No. 16-1215

In the Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,

Petitioner,

v.

R. SCOTT APPLING,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

STATEMENT

The Eleventh Circuit, in an opinion by Judge William Pryor, correctly construed the phrase "statement respecting the debtor's * * * financial condition." 11 U.S.C. § 523(a)(2).

The word "respecting" is one of expansion, one that adds breadth to the object it modifies. That is how it has been used throughout American constitutional and statutory law since the Framing. Congress routinely uses such broadening terms, and the Court faithfully gives meaning to those words.

Lamar defines "financial condition" as the "balance of all of the debtor's assets and liabilities" (Pet. 19) and "one's overall financial health or status" (Br. 23). A "statement respecting financial condition" must therefore reach more than those statements that, standing alone, reveal one's *entire* financial status. Otherwise, the word "respecting" does no work.

A debtor's statement describing a *single* asset or liability has a direct impact on the *sum* of his assets and liabilities. It describes the existence or value of an item that would appear on his balance sheet or income statement. A statement describing a single asset is, accordingly, a "statement respecting his financial condition." This construction gives effect to the word "respecting," and it is appropriately bounded by the meaning of the term "financial condition."

The Eleventh Circuit's result also accords with how we ordinarily use language. If a friend announces that she just won $500,000 in the lottery, most everyone would understand that as a "statement respecting her financial condition."

Lamar contends that the phrase is limited to only those "statements providing a more holistic snapshot of one's financial status." Br. 29. But this gives "respecting" no effect. Lamar's position might have force if Congress had written a different statute, one that covered a "statement *of* financial condition."

Lamar tellingly dedicates most of its brief to the purpose, principles, and history of the Bankruptcy Code. But where, as here, the statutory language is unambiguous, the Court need not—indeed, should not—go beyond the text itself. In any event, the purpose, principles, and history of the Bankruptcy Code independently compel the Eleventh Circuit's construction.

After a debtor declares bankruptcy, a creditor may attempt to exempt debt from discharge by alleging that the debtor made a false statement. Section 523(a)(2)(B) applies if the statement is one "respecting the debtor's financial condition." Otherwise, Section (2)(A) applies.

In recognition of widespread creditor misconduct, Congress adopted certain safeguards for debtors in (2)(B): the statement must be in writing, and the creditor must prove reasonable (rather than justifiable) reliance. Lamar acknowledges (Br. 11) that Congress designed (2)(B) to "balance the scales more fairly" in favor of debtors.

It is common ground that the protections of (2)(B) apply if a debtor makes a statement describing *all* of his assets and liabilities. The question here is whether (2)(B) applies if the debtor describes *some* of his assets or liabilities. It does.

Lamar's rule to the contrary would render (2)(B)'s protections illusory. In its view, any creditor can evade the statute's protections by structuring its questions to ask everything but "overall" financial condition. Under this logic, a creditor could also avoid (2)(B) by asking a borrower to list his assets on Monday and his debts on Tuesday. Congress used a broadening term here, as it often does, to prevent such circumvention.

Indeed, Lamar's atextual interpretation would exclude from (2)(B)'s ambit the very practice Congress designed the statute to reach. Congress observed that unscrupulous creditors would trick borrowers into providing an incomplete list of debts, later using that as a basis to deny discharge. But, under Lamar's rule, (2)(B) would not apply. Not only is our reading true to the text, but it also captures the particular practice for which (2)(B) was designed.

The Eleventh Circuit's construction also accords with real-world behavior. Creditors rely on representations borrowers make about individual assets because those statements shed light on the borrower's financial condition and thus the likelihood that the borrower will repay. In form, substance, and effect, there is often little distinction between a statement that describes the entirety of a borrower's financial condition and one that describes some important aspect of it. This case illustrates that principle.

Lamar's approach, however, rests on arbitrary line-drawing. Lamar believes that (2)(B) applies to a statement as vacuous as "Don't worry, I am above water." Br. 19. Yet it contends that statements describing substantial, concrete assets—"Don't worry, I have $100,000 of equity in my house"—are not within (2)(B)'s protections. That makes no sense.

Additionally, the Eleventh Circuit's construction properly recognizes that the statute encourages reliance on written statements. Writing enhances accuracy at the start, and it obviates the sort of guesswork that occurred below, where the bankruptcy court sought to reconstruct oral conversations that occurred a decade earlier. Given the staleness of this dispute, it is unsurprising that the court disbelieved testimony by both Appling *and* Lamar. Contradictions in Lamar's reliance theory, moreover, remain unresolved. Congress's decision to encourage writing—a policy apparent on the face of the statute—promotes fairness, accuracy, and efficiency.

The statute's lineage also compels our construction: prior to 1978, courts construed the statutory language precisely as we urge. When Congress reused the same text in the 1978 Code, it already had established meaning.

Setting all of this aside, Appling would win even under Lamar's newly announced interpretation.

A. Statutory background.

Because the "main purpose" of bankruptcy is "to aid the unfortunate debtor by giving him a fresh start in life" (*Stellwagen* v. *Clum*, 245 U.S. 605, 617 (1918)), the Bankruptcy Code contains broad discharge provisions. See, *e.g.*, 11 U.S.C. § 727. Through discharge, the debtor exchanges "the property which he owns at the time of bankruptcy" for "a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934).

But there are exceptions. Relevant here, Section 523(a)(2) bars a debtor from discharging debts "to the extent obtained by" certain kinds of fraud.

Section 523(a)(2)(A) bars discharge of debt 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). A creditor’s claim of nondischargeability under (2)(A) requires proof of the common-law elements of fraud, including justifiable reliance. See *Field* v. *Mans*, 516 U.S. 59, 61 (1995).

Section 523(a)(2)(B), by contrast, bars discharge of debts obtained by a fraudulent “statement” “respecting the debtor’s or an insider’s financial condition.” 11 U.S.C. § 523(a)(2)(B). For a (2)(B) claim, the statement must be “in writing,” “materially false,” “made or published with intent to deceive,” and the claimant must have “reasonably relied” on it. *Ibid.*

Sections (2)(A) and (2)(B) are mutually exclusive. See, *e.g.*, *Field*, 516 U.S. at 66; *Collier on Bankruptcy* ¶ 523.08 (16th ed. 2017); 3 *Norton Bankruptcy Law and Practice* § 57.15 (3d ed. 2017).

