAR, ARCHER & COFRIN, LLP, PETITIONER

v.

R. SCOTT APPLING

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. A central purpose of the federal bankruptcy system is to give insolvent debtors a "fresh start" by discharging their debts, while ensuring the maximum possible equitable distribution to creditors. See, *e.g.*, *Stellwagen* v. *Clum*, 245 U.S. 605, 617 (1918). In furtherance of a general policy of "affording relief only to an 'honest but unfortunate debtor,'" however, Congress has enacted various provisions that prevent or limit the discharge in bankruptcy of debts that arise from a debtor's fraudulent acts. *Cohen* v. *de la Cruz*, 523 U.S. 213, 217 (1998) (quoting *Grogan* v. *Garner*, 498 U.S. 279,

287 (1991)). Such provisions reflect Congress's evident determination that, in certain circumstances, "creditors' interest in recovering full payment of debts * * * outweigh[s] the debtors' interest in a complete fresh start." *Grogan*, 498 U.S. at 287.

Section 523(a) of the Bankruptcy Code, 11 U.S.C. 101 *et seq.*, declares various categories of debts ineligible for discharge. 11 U.S.C. 523(a).[1] As relevant here, Section 523(a)(2)(A) provides that a discharge under Chapters 7, 11, 12, or 13 of the Bankruptcy Code "does not discharge an individual debtor from any debt * * * for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by * * * false pretenses, a false representation, or actual fraud, *other than a statement respecting the debtor's or an insider's financial condition*." 11 U.S.C. 523(a)(2)(A) (emphasis added). To establish nondischargeability under Section 523(a)(2)(A), a creditor must show "justifiable" reliance on the debtor's deceptive or fraudulent conduct. *Field* v. *Mans*, 516 U.S. 59, 61, 69-76 (1995).

An adjoining provision, Section 523(a)(2)(B), addresses the circumstances under which debts incurred through "a statement * * * respecting the debtor's or an insider's financial condition" are ineligible for discharge. 11 U.S.C. 523(a)(2)(B)(ii). Section 523(a)(2)(B) specifies that, for debts incurred through the use of such a statement, the debt is excepted from discharge only if the statement is "in writing"; is "materially false"; was

---

[1] Although Section 523(a) applies by its terms only to "individual debtor[s]," Congress has extended its application to corporate debtors under Chapter 11 with respect to debts owed "to a domestic governmental unit" or "to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute." 11 U.S.C. 1141(d)(6); cf. 31 U.S.C. 3729-3733 (False Claims Act).

"reasonably relied" upon by "the creditor to whom the debtor is liable"; and was "caused to be made or published" by the debtor "with intent to deceive." 11 U.S.C. 523(a)(2)(B)(i)-(iv). Section 523(a)(2)(B)'s requirements thus differ from those of Section 523(a)(2)(A) in several respects, including by requiring that the statement be in writing and that the creditor show reasonable (not merely justifiable) reliance.

The dispute in this case concerns the meaning of the phrase "statement respecting the debtor's * * * financial condition." The answer to the interpretive question presented here controls whether the dischargeability of respondent's debt is determined under Section 523(a)(2)(A) or Section 523(a)(2)(B).[2]

2. a. In July 2004, respondent R. Scott Appling hired petitioner Lamar, Archer & Cofrin, LLP, a law firm, to represent him in litigation against the former owners of a business he had recently purchased. Pet. App. 46a-47a. Respondent soon fell behind on his legal bills, however, and by March 2005 owed petitioner more than $60,000. *Ibid.* Petitioner advised respondent by letter that unless the overdue fees were promptly paid, it would terminate its representation and would place an attorney's lien on its work product. *Id.* at 47a-48a.