B. Factual background.

In the summer of 2004, respondent R. Scott Appling purchased a small manufacturing business in Hartwell, Georgia; soon after, he learned that the seller had substantially misrepresented its value. Pet. App. 21a, 47a.

Appling sought representation, first from Walter Gordon, a lawyer in Hart County. J.A. 32-34. Gordon referred Appling to petitioner Lamar, Archer & Cofrin, LLP (Lamar), an Atlanta law firm. *Ibid.* Lamar took the case, retaining Gordon as local counsel. Pet. App. 47a. Lamar estimated that the representation could “cost as much as a hundred thousand dollars.” J.A. 87.

Appling paid more than $135,000 in fees. J.A. 88-90, 98-99; Bankr. Dkt. 69, at 28. By March 2005, he was no longer current with Lamar's escalating bills; he owed the firm more than $60,000, and he lacked funds to pay. Pet. App. 2a. At the same time, the case was nearing trial. On March 9, 2005, days before the pretrial hearing (J.A. 98-99), Lamar sent Appling a letter demanding payment; Lamar threatened to terminate the firm's representation if he did not pay. Pet. App. 52a.

On March 18, 2005, Appling met with Walter Gordon and Robert Lamar. What was said at this meeting (and at another meeting some months later) lies at the core of this case.

Testifying nearly a decade later during the September 2014 bankruptcy trial (J.A. 31, 111), Appling, Gordon, and Robert Lamar all recalled that, in response to Lamar's demand for payment, Appling reported that his accountant, Mike Strickland, had determined that he could amend his prior years' tax returns and request a refund. Pet. App. 22a. The parties' recollections of what was said beyond that conflict.

Appling testified that he merely relayed what his accountant had told him and that his description of the prospective refund was therefore qualified. Appling recalled saying that, per Strickland's estimate, he could "*possibly* get a hundred back" and that "Mike Strickland said that it could be *potentially* $100,000." J.A. 115 (emphasis added). In Appling's recollection, he made clear that the amount of the refund was uncertain because Strickland had not yet prepared the amended return: "at the time of that meeting, I didn't make a promise, because I couldn't promise what I didn't know I was going to get. It hadn't been done yet." J.A. 98.

Gordon's recollection of the conversation was materially similar. Gordon recalled Appling's statement that the amount of the refund was unknown; he recounted Appling saying "that he felt like" the refund "would be approximately a hundred thousand dollars." J.A. 35. Gordon did not believe that Appling's amended return had "been prepared at that point." *Ibid.*

Robert Lamar's testimony was different. In Lamar's account, Appling told them that he "had already prepared the tax return." J.A. 54. In this version of the story, because the tax return was final, Appling stated that the amount was already known and that it would be "in excess of $100,000." J.A. 55.

Lamar was aware that the prospective tax refund was Appling's sole unencumbered asset. He and Gordon had access to all of Appling's financial information. See J.A. 43. Lamar knew at the time "the fact that there [were] no other assets there." J.A. 54-55. Because "everything" Appling owned was "tied up in the business," Lamar recounted that "there were absolutely no assets of any type available to satisfy our fees" other than the prospective refund. *Ibid.*

In June 2005, Appling filed an amended tax return requesting a $60,718 refund. Pet. App. 3a. In October 2005, the IRS issued a $59,851 refund. *Ibid.*

Appling, his wife, and Robert Lamar subsequently met in November 2005. Pet. App. 3a, 22a. As with the March meeting, the parties have "very different" "recollection[s]" of what was said. *Id.* at 57a.

Appling requested this meeting (J.A. 106) because he believed that Lamar was overbilling him (J.A. 53). Indeed, the bills nearly doubled Lamar's initial upper estimate of $100,000 (J.A. 87), and Appling had already paid more than $135,000. See J.A. 88-90, 98-99. Appling therefore tried to "negotiate" with Lamar. J.A. 114. See also J.A. 106-107 ("I asked Mr. Lamar if he would be interested in bringing the bill down."). Lamar refused, saying, "We're not going to reduce it a dollar." J.A. 107.

During this meeting, Appling testified that he "[w]ithout a doubt" informed Lamar that he had already received his tax refund. J.A. 114. But, after Lamar refused to negotiate the amount of the outstanding bill, Appling told Lamar that he would use his refund to keep his struggling business afloat. J.A. 109, 114. Appling's wife, Connie, corroborated that account. J.A. 133.

Robert Lamar recalled the conversation differently. He testified that Appling "represented to us that it had been screw[ed] up * * * and he still hadn't gotten the refund, but he expected it at any time." J.A. 57. Lamar claims that he did not learn that Appling had received his tax refund until June 2006. J.A. 58-59.

After June 2006, Lamar did nothing for six years. In 2012, Lamar sued Appling in state court. C.A. App. A113. Lamar obtained a judgment, including interest, for $104,179.60. Pet. App. 23a. Appling and his wife filed for bankruptcy three months later. *Ibid.*

C. Proceedings below.

1. Lamar followed Appling into bankruptcy and filed this adversary proceeding. Lamar sought to

have its entire $104,179.60 judgment declared nondischargeable under Section 523(a)(2)(A). Pet. App. 23a. Lamar contended that Appling made misrepresentations about his expected tax refund during their 2005 meetings and that Lamar justifiably relied on those misrepresentations in forgoing collection between March 2005 and June 2006. *Id.* at 68a-69a.

Appling moved to dismiss for failure to state a claim. Pet. App. 67a. He asserted that, because the alleged misrepresentations were "statements respecting [his] financial condition," (2)(B)'s writing requirement applies. *Id.* at 70a-76a. Here, however, the relevant statements were oral. *Id.* at 70a.

The bankruptcy court disagreed. It reasoned that the term "statement respecting financial condition" covers only a debtor's "overall financial condition or net worth." Pet. App. 73a. Because Appling's statements about his "tax refund" described a "single asset," the court held that (2)(A) governed. *Ibid.*

2. The case proceeded to trial in September 2014. Pet. App. 46a. In March 2015, the bankruptcy court made findings as to what was said during the oral conversations a decade earlier. *Id.* at 52a-60a.