On March 18, 2005, respondent met with Robert Lamar, a partner of the petitioner law firm, at the office of petitioner's local counsel. Pet. App. 47a-48a. According to petitioner, respondent stated at the meeting that his

---

[2] The parties apparently do not dispute (cf. Pet. 12 n.2), and the United States agrees, that the phrase "statement respecting the debtor's or an insider's financial condition," 11 U.S.C. 523(a)(2)(A) and (B), bears a consistent meaning regardless of whether the debtor's or an insider's financial condition is at issue. See 11 U.S.C. 101(31) (defining "insider").

accountant had prepared him an amended tax return through which he would "receive a tax refund of approximately $100,000," which would be enough to pay petitioner's current and future fees. *Id.* at 48a. Petitioner asserts that, in reliance on that statement, it continued to represent respondent in the underlying litigation and did not begin collecting the outstanding fees. *Ibid.*

Roughly three months later, respondent and his wife filed their amended tax return. Pet. App. 48a. Rather than seeking a refund of approximately $100,000, the return sought only $60,718, which the IRS further adjusted to $59,851. *Ibid.* Upon receiving a refund in that lower amount, respondent did not use it to pay the outstanding fees. *Id.* at 48a-49a.

In November 2005, respondent again met with his attorneys to discuss the outstanding fees and the future of their professional relationship. Pet. App. 49a. According to petitioner, respondent stated at this meeting that he had not yet received the tax refund, and also failed to disclose that the refund he had requested (and, by then, had received) was significantly less than the $100,000 he had originally indicated. *Id.* at 49a, 58a-60a. Petitioner contends that in reliance on these statements, it continued to represent respondent through a contemplated settlement of the underlying litigation and continued to forbear from collecting the outstanding fees. *Id.* at 49a.

In June 2006, a few months after the underlying litigation settled, petitioner learned that respondent had received the tax refund and had spent it on his business rather than using it to pay petitioner's fees. Pet. App. 49a. Petitioner later sued respondent in state court for its overdue fees plus interest, and in October 2012, it obtained a judgment against respondent for $104,179.60.

Ibid. Three months later, respondent and his wife filed for bankruptcy under Chapter 7. *Ibid.*

b. Petitioner initiated an adversary proceeding in the bankruptcy court, seeking a determination that the debt created by petitioner's state-court judgment against respondent was nondischargeable under 11 U.S.C. 523(a)(2)(A). In its amended complaint, petitioner alleged that respondent's false statements about his tax return had induced petitioner to continue its representation and to forbear from collecting the existing debt, and that respondent had thereby committed "false pretenses, a false representation, or actual fraud." C.A. App. A42 (quoting 11 U.S.C. 523(a)(2)(A)); see *id.* at A33-A43. Respondent moved to dismiss, arguing that the alleged false statements were statements respecting his financial condition and that petitioner's claim failed because the statements were not "in writing," as Section 523(a)(2)(B) requires. See Pet. App. 70a.

The bankruptcy court denied respondent's motion. Pet. App. 67a-81a. The court observed that distinct "views have emerged on the proper interpretation of the phrase 'respecting the debtor's . . . financial condition.'" *Id.* at 71a (quoting *In re May*, No. 06-8044, 2007 WL 2052185, at *6 (6th Cir. B.A.P. July 19, 2007)). The court identified a "'broad interpretation,'" under which the phrase encompasses "any communication that has a bearing on the debtor's financial position." *Ibid.* (citation omitted). But the court instead "adopt[ed] the 'strict interpretation,'" under which the phrase encompasses only "communications that purport to state the debtor's overall net worth, overall financial health, or equation of assets and liabilities." *Id.* at 71a-72a (citations omitted). The court concluded that, because respondent's "alleged oral misrepresentation regarding

* * * the tax refund" had involved a "single asset" and had not stated his "overall financial condition or net worth," it was "not a representation 'respecting the debtor's . . . financial condition.'" *Id.* at 73a, 76a.

Following a two-day trial, the bankruptcy court held that petitioner's claim was nondischargeable under Section 523(a)(2)(A). The court found that respondent had "knowingly misrepresented the amount of the tax refund" at the March 2005 meeting, Pet. App. 55a; that respondent had made a "knowingly false representation at the November 2005 meeting that he had not yet received the refund," *id.* at 58a; and that respondent had "committed a false pretense" by "not disclosing the true amount of the refund," *id.* at 59a. The court further found that petitioner had justifiably relied on those representations in forgoing immediate collection of the outstanding fees, *id.* at 60a-62a, and that this forbearance amounted to an "extension of credit" that "made the entire debt nondischargeable," *id.* at 65a-66a; see *id.* at 62a-66a, 79a-81a.

c. The district court affirmed. Pet. App. 20a-44a. It observed that "[c]ourts disagree whether to construe the phrase 'respecting the debtor's . . . financial condition' broadly or strictly." *Id.* at 25a. Like the bankruptcy court, the district court adopted "the strict interpretation" of that phrase and held that, because "[respondent's] statements about his tax refund involved a single asset," they did not constitute statements respecting his financial condition. *Id.* at 26a, 30a.

d. The court of appeals reversed. Pet. App. 1a-19a. Citing decisions from the Fourth, Fifth, Eighth, and Tenth Circuits and from numerous district and bankruptcy courts, the court of appeals recognized that the question whether "a statement about a single asset can

be a 'statement respecting the debtor's . . . financial condition'" has "divided the federal courts." *Id.* at 1a, 6a-7a (citation omitted). The court agreed that the term "'[f]inancial condition' likely means one's overall financial status." *Id.* at 7a. The court explained, however, that "even if 'financial condition' means the sum of all assets and liabilities, it does not follow that the phrase 'statement *respecting* the debtor's . . . financial condition,' covers only statements that encompass the entirety of a debtor's financial condition at once." *Id.* at 8a (quoting 11 U.S.C. 523(a)(2)).

Based on dictionary definitions of the term "respecting," the court of appeals reasoned that "[a] statement about a single asset" "can 'respect' a debtor's 'financial condition'" inasmuch as it "'relates to' or 'impacts' a debtor's overall financial condition," and serves as "a partial step toward knowing whether the debtor is solvent or insolvent." Pet. App. 8a-9a. The court concluded that Section 523(a)(2) is "not ambiguous" and "establish[es] that a statement about a single asset can be a 'statement respecting the debtor's . . . financial condition.'" *Id.* at 7a, 12a (citation omitted). Because respondent's statements about the tax refund were statements respecting his financial condition, and because those statements were not in writing, the court concluded that neither Section 523(a)(2)(A) nor (B) barred discharge of respondent's debt.

Judge Rosenbaum concurred. Although she disagreed with the majority's view that the statutory text is unambiguous, Pet. App. 15a, she concluded that the majority's interpretation of the statute was more consistent with congressional intent, *id.* at 19a.

DISCUSSION

The Eleventh Circuit correctly held that a statement about a debtor's asset, offered as evidence of the debtor's ability to pay, can be a "statement respecting the debtor's * * * financial condition" within the meaning of 11 U.S.C. 523(a)(2). This Court's review is nonetheless warranted because the decision below deepens an existing circuit conflict about the meaning of that phrase. The question presented is important and recurring, and this case is a suitable vehicle to resolve the disagreement among the circuits. The petition for a writ of certiorari therefore should be granted.

A. This Case Warrants The Court's Review Because It Presents An Important, Recurring Question On Which The Courts Of Appeals Are Divided

The question in this case is whether a statement about one aspect of a debtor's financial circumstances, such as a single asset of the debtor, qualifies as a "statement respecting the debtor's * * * financial condition" within the meaning of 11 U.S.C. 523(a)(2)(A) and (B). The resolution of that question controls whether a creditor who objects to discharge of a debt that arose out of a fraudulent statement about the debtor's asset may proceed under Section 523(a)(2)(A) or instead must proceed under Section 523(a)(2)(B). In particular, resolution of that question controls whether a debtor's fraudulent *oral* statement about a particular asset can render a debt nondischargeable. The question presented arises with some frequency and has been the subject of substantial disagreement among the lower federal courts.

1. "The circuits and other federal courts are split on th[e] question" presented. Pet. App. 6a; see *id.* at 25a, 71a. Like the Eleventh Circuit, the Fourth Circuit has held that a statement concerning a specific asset may

qualify as a "statement respecting the debtor's * * * financial condition," while the Fifth and Tenth Circuits have taken the contrary view.