The court acknowledged the difficulty of resolving what amounted to a "disagreement as to recollection." J.A. 135. As the court quipped, "most people who get on this witness stand don't have horns and pitchforks so that I can tell who the angel and who the devil is." *Ibid.* The court therefore assessed "the demeanor of the witnesses" to determine their credibility. Pet. App. 58a.[1]

[1] Robert Lamar is a trial lawyer with more than 40 years' experience. J.A. 70. Appling, by contrast, repeatedly aggravated

The bankruptcy court addressed two issues regarding the March meeting—whether Appling had misrepresented the status of the amended return, and whether he misrepresented the amount that he anticipated receiving.

As to the first, the court agreed with Appling, disbelieving Robert Lamar. Although "Lamar testified" that Appling represented that the amended tax return had "been prepared by that time," both Appling and Gordon "testified that no such representation was made." Pet. App. 54a. Given that "Gordon ha[d] no financial interest in this litigation (and even if he did, his testimony would be adverse to that interest)," the court did not credit Lamar's testimony. *Ibid.*

As to the second issue, during trial, the bankruptcy court recognized that Appling may have "simply gotten some preliminary information from Mr. Strickland" and then accurately relayed what Strickland had told him. J.A. 134. Indeed, Appling described his prospective refund as "possibl[e]" and "potential[]" (J.A. 115), and Gordon similarly knew that the amount of the refund was then "approximate[]" (J.A. 35).

But, in its subsequent decision, the bankruptcy court did not address this possibility. The court instead concluded that it did "not believe" Appling's statements "that he honestly thought that he would receive a refund of approximately $100,000." Pet. App. 55a. The court never resolved whether, in the oral conversation a decade earlier, Appling had actu-

the court by speaking out of turn. See, *e.g.*, J.A. 89 ("This is not your turn to just talk, and talk, and talk."); J.A. 95 ("You be quiet."); J.A. 101 ("Stop talking, Mr. Appling.").

ally made that representation—or whether Appling merely, and accurately, relayed what his accountant had told him.

Despite having rejected Robert Lamar's testimony about the March meeting, the bankruptcy court relied on his account of the November meeting. Pet. App. 55a-60a. The court found that Appling made a "false representation at the November 2005 meeting that he had not yet received the refund." *Id.* at 58a.

On the basis of these findings, the bankruptcy court concluded that Appling made oral misrepresentations as to the amount and status of his tax refund. Pet. App. 52a-60a. As to reliance, because of its "knowledge of [Appling's] financial condition," Lamar "clearly believed that the tax refund was the only source of cash [Appling] would have to pay the fees." *Id.* at 62a. The court ultimately entered judgment for Lamar pursuant to Section 523(a)(2)(A). *Id.* at 66a.

3. The district court affirmed. Pet. App. 20a-44a. It recognized that the "case turns" on the proper construction of the phrase "statement respecting a debtor's * * * financial condition." *Id.* at 26a. In that court's view, "financial condition" "connote[s] the overall net worth of an entity or individual." *Id.* at 28a (quotation omitted). It did not consider the word "respecting." *Id.* at 28a-29a. Because Appling's "statements about his tax refund involved a single asset rather than [Appling's] net worth, overall financial health, or equation of assets and liabilities," the court held that they were not statements "respecting * * * financial condition." *Id.* at 30a.

4. The Eleventh Circuit unanimously reversed. Pet. App. 1a-14a.

Appling presented three arguments to the Eleventh Circuit: *first*, that the writing requirement of (2)(B) bars Lamar's claim; *second*, that Lamar failed to prove reliance, particularly in light of the unexplained six-year delay; and, *third*, that Lamar did not prove that Appling's alleged misrepresentations caused its asserted injury. The court of appeals agreed with the first and did not reach the others.

The court held that a statement describing a single asset or debt can be a "statement respecting the debtor's … financial condition." Pet. App. 14a. As a result, Section 523(a)(2)(B) governs this case. *Ibid.* Because the alleged misstatements were not in writing, Lamar cannot state a claim. *Ibid.*

The "text," the Eleventh Circuit concluded, "is not ambiguous." Pet. App. 12a. The court reasoned that, although "'financial condition' likely refers to 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. The court explained that the term "respecting" is "defined broadly as '[w]ith regard or relation to; regarding; concerning.'" *Ibid.* Given this plain meaning, "a statement can 'respect' a debtor's 'financial condition' without describing the overall financial situation of the debtor." *Ibid.*

Accordingly, when "[r]ead in context," the statutory phrase "includes a statement about a single asset." Pet. App. 8a. Holding otherwise would improperly "read the word 'respecting' out of the statute." *Ibid.*

The court observed that this statute is "perfectly sensible" because it "gives creditors an incentive to create writings before the fact." Pet. App. 13a. It therefore "promotes accuracy and predictability in bankruptcy disputes that often take place years after the facts arose." *Ibid*. The court concluded that the writing requirement enables the "the honest debtor" to quickly "prove his honesty" and, conversely, "the innocent creditor prove a debtor's dishonesty." *Ibid*.

Judge Rosenbaum concurred, explaining that the court's construction "better promotes congressional intent to give a fresh start to only the 'honest debtor' than does a narrow construction of the same phrase." Pet. App. 14a-19a.

SUMMARY OF ARGUMENT

I. The plain language of Section 523(a)(2) resolves the question presented. A statement that describes a debtor's assets or liabilities, either individually or in the aggregate, is a "statement respecting the debtor's * * * financial condition."

The term "respecting" has a broadening effect when used as a preposition, and the Court consistently holds that such terms have critical importance to statutory construction. This case is no different.

A debtor's "financial condition" is the aggregate of the debtor's assets and liabilities. See Pet. 19. A statement describing a single asset or debt has a direct impact on that aggregate and is, therefore, a "statement respecting financial condition." This construction gives effect to the word "respecting," and it is appropriately bounded by the term "financial condition."