The Fourth Circuit's decision arose from a loan in which the debtor's livestock and farm implements served as collateral, which the debtor falsely stated were not subject to any superior security interests. See *Engler* v. *Van Steinburg*, 744 F.2d 1060 (1984). In arguing that the debt was nondischargeable under Section 523(a)(2)(A), the creditor asserted that "a statement respecting the debtor's financial condition means a formal financial statement, such as a typical balance sheet or a profit and loss statement." *Id.* at 1060. The court of appeals disagreed, explaining that "Congress did not speak in terms of financial statements," but instead "referred to a much broader class of statements—those 'respecting the debtor's . . . financial condition.'" *Id.* at 1060-1061. The court concluded that "[a] debtor's assertion that he owns certain property free and clear of other liens is a statement respecting his financial condition," so that such a "statement must be in writing to bar the debtor's discharge." *Id.* at 1061.

The Fifth and Tenth Circuits have adopted a contrary interpretation. The Tenth Circuit in *In re Joelson*, 427 F.3d 700 (2005), cert. denied, 547 U.S. 1163 (2006), considered a dispute arising from a debtor's false representations that she owned several residences, a motel, and "a number of antique vehicles" that could serve as "collateral to secure the [creditor's] loan." *Id.* at 703. The court of appeals observed that "[t]he phrase 'respecting the debtor's . . . financial condition' has a range of potential meanings." *Id.* at 705. After surveying the "text and structure of the Bankruptcy Code, the legislative history of § 523(a)(2)(A) and

(B), and case law," *id.* at 714; see *id.* at 706-714, the court adopted the "strict reading" and held that the phrase covers only statements "that purport to present a picture of the debtor's overall financial health." *Id.* at 714. The court accordingly concluded that the false representations concerning the alleged collateral, although made to induce the creditor to believe that the debtor could repay the loan, were not statements respecting her financial condition. *Id.* at 714-715.

The Fifth Circuit in *In re Bandi*, 683 F.3d 671 (2012), cert. denied, 568 U.S. 1086 (2013), considered similar misrepresentations and reached the same result. The creditor opposed discharge of a promissory note executed by the debtors' business, where the debtors had falsely represented that they owned certain commercial real estate. The court held that the phrase "statement respecting the debtor's * * * financial condition" covers only "statements * * * 'that purport to present a picture of the debtor's overall financial health.'" *Id.* at 676, 677 (quoting *Joelson*, 427 F.3d at 714).[3]

---

[3] The Eighth Circuit's decision in *In re Lauer*, 371 F.3d 406 (8th Cir. 2004), is sometimes cited as reflecting an approach consistent with that of the Fifth and Tenth Circuits. See, *e.g.*, Pet. App. 6a-7a, 27a, 72a. In *Lauer*, the debtor was a general partner who, in purchasing the interests of limited partners in return for deferred payments, falsely represented that the partnership retained an interest in an asset (a nursing home) that would serve as security for the deferred payments. The debtor argued that his "failure to disclose" that the asset had been sold was a "'statement respecting * * * an insider's financial condition,'" and asserted that the debt resulting from missed deferred payments was dischargeable because the creditors could not satisfy Section 523(a)(2)(B). 371 F.3d at 413 (citation omitted). The court of appeals cited a passage from *Field* v. *Mans*, 516 U.S. 59 (1995), in which this Court suggested that Section 523(a)(2)(B) may have been intended to redress abuse

The decision below cannot be reconciled with the reasoning of the Fifth and Tenth Circuits. The disagreement among the lower federal courts has been noted by other courts of appeals, see *In re Curran*, 855 F.3d 19, 23 (1st Cir. 2017); *Stelmokas* v. *Kodzius*, 460 Fed. Appx. 600, 603 (7th Cir. 2012); *In re Bogdanovich*, 292 F.3d 104, 112-113 (2d Cir. 2002), and by a leading bankruptcy treatise, see 4 *Collier on Bankruptcy* ¶ 523.08[2][c] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2017). As respondent acknowledges (Br. in Opp. 12), moreover, the question presented arises regularly in federal bankruptcy and district courts, as the non-exhaustive lists of cases compiled by the court of appeals (Pet. App. 6a-7a) and petitioner (Pet. 17-18 & nn.4-5) demonstrate. The conflict thus is of the kind that ordinarily warrants this Court's review.