Lamar, by contrast, cannot offer a construction of the statute that provides a role for the word "respecting." It focuses entirely on the term "financial condition." Lamar's strategy might have purchase if the statute said "statement *of* financial condition." But it does not.

The interpretation Lamar advances, moreover, leads to arbitrary distinctions and bizarre results. Lamar says that statements as meaningless as "Don't worry, I am above water" (Br. 19) trigger the protections of (2)(B), but statements that offer significant, concrete details about a debtor's financial status do not. Lamar's approach cannot account for implicit statements, piecemeal disclosures, or the reality of how creditors—including Lamar itself—say that they rely on borrowers' representations.

Lamar fears that, under our true-to-text construction, (2)(B) would swallow (2)(A). Not only is that wrong as a textual matter, but it is also disproven empirically: the Fourth Circuit adopted this construction 34 years ago, yet (2)(A) retains a substantial function.

Lamar tries to escape the statute's plain text with the aphorism that the Bankruptcy Code protects the "honest but unfortunate debtor." But, because the statutory language is clear, no recourse to a substantive construction canon is appropriate. Lamar's argument also disregards the structure of Section 523(a)(2), and it mistakes the applicable canons. In any event, the Eleventh Circuit concluded that our construction furthers the goal that Lamar trumpets: a written instrument "helps both the honest debtor prove his honesty and the innocent creditor prove a debtor's dishonesty." Pet. App. 13a.

The text should be the beginning and the end of this case.

II. The statute's lineage confirms this result. The phrase "statement respecting financial condition" dates to 1926. Between 1926 and 1978, courts repeatedly held that a statement describing a single asset or liability qualified. It was against that backdrop that Congress reenacted the same language in the current statute.

All of Lamar's talk of sledgehammers, elephants, and peeps, meanwhile, rests on an unsupported assumption that, prior to 1978, oral misstatements respecting financial condition could render debt nondischargeable. But the leading treatise indicates otherwise.

III. As Judge Pryor explained below, the statute, interpreted according to its text, is "perfectly sensible." Pet. App. 13a.

The Eleventh Circuit's construction is necessary to give effect to Congress's carefully calibrated protections for debtors. In adopting Section 523(a)(2), Congress identified an abusive practice that it sought to end: creditors would solicit lists of a borrower's liabilities only, take steps to ensure that the list was incomplete, and then later use the list as a means to prevent discharge. Lamar's approach fails to capture the very example that Congress stated was the motivation for the law. Lamar's construction, moreover, would render (2)(B) subject to ready circumvention. Adherence to the statutory text avoids these improbable results.

Additionally, Congress's adoption of a writing requirement makes underlying transactions more accurate, and it avoids saddling bankruptcy courts with the task of adjudicating the contents of oral conversations about a debtor's financial condition that occurred years or decades earlier.

This case demonstrates the wisdom of the statutory design. In reconstructing decade-old conversations, the bankruptcy court doubted testimony from both Appling *and* Lamar. Little wonder why: it can be difficult to recall, with legal precision, the particulars of a conversation from six months ago; turning back the clock a full decade is another matter entirely. It was sensible for Congress to determine that bankruptcy courts should not be in the business of resurrecting the particulars of ten-year-old conversations about a debtor's financial condition.

IV. For the first time, Lamar now says that a statement "providing a more holistic snapshot of one's financial status" qualifies as a "statement respecting the debtor's financial condition." Br. 29. Appling prevails under that newly minted position: because Lamar's theory of reliance was that it knew *everything* about Appling's finances other than his tax refund (Pet. App. 62a), Appling's statements completed Lamar's "holistic snapshot" of Appling's "financial status."

ARGUMENT

I. A debtor's statement describing a single asset or debt is a "statement respecting the debtor's financial condition."

Interpreting the Bankruptcy Code begins "'with the language of the statute itself.'" *Puerto Rico* v. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016). And where, as here, the language is plain, that "is also where the inquiry should end." *Ibid.*

The plain text of Section 523(a)(2)—"statement respecting the debtor's * * * financial condition"—resolves the question presented. A "statement respecting the debtor's financial condition" is a statement that has a "direct relation to, or impact on" (*Presley* v. *Etowah Cty. Comm'n*, 502 U.S. 491, 506 (1992)) "the balance of all of the debtor's assets and liabilities" (Pet. 19) or the debtor's "overall financial status" (Pet'r Br. 23).

A debtor's statement describing an individual asset or liability necessarily qualifies. Indeed, a debtor's statement describing a *single* asset or liability has a direct impact on the *sum* of his assets and liabilities, which is how Lamar defines "financial condition." Put differently, a debtor's statement that describes the existence or value of a constituent element of the debtor's balance sheet or income statement qualifies as a "statement respecting financial condition."

This construction also accords with how one ordinarily uses this language. Suppose a friend calls to say that he just won $500,000 in the lottery. One would certainly think that he made a "statement respecting his financial condition" (or, as Lamar prefers, a "statement about his financial condition"), even though he did not offer other details about his finances. If that friend proceeds to announce that recent tests show he no longer has cancer, he has made a statement "respecting" (or "about") his medical condition, even if he did not also volunteer his cholesterol level.

The plain meaning of the language that Congress used resolves this case. Lamar, by contrast, asks the Court to interpret the statutory text in a way irreconcilable with its common usage.

A. The plain text governs.

1. "Respecting" is a broadening term.

a. There is no genuine dispute as to our foundational point: the word "respecting" has a broadening effect when used as a preposition in a statute.

That conclusion stems from the definition of the term. *Webster's Third* defines "respecting" as "with regard or relation to: regarding, concerning" or "in view of: considering." *Webster's Third New International Dictionary* 1934 (3d ed. 1981). *Webster's Second* likewise defines the term as "concerning; about; regarding; in regard to; relating to." *Webster's New Twentieth Century Dictionary* 1542 (2d ed. 1967).[2]

Use of the word "respecting" throughout American law leaves no doubt that it adds breadth to the object it modifies. The Establishment Clause, for example, forbids Congress from making any law "respecting an establishment of religion." U.S. Const. amend. I. This is not synonymous with a law establishing a religion; the First Congress considered and rejected a proposal that "Congress shall make no law establishing Religion." *Lee* v. *Weisman*, 505 U.S. 577, 613 (1992) (Souter, J., concurring). For this reason, the Constitution does "not simply prohibit the establishment of a state church or a state religion"—rather, "[a] law may be one 'respecting' the forbidden objective while falling short of its total realization." *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971).

[2] The meaning of "respecting" has been consistent. See, *e.g.*, 2 *The New Century Dictionary* 1537 (1946) (defining "respecting" as "regarding or concerning, or relating to"); 8 *The Oxford English Dictionary* 536 (1933) (defining "respecting" as "[w]ith reference or regard to").

The Property Clause, moreover, provides Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. The Court has repeatedly held that Congress's regulatory power reaches beyond public property itself; it has "approved legislation respecting the public lands '[i]f it be found to be necessary, for the protection of the public, or of intending settlers on the public lands.'" *Kleppe* v. *New Mexico*, 426 U.S. 529, 540 (1976) (quoting *Camfield* v. *United States*, 167 U.S. 518, 525 (1897)).

Section 5 of the Voting Rights Act required preclearance before certain entities enforced any new "standard, practice, or procedure *with respect to* voting." 52 U.S.C. § 10304 (emphasis added). In *Presley*, 502 U.S. at 506, the Court held that the statute governed policies that have a "direct relation to, or impact on, voting."

For its part, Lamar has repeatedly agreed that "respecting" performs a broadening function. Lamar told the court of appeals that, in view of our argument, "respecting" has an "identical effect" to the alternative terms "concerning, about, regarding, relating." Pet'r C.A. Br. 22. In its petition for certiorari, Lamar acknowledged that "it is no doubt true that 'respecting,' like the similar 'related to' or 'in connection with' phrases Congress uses from time to time, has breadth in the abstract." Pet. 20. Even now, Lamar admits that "it is true that 'respecting' *can* be 'defined broadly'" (Br. 27), and—in attempting to find a role for the word, albeit unsuccessfully—Lamar says "[r]especting broadens the scope of statements * * * that qualify" (Br. 29).

b. Despite its earlier admissions, Lamar now contends that "respecting" cannot mean "related to." Br. 26-28. Instead, Lamar plucks three other synonyms that it prefers—"about," "with reference to," or "as regards." *Ibid.* This just invites a game of dictionary hide-and-seek.

"[A]bout" means "in relation to; having regard to." *Webster's New Twentieth Century Dictionary* 5 (2d ed. 1967). Likewise, "with reference to" is defined as with "relation" to and with "regard" to. *Id.* at 1516. And "regard" means "to have relation to" or "to concern." *Id.* at 1520.

So, while Lamar now resists the notion that "respecting" here means "related to," Lamar admits that it means "about," "with reference to," or "as regards"—all of which mean "in relation to."

The distinctions that Lamar attempts to draw do not exist. Rather, Lamar got it right earlier—these terms are synonyms with "similar" (Pet. 20), if not "identical" (Pet'r C.A. Br. 22), effect.[3] The fundamental conclusion remains: "respecting" performs a broadening function.

2. *The Court gives effect to broadening terms.*

Congress's use of the broadening term "respecting" is critical to the statute's construction. When interpreting statutes with such language, the Court has identified two guiding principles.

[3] This is why Lamar is wrong to contend (Br. 19, 29-30) that the Bankruptcy Code's alternative use of the similar term "relating to" creates a negative inference. The term "in relation to" means "respect." *Webster's Third New International Dictionary*, *supra*, 1916. These are all synonyms.

a. First, in recognition of the language Congress actually used, the statute's construction must take account of the term of breadth.

Take the Court's decision in *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992). The Court addressed the Airline Deregulation Act (ADA), which had a preemption clause forbidding states from enforcing any law "relating to rates, routes, or services of any air carrier." *Id.* at 383. The question was whether this law preempted states from regulating airline advertising. *Id.* at 379-380.

The states argued that the ADA "only pre-empts the States from actually prescribing rates, routes, or services." *Morales*, 504 U.S. at 385. The Court rejected that construction because it "simply reads the words 'relating to' out of the statute." *Ibid.* In that statute, "the key phrase, obviously, is 'relating to.'" *Id.* at 383.

The Court instead held that the ADA preempts any state law that has "a significant impact upon" airlines rates. *Morales*, 504 U.S. at 389, 390. Of course, not everything can be said to relate to airline rates: if the connection is "too tenuous, remote, or peripheral," then a law does not "relate to" airline rates, and there is no preemption. *Id.* at 388, 390. See also *Northwest, Inc.* v. *Ginsberg*, 134 S. Ct. 1422, 1428 (2014); *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008).

Morales borrowed from the Court's ERISA jurisprudence, where "[t]he phrase 'relate to' was given its broad common-sense meaning." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 47 (1987). Last Term, construing the Federal Employees Health Benefits Act, the Court explained that "Congress characteristically employs" "the expansive phrase 'relate to'" in order "to reach any subject that has 'a connection with, or reference to,' the topics the statute enumerates." *Coventry Health Care of Mo., Inc.* v. *Nevils*, 137 S. Ct. 1190, 1197 (2017).

The Court has repeatedly recognized that broadening terms must have an effect on statutory construction. Because "respecting" is a well-recognized broadening term, the proper construction cannot "simply read[]" this "key" term out of the statute. *Morales*, 504 U.S. at 383, 385.

b. At the same time, the Court recognizes the importance of limiting principles. When statutes use such broadening words, the party seeking the narrower construction will invariably raise the slippery-slope specter (see Pet'r Br. 18, 31, 46)—that, if the terms were "extended to the furthest stretch of their indeterminacy," then the statutory relationships could be said to "stop nowhere." *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1990 (2015) (quotation and alteration omitted).

The answer to that concern, the Court has instructed, is not to disregard the broadening term altogether. See *Morales*, 504 U.S. at 383, 385. No, the solution is that the Court must give effect to the broadening term while simultaneously identifying "a limiting principle consistent with the structure of the statute and its other provisions." *Maracich* v. *Spears*, 570 U.S. 48, 60 (2013).