2. Respondent's assertions that "[r]eview is premature" (Br. in Opp. 9-12) are not persuasive. Respondent principally contends (*id.* at 11) that no other circuit has "wrestled with the plain meaning of 'respecting,'" and he suggests that this Court should await a decision in which "a sister court of appeals expressly considers and rejects the Eleventh Circuit's reasoning." But the Fifth

---

by "consumer finance companies, which sometimes have encouraged [false financial statements] by their borrowers for the very purpose of insulating their own claims from discharge." *Lauer*, 371 F.3d at 413 (brackets in original) (quoting *Field*, 516 U.S. at 76-77). Noting that the transaction at issue "was a sale, not a loan," and that it did not involve "a creditor that routinely require[s] the submission of financial statements," the court concluded that it was more appropriate to apply Section 523(a)(2)(A) than Section 523(a)(2)(B). *Id.* at 413-414. But the court did not expressly interpret the phrase "statement respecting the debtor's or an insider's financial condition."

and Tenth Circuits, in reasoned decisions focused exclusively on the question presented in this case, have already interpreted the same statutory text and reached a conclusion opposite to that of the Eleventh Circuit. If this case had arisen in either of those circuits, governing precedent would hold that respondent's representations were not "statement[s] respecting [his] * * * financial condition," and petitioner's objection to discharge would be analyzed under Section 523(a)(2)(A) rather than under Section 523(a)(2)(B). That the Fifth and Tenth Circuits did not place significant weight on the word "respecting" reflects only that those courts deemed other considerations more persuasive in interpreting the statutory text.

Respondent's suggestion (Br. in Opp. 12) that this Court should await the outcome in *In re Haler*, No. 17-40229 (5th Cir. oral argument scheduled for Dec. 5, 2017), is similarly unconvincing. As noted, the Fifth Circuit has already resolved the question presented in petitioner's favor, and respondent does not seriously dispute that the court in *Haler* will be bound by its prior decision in *Bandi*. The debtor's principal argument in *Haler* is that the statements at issue qualify as "statements respecting * * * financial condition" even under *Bandi*. See Appellant Br. at 13-18, *Haler*, *supra* (No. 17-40229). And even if the Fifth Circuit in *Haler* overruled its prior decision in *Bandi*, the circuit split would persist because of the Tenth Circuit's decision in *Joelson*.

Respondent observes (Br. in Opp. 11) that this Court has previously denied review of the question presented. But when the Court last considered whether to grant review (in *Bandi*), only the Fourth Circuit had concluded that a statement concerning a single asset may

qualify as a statement respecting financial condition, and its decision predated those of the other courts of appeals. The Eleventh Circuit's decision in this case has "eliminated any element of staleness" and "any realistic chance that the conflict would sort itself out on its own." Pet. 15.

Finally, respondent's contention that this case is "a poor vehicle for review" (Br. in Opp. 27) is also unpersuasive. Respondent suggests that "resolution of the question presented is unlikely to have any bearing on [the] ultimate outcome" of the case, *ibid.*, because petitioner's objection to discharge would ultimately fail even under Section 523(a)(2)(A) due to lack of proof of common-law damages. But this argument, which the bankruptcy and district courts considered and rejected, see Pet. App. 41a-44a, 62a-66a, 79a-81a, would not preclude the Court from reaching and resolving the question presented.[4] To the contrary, respondent's damages argument will become relevant only if this Court grants review and holds that respondent's statements were not ones "respecting [his] * * * financial condition." 11 U.S.C. 523(a)(2)(A). The question presented in this Court was the sole issue passed upon by the court of appeals below, and the government is aware of no obstacle that would prevent this Court from similarly reaching and resolving the question on this record.

---

[4] The United States takes no position here on the merits of those rulings.

B. A Statement Concerning A Particular Asset Can Be A Statement "Respecting" The Debtor's Financial Condition Under Section 523(a)(2)

The court of appeals correctly held that a statement concerning a particular asset may qualify as a "statement respecting the debtor's * * * financial condition." 11 U.S.C. 523(a)(2)(A). In the view of the United States, an affirmative representation by a debtor qualifies as a statement respecting financial condition when it relates to a debtor's financial circumstances and is offered by the debtor as evidence of his ability to pay.