The Court's decision in *Travelers Indemnity Co.* v. *Bailey*, 557 U.S. 137 (2009), is illustrative. See Pet'r Br. 31. The Court there considered the language "based upon, arising out of or relating to." 557 U.S. at 149. That a "curbstone philosopher" could assert that "everything is related to everything else" was no license to disregard that language. *Ibid*. Rather, it supported the far more modest conclusion that "[t]here is, of course, a cutoff at some point, where the connection between the insurer's action complained of and the insurance coverage would be thin to the point of absurd." *Ibid*. See also *Morales*, 504 U.S. at 388, 390.

3. The phrase as a whole compels the Eleventh Circuit's construction.

The Court's balanced approach to such terms of breadth yields a sensible result to the question presented: a statement that describes a debtor's assets or debts, either individually or in the aggregate, qualifies as a "statement respecting the debtor's financial condition." See Pet. App. 8a-9a. Our construction is faithful to Congress's use of the broadening term "respecting," and it employs "financial condition" as a limiting principle.

a. The phrase has three main components: (i) "statement," (ii) "respecting," and (iii) "financial condition." We consider these terms individually and then together as a whole.

i. Used here, "statement" has its plain meaning: "that which is stated; an embodiment in words of facts or opinions; a narrative; recital; report; account." Pet. App. 10a (quoting *Webster's New International Dictionary* 2461 (2d ed. 1961)).

Lamar does not now disagree.[4] And there is no reason to read the word "statement" any other way.

[4] Below, Lamar identified scattered uses of "financial statement" in the legislative history. Pet'r C.A. Br. 15-17. But, because Congress did not use the term "financial statement" in

Elsewhere in the Bankruptcy Code, Congress specified certain kinds of statements, like a "disclosure statement (11 U.S.C. § 1125) and a "registration statement" (*id.* § 101(49)(A)(xii)). But *this* statute uses the term "statement;" it would be error, therefore, to "limit the definition" to a specific kind of statement, like a "financial statement[]." Pet. App. 10a.

Additionally, because "it is hard to imagine an oral recitation of all assets and liabilities," "a formal financial statement is almost always a written document." Pet. App. 10a-11a. Therefore, "reading the statute to cover only financial statements would render the writing requirement surplusage." *Id.* at 11a.

ii. As we have described, the preposition "respecting" has a broadening effect. From the Establishment Clause to the Voting Rights Act, the Court has consistently embraced that result. See pp. 18-19, *supra.*

When Congress does not intend for a broadening effect, it has alternative language at its disposal—including "of." Pet. App. 9a. Elsewhere in the Bankruptcy Code, Congress used various "statement of" phrases.[5] And, throughout federal law, Congress uses the phrase "statement *of* financial condition" when it intends for a narrower result.[6] But Congress did

the statutory text, this "argument works against" Lamar. Pet. App. 10a. Lamar has since abandoned this contention. Indeed, the legislative history often used "statement" alone. See, *e.g.*, S. Rep. No. 95-989, at 78 (1978).

[5] See, *e.g.*, 11 U.S.C. § 329(a) ("statement of the compensation paid"); *id.* § 521(a)(1)(B)(iii) ("statement of the debtor's financial affairs"); *id.* § 707(b)(2)(C) ("statement of the debtor's current monthly income").

[6] See, *e.g.*, 8 U.S.C. § 1330(b)(3)(iii)(D) ("The Attorney General shall prepare and submit annually to the Congress statements

not use that language here. Congress's use of a broadening term must be understood as intentional. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

iii. As to "financial condition," the Eleventh Circuit (Pet. App. 7a-8a) looked to the Code's definition of the term "insolvent," which is, in relevant part, the "financial condition such that the sum of such entity's debts is greater than all of such entity's property." 11 U.S.C. § 101(32)(A). It concluded that "'financial condition' likely refers to the sum of all assets and liabilities." Pet. App. 8a.

Earlier, Lamar offered materially the same formulation: "financial condition," it said, is "the balance of all of the debtor's assets and liabilities." Pet. 19. Lamar now defines "financial condition" as, similarly, "one's overall financial status," which remains the sum total of one's assets and debts. Br. 23. See also Br. 24-27.

b. The whole phrase read together answers the question presented: a "statement respecting the debtor's financial condition" is a statement that has a "direct relation to, or impact on" (*Presley*, 502 U.S. at 506) "the balance of all of the debtor's assets and liabilities" (Pet. 19) or the debtor's "overall financial status" (Pet'r Br. 23).

This necessarily includes statements a debtor makes describing his assets or debts, either individually or in the aggregate. Under Lamar's own definition, "financial condition" is "the balance of all of the debtor's assets and liabilities." Pet. 19. A debtor's

of financial condition of the Immigration Enforcement Account"); 12 U.S.C. § 4707(f)(1)(B) ("a statement of financial condition"); 31 U.S.C. § 5134(d)(2) ("Statements of the financial condition of the Fund").

statement describing a *single* asset or liability has a direct impact on the *sum* of his assets and liabilities.[7]

Put differently, a debtor's statement describing the existence or value of a constituent element of his balance sheet or income statement qualifies as a "statement respecting his financial condition."[8]

Lamar offers two principal rejoinders: *first*, that this result does not give "financial condition" its due (Br. 26-29), and *second*, that there is no limiting principle because "everything is related to everything else" (*id.* at 30-33). Both are mistaken for the same reason—our construction is bounded by the term "financial condition."

We, like the Eleventh Circuit, assume Lamar's definition of "financial condition." Lamar cannot, therefore, assert that we have improperly defined the term.

Lamar says that, as we interpret the statute, its meaning is similar to other hypothetical texts, such as a "statement respecting the debtor's *assets or liabilities*." Br. 26, 29. But Lamar's observation is merely that there are different ways to write statutory language that yield similar meaning. That is *always* true.

[7] This result accords with *Field*, which indicated that a statement about a "bank balance" qualifies as a "statement respecting financial condition." See 516 U.S. at 76. A "bank balance" is, of course, a single asset.