1. This Court's "interpretation of the Bankruptcy Code starts 'where all such inquiries must begin: with the language of the statute itself.'" *Ransom* v. *FIA Card Servs.*, 562 U.S. 61, 69 (2011) (quoting *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). A "cardinal principle" is that a "statute ought * * * to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (citation omitted).

In interpreting the statutory phrase "statement respecting the debtor's * * * financial condition," the court of appeals properly gave meaning to each of the phrase's components. The court recognized that the term "[f]inancial condition," taken alone, refers to a person's "overall financial status." Pet. App. 7a. The court further observed, however, that the statute refers to "statement[s] *respecting* the debtor's . . . financial condition," *id.* at 8a (quoting 11 U.S.C. 523(a)(2)(A)) (emphasis added by court of appeals), and reasoned that courts "must not read the word 'respecting' out of the statute," *ibid.* The court noted that the term "[r]espect-

ing" has been "defined broadly" as "[w]ith regard or relation to; regarding; concerning," *ibid.* (brackets in original) (quoting *Webster's New International Dictionary of the English Language* 2123 (2d ed. 1959)), and as "[w]ith respect to; with reference to; as regards," *ibid.* (quoting *Oxford English Dictionary* (online ed.)). Just as a representation "can 'relate to' or 'concern' someone's health without describing [the person's] entire medical history," so too a statement "can 'respect' a debtor's 'financial condition' without describing the overall financial situation of the debtor." *Ibid.*

The court of appeals also properly concluded that the word "statement" should be given an "ordinary," rather than "technical," meaning. Pet. App. 9a-10a. If Congress had intended to cover only "formal financial statement[s]," it could have so specified, rather than using the non-technical phrase "statement respecting the debtor's * * * financial condition." *Id.* at 10a. Indeed, Congress's proviso that the "statement" must be "in writing" in order to establish nondischargeability under Section 523(a)(2)(B) is consistent with the understanding that "statement" was intended to refer to "an expression or embodiment in words," as opposed to a comprehensive financial accounting that would generally exist in writing in any event. *Id.* at 10a-11a.

2. The statutory lineage of the phrase "statement respecting the debtor's * * * financial condition" also supports the court of appeals' interpretation. With regard to discharges in bankruptcy, the phrase dates to 1926, when Congress amended existing law to provide that a debtor would be denied any discharge entirely if the debtor had "obtained money or property on credit, or obtained an extension or renewal of credit, by making

or publishing * * * in any manner whatsoever, a materially false statement in writing respecting his financial condition." Act of May 27, 1926, ch. 406, § 6, 44 Stat. 663 (amending Section 14(b) of the Bankruptcy Act, ch. 541, § 14(b), 30 Stat. 550 (1898)). Congress later amended the law to provide that such a statement, when made by a nonbusiness debtor, would bar discharge only of the particular debt that arose from the statement, rather than preclude the debtor's discharge entirely. See Act of July 12, 1960, Pub. L. No. 86-621, § 2(a), 74 Stat. 409. Throughout this period, courts understood the statutory phrase "materially false statement in writing respecting his financial condition" to include statements that described a debtor's specific asset or assets. 11 U.S.C. 32(c)(3) (1976); see, *e.g.*, *Tenn* v. *First Hawaiian Bank*, 549 F.2d 1356, 1357-1358 (9th Cir.) (per curiam) (holding that "appellants' recordation of [a false] deed * * * for the purpose of obtaining an extension of credit on the basis of an asset that they did not own was a false statement of financial condition"), cert. denied, 434 U.S. 832 (1977); *Shainman* v. *Shear's of Affton, Inc.*, 387 F.2d 33, 38 (8th Cir. 1967) ("A written statement purporting to set forth the true value of a major asset of a corporation, its inventory, is a statement respecting the financial condition of that corporation."); *Scott* v. *Smith*, 232 F.2d 188, 190 (9th Cir. 1956) ("The bankrupt's implied representation * * * that he then had some ownership or control of property * * * available for hypothecation by him, amounts to a statement 'respecting his financial condition.'"); *Albinak* v. *Kuhn*, 149 F.2d 108, 110 (6th Cir. 1945) ("No cases have been cited to us, and none has been found by careful examination, which confines a statement respecting one's financial condition as

limited to a detailed statement of assets and liabilities.").