[8] For a creditor to bring any claim under Section 523(a)(2), the creditor must prove that the alleged misstatement was material. See *Field*, 516 U.S. at 67-69 (describing materiality for (2)(A)); 11 U.S.C. § 523(a)(2)(B)(i) (requiring a "materially false" statement).

The correct question is whether our construction gives the whole of the text, including the term "financial condition," its due. Our construction does; it is tethered entirely to "financial condition." Only those statements that have a direct relation to or direct impact on "the balance of all of the debtor's assets and liabilities" (Pet. 19) or "one's overall financial status" (Pet'r Br. 23) will qualify. Many kinds of statements do not have such a direct impact; we provide several examples below. See pp. 33-35, *infra*. Far from "render[ing] Congress's use of 'financial condition' largely meaningless" (Pet'r Br. 26), our construction is bounded by it.

Lamar's slippery-slope contention (Br. 31-33) fails for this same reason. Lamar frets that our construction might cover a lie about one's "ability to make money." Br. 32. Consider a debtor's statement that she is a licensed architect. See p. 34 n.10, *infra*. That statement has no *direct* impact on her "overall financial status" or the "balance of all of her assets and liabilities." It is *not* a statement that describes an item on her balance sheet or income statement. Any arguable bearing that statement may have to her "financial condition" is decidedly *in*direct.

Our construction gives meaning to both "respecting" and "financial condition." The term "respecting" serves its broadening function, while the ultimate touchstone remains "financial condition."[9]

[9] The Federal Debt Collection Procedures Act authorizes the government, when collecting on debts, to obtain "discovery regarding the financial condition of the debtor." 28 U.S.C. § 3015(a). It would be odd if that statute limited the government to only those documents that, standing alone, reveal the *entirety* of a debtor's financial condition. Courts routinely authorize

4. *Lamar cannot account for the term "respecting"—and its position yields bizarre and arbitrary results.*

a. Lamar has not and cannot offer a construction of the statutory text that gives meaning to the word "respecting."

It is revealing that Lamar has abandoned the courts of appeals that reached the result it favors. The petition for certiorari was built on *In re Bandi*, 683 F.3d 671 (5th Cir. 2012), and *In re Joelson*, 427 F.3d 700 (10th Cir. 2005). See Pet. 10-14. Having reached the merits, Lamar does not cite either decision. Not even once. Lamar's tactic is perhaps unsurprising, as neither court considered the word "respecting."

Nor can Lamar account for the word. In the court of appeals, Lamar opened its argument with legislative history. Pet'r C.A. Br. 15-17. Lamar chided our "focus on 'respecting'" as "nothing more than a game of semantics." *Id.* at 22.

The same was true in the petition. Rather than give effect to "respecting," Lamar said that the Eleventh Circuit's construction used "respecting" in a way that "change[d] the meaning of 'financial condition.'" Pet. 20. But that argument was difficult to understand, because *of course* one word in a phrase may change what another word means when standing alone. That is why words must be interpreted together, not in isolation.

the government to obtain information that describes individual assets. See, *e.g.*, *United States* v. *Thomas*, 165 F. Supp. 3d 992, 994, 996 (D. Colo. 2015); *United States* v. *Law*, 2011 WL 2945815, at *3 (D. Idaho 2011) (report and recommendation), *adopted by* 2011 WL 2970980 (D. Idaho 2011).

Now, on the merits, Lamar offers a brief passage as to what work "respecting" could do: we are told that "'[r]especting' broadens the scope of statements about one's overall financial status or health that qualify beyond a classic financial statement or balance sheet." Br. 29. In Lamar's view, the phrase covers statements like "I am in good financial shape" (*id.* at 28) and "Don't worry, I am above water" (*id.* at 19).

Although we are heartened to see Lamar acknowledge that "respecting" must "broaden[] the scope" of the statute (Br. 29), its construction is wrong because "respecting" does no work. Lamar contrasts its supposedly "broaden[ed]" construction with "a classic financial statement." *Ibid.* But Lamar does not argue that the term "statement," as used here, means a "classic financial statement." Nor does Lamar argue that "financial condition," as used here, implies a "classic financial statement." See Pet'r Br. 23 (defining "financial condition" as "one's overall financial health or status").

Lamar's use of a "classic financial statement" as a foil is thus a straw man. Because nothing in the statutory text is limited to that concept, the word "respecting" does no "broaden[ing]" work (Br. 29) to extend the statute's reach beyond a "classic financial statement."

Lamar's articulation of what appears to be its preferred construction proves our point. Lamar says that the statutory phrase covers "any number of * * * statements providing a more holistic snapshot of one's financial status." Br. 29. But a "more holistic snapshot of one's financial status" is the same thing as "one's overall financial health or status," which is how Lamar defines "financial condition." Br. 23. Under Lamar's construction, therefore, the meaning of "financial condition" does everything—and the word "respecting" does nothing at all.

b. Lamar's position, if adopted, would also create bizarre results that conflict with real-world behavior.

The question here is the range of statements to which the debtor protections in (2)(B) attach. In Lamar's view, statements as vacuous as "Don't worry, I am above water" (Br. 19) and "I am in good financial shape" (Br. 28) *do* qualify, while statements that describe concrete assets—like a specific tax refund—do not.

The Fifth Circuit, where Lamar's rule governs, illustrates this result. There, a debtor's statement describing "a commercial building, a condominium development, and a residence," as well as his provision of a list of accounts receivable, did not together qualify as a statement respecting financial condition—and thus did not trigger the debtor protections in (2)(B). *In re Bandi*, 683 F.3d at 673, 678. But that same court recently held that conclusory statements describing a company as being in "very fine legally financial shape" and having "plenty of cash to operate" *were* statements respecting financial condition. *In re Haler*, 708 F. App'x 836, 838 (5th Cir. 2017).

These flimsy distinctions reveal at least three shortcomings to Lamar's position: Lamar fails to address implicit representations, Lamar cannot account for piecemeal disclosures, and Lamar ignores the reality of how creditors actually behave.