When Congress enacted the Bankruptcy Code in 1978, the House Report noted that the Code "continues the exception to discharge based on a false statement in writing concerning the debtor's financial condition." H.R. Rep. No. 595, 95th Cong., 1st Sess. 129 (1977) (*House Report*). Congress undertook "some modifications" to that exception, including extending the provision to cover "debt[s] for services" in addition to debts for money, property, and credit; requiring "reasonable reliance" in lieu of lesser reliance; and requiring an unsuccessful creditor to pay "costs, attorney's fees, and damages to a consumer debtor." *Id.* at 129, 130. Congress also clarified that debts obtained by fraudulent "statement[s] respecting * * * financial condition" would be excluded from the general provision barring the discharge of debts obtained by fraud, cf. 11 U.S.C. 523(a)(2)(A), and instead would be governed by an independent provision, cf. 11 U.S.C. 523(a)(2)(B). But Congress retained substantively the same phrase—"statement respecting * * * financial condition"—that courts had interpreted under prior bankruptcy law. When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978).

3. As the court of appeals noted, its interpretation also can be understood to serve Congress's policy goals. The broader interpretation "gives creditors an incentive to create writings before the fact," which may "reduce the incidence of fraud" in the first instance. Pet. App. 13a-14a. By creating "reliable evidence" for future

litigation, such a writing "helps both the honest debtor prove his honesty and the innocent creditor prove a debtor's dishonesty." *Id.* at 13a. And while lower courts have disagreed as to the best interpretation of the phrase "statement respecting the debtor's * * * financial condition," Congress clearly intended that such statements should be treated differently from other false representations used to obtain money, property, services, or credit. See *ibid.* (noting that the Bankruptcy Code "imposes different requirements of proof for different kinds of statements"); cf. *Field* v. *Mans*, 516 U.S. 59, 76 (1995) (suggesting that Congress may have viewed "the relative equities" differently in the context of "lies about financial condition"); *House Report* 130 (identifying abuses in the consumer-finance industry).

4. By contrast, the interpretation favored by petitioner entails substantial line-drawing problems and may cause unjustified differential treatment of functionally equivalent scenarios.

First, petitioner offers no clear test for identifying those representations that are sufficiently comprehensive to constitute a "statement respecting * * * financial condition." It is unclear, for example, whether petitioner would view a statement that comprehensively describes one side of a debtor's balance sheet—*e.g.*, all of a debtor's assets, but none of his liabilities—as a statement respecting his financial condition. The Tenth Circuit's lengthy, and apparently non-exhaustive, list of representations qualifying as "statement[s] respecting * * * financial condition" is indicative of the significant line-drawing problems under petitioner's approach. See *Joelson*, 427 F.3d at 714 (suggesting that statements respecting financial condition include "those

analogous to balance sheets, income statements, statements of changes in overall financial position, or income and debt statements that present the debtor or insider's net worth, overall financial health, or equation of assets and liabilities," but cautioning that "such statements need not carry [any] formality"). And however clear the distinction between statements of a debtor's "overall financial position" (*ibid.*) and statements about a particular asset or assets might be in the context of a business, it is considerably less clear in the context of individuals, whose financial holdings are generally less extensive. Cf. 11 U.S.C. 523(a) (governing exceptions to discharge for "individual debtor[s]"). But cf. p. 2 n.1, *supra* (noting that Section 523 also applies to corporate Chapter 11 debtors for specified governmental debts).

Second, to the extent that petitioner's approach perceives representations of "overall financial condition" to be distinct because they illuminate a debtor's "ability to repay debt," *Bandi*, 683 F.3d at 676, its interpretation is significantly underinclusive. Many consumer lenders have not required comprehensive financial information before deciding whether to lend. See 81 Fed. Reg. 47,864, 47,872 (July 22, 2016) (noting that "payday" lenders typically require information only about an individual's income and personal deposit accounts, and not about a borrower's other financial obligations). And many creditors rely principally upon the value of a particular asset of the debtor—for instance, property pledged or offered by the debtor as collateral, see *Joelson*, 427 F.3d at 703—in deciding whether a debtor's financial circumstances justify the transaction. The notional difference between comprehensive financial information, and other financial information, is not

necessarily a meaningful one in motivating the real-world behavior of either debtors or creditors.

Section 523(a)(2)(A)'s rule of nondischargeability, moreover, is limited to debts "for money, property, services, or * * * credit, *to the extent obtained by*" a false statement or similar deceptive conduct. 11 U.S.C. 523(a)(2) (emphasis added). Because "some degree of reliance is required to satisfy the element of causation inherent in the phrase 'obtained by'" in Section 523(a)(2), *Field*, 516 U.S. at 66; see Pet. App. 60a-61a, the determination whether a particular statement was one "respecting the debtor's * * * financial condition" will make a practical difference only if the creditor relied on that statement in deciding to provide money, etc. Thus, while many statements by debtors about specific assets may well be irrelevant to creditors' financial decisions, Section 523(a)(2)(A) is concerned only with statements that actually affect creditor behavior. Here, for example, a partner in the petitioner firm "testified that [petitioner] agreed to continue its representation of [respondent] and forego collection activities in reliance upon [respondent's] representations regarding the tax refund." Pet. App. 61a. Where a debtor's statement about a particular asset is offered as evidence of his ability to pay, and the statement actually induces a creditor to provide money, property, services, or credit, there is no evident reason to treat that statement differently than when a statement about the debtor's overall finances has the same effect.

Third, petitioner's interpretation appears to yield different results depending on whether a creditor receives the debtor's financial information all at once or instead through multiple disclosures. Under petitioner's approach, if a creditor asks the debtor for a

comprehensive statement of his financial condition, and the debtor misrepresents his salary within that statement, the creditor would need to satisfy the requirements of Section 523(a)(2)(B) in order to show that the debt was nondischargeable in bankruptcy. But if the creditor had previously obtained a comprehensive statement of the debtor's financial condition, and then requested an update only as to the debtor's salary, petitioner would not view that update as a statement respecting the debtor's financial condition.

The facts of this case may illustrate that concern. At trial, Robert Lamar (a partner in the petitioner firm) acknowledged that petitioner was generally aware of the financial condition of respondent and his company by virtue of its work in the underlying litigation, for which petitioner had procured an expert valuation of respondent's business and had obtained a restraining order against the payment of certain debts in order to prevent respondent from becoming insolvent. See C.A. App. A35; D. Ct. Doc. 6 (May 4, 2015); D. Ct. Doc. 7 (May 4, 2015); Bankr. Ct. Doc. 66, at 65, 80, 83-86 (Dec. 22, 2014). Petitioner may have refrained from requesting any statement of respondent's "overall net worth" at the March 2005 meeting, instead relying solely upon his statement about the tax refund, only because petitioner was already familiar with respondent's difficult overall financial circumstances. Cf. Pet. App. 62a (concluding that petitioner had justifiably relied on respondent's representations because petitioner "clearly believed that the tax refund was the only source of cash [respondent] would have to pay the fees").

5. The United States is the largest creditor in the Nation and frequently appears as a creditor in bankruptcy cases, including by objecting to the discharge of

debts for money or property obtained through fraud. Because the United States typically relies on written representations when providing money, property, services, or credit to individual debtors, the government's ability to prevent discharge usually will not depend on whether Section 523(a)(2)(A) or Section 523(a)(2)(B) covers a particular representation. The government as creditor nonetheless might benefit in some circumstances from an approach under which a debtor's fraudulent oral statement concerning a specific asset or liability could prevent discharge of his debt. In the view of the United States, however, the better reading of the statutory text is that a statement concerning a single asset, when tendered as evidence of the debtor's ability to pay, is a "statement respecting the debtor's * * * financial condition" within the meaning of 11 U.S.C. 523(a)(2). Thus, while the United States agrees with petitioner that the petition for a writ of certiorari should be granted, the government believes that the judgment below ultimately should be affirmed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
JEFFREY E. SANDBERG
Assistant to the Solicitor General
MARK B. STERN
KAREN SCHOEN
Attorneys

NOVEMBER 2017