Suppose a prospective creditor asks a potential borrower "are you solvent?" If the borrower says "yes," then Lamar believes that (2)(B) applies. So too if the borrower says "yes, because I own $100,000 worth of gold bars." But what if the borrower answers that question by saying, simply, "I own $100,000 worth of gold bars." Is that a statement about a single asset—or, given the question, is it an implicit statement about solvency?

If it *is* a statement respecting financial condition, then Lamar's rule does just what Lamar decries—"it introduces an additional, subjective layer to the inquiry." Pet'r Br. 46. And such a rule, Lamar recognizes (*ibid.*), is unmanageable. If it is *not* a statement respecting financial condition, then Lamar makes a formalistic distinction that disregards what both the borrower and creditor may have understood was the content of the communication.

Further suppose that, over time, a creditor has come to know *everything* about the borrower's financial condition—every nook and cranny—*except* the value of the borrower's holding in gold bars. With that history, is the borrower's statement "I own $100,000 worth of gold bars" a "statement respecting financial condition" when it *completes* the creditor's understanding of the borrower's "overall financial health or status"? Lamar does not say.

But that is this case. Robert Lamar testified that, at the time Appling made the statements about his tax refund, Lamar knew "the fact that there [were] no other assets there" because "everything" Appling owned was "tied up in the business." J.A. 54-55. Lamar was therefore aware that, in his own words, "there were absolutely no assets of any type available to satisfy our fees," other than the tax refund. *Ibid.* This was the linchpin of Lamar's materiality and reliance theories—Lamar "clearly believed that the tax refund was the only source of cash [Appling] would have to pay the fees." Pet. App. 62a.

If multiple disclosures that, when taken together, reveal a debtor's "overall financial health or status" qualify as a "statement respecting the debtor's financial condition," then Appling wins. If such disclosures do not qualify, then Lamar's rule is all form and no substance. It is a rule that any devious creditor can skirt at will by staging its requests for information. A creditor could avoid (2)(B) by asking a borrower to list his assets on Monday and his debts on Tuesday.

What these examples demonstrate is that creditors rely on statements describing *some* of the borrower's assets or liabilities for the same reason that they rely on statements describing *all* of the borrower's assets or liabilities. Creditors may believe that the information is material to whether the borrower's financial condition is such that she is likely to repay. That is *exactly* why Lamar says it relied on Appling's statements here. Pet. App. 62a.

The Fifth Circuit's decision in *Bandi* exemplifies this contradiction in Lamar's approach: while the court held that the debtors' statements about several of their assets did not describe their "overall financial condition and consequent ability to pay" (683 F.3d at 678-679), the court simultaneously held that the creditor was justified in relying on these statements when extending credit (*id.* at 679). Both points cannot be true. The creditor relied precisely because he thought the information *did* bear on the borrowers' ability to repay.

c. Lamar's position, moreover, lacks internal consistency.

Lamar's rule appears to require a statement that reveals "one's overall financial status or health." Br.

29. Yet, at the same time, Lamar says (Br. 28) that a representation about "net monthly cash flow" qualifies. This kind of statement, however, shows at most only changes to one's net worth; it says nothing about *preexisting* assets or liabilities. This sort of statement does not even reveal whether one has a positive net worth and thus does not describe "one's *overall* financial status." Lamar offers no unifying logic as to how this example fits within its approach.

Lamar raises yet more questions by contending that its construction covers "statements providing a more holistic snapshot of one's financial status." Br. 29. Lamar does not explain what work it intends for the word "more" to do. If Lamar means to say that a *partial* disclosure of overall financial status may qualify, then it has given up the game—because that is our position. In our view, statements about single assets, multiple assets, or all assets qualify.

Indeed, if Lamar's view is that some partial disclosures qualify, then it has contradicted its own theory that the statute is limited to statements revealing "overall financial status or health." Br. 29. And Lamar has certainly not offered any objective standard that would allow a court to determine when, in Lamar's view, a statement is sufficiently "holistic" so as to trigger (2)(B).

Lamar's approach, accordingly, rests on arbitrary distinctions and disregards actual behavior. These problems are avoided by adherence to the statute's text.

B. Lamar disregards three decades of Fourth Circuit experience.

Lamar asserts that "[t]he Eleventh Circuit's interpretation gives the 'other than' carve-out an implausibly broad reach" and that, under our rule, "little will be left to be covered by Section 523(a)(2)(A)'s general rule." Br. 31-33. See also Br. 46-47.

Hard evidence disproves this conjecture. The construction we advocate has been the law in the Fourth Circuit for 34 years. See *Engler* v. *Van Steinburg*, 744 F.2d 1060, 1061 (4th Cir. 1984). And, contrary to Lamar's supposition, (2)(A) has a substantial function there.

Section 523(a)(2)(A) regularly applies to bar a discharge when an individual misstates skills or qualifications.[10] It governs misstatements about professional licensing,[11] as well as the intended use of borrowed funds.[12] And (2)(A) bars discharges when a

[10] See, *e.g.*, *In re Pleasants*, 219 F.3d 372, 374 (4th Cir. 2000) (debtor "[mis]represented that he was an architect who was educated at the University of Virginia School of Architecture"); *In re Foster*, 2013 WL 4590645, at *5 (Bankr. D. Md. 2013) (debtor lied about his "skill, experience and qualifications").

[11] See, *e.g.*, *In re White*, 128 F. App'x 994, 999 (4th Cir. 2005) (misrepresentations about the debtor's sales license); *Fralick* v. *Hasenberg*, 2006 WL 2390289, at *2 (D. Md. 2006) (contractor's license); *Morlang* v. *Cox*, 222 B.R. 83, 84 (W.D. Va. 1998) (business license); *In re Rixham*, 578 B.R. 287, 310-311 (Bankr. D. Md. 2017) (contractor's license); *In re Butler*, 2012 WL 6106586, at *10 (Bankr. W.D.N.C. 2012) (sales license).

[12] See, *e.g.*, *Johnson* v. *Dowling*, 2013 WL 684681, at *6 (W.D. Va. 2013) (debtor stated "he intended to use the loan proceeds to make a down payment on a parcel of land" but instead used the loan to pay other debts); *In re Simone*, 509 B.R. 6, 8 (Bankr. D. Md. 2014) (debtors stated they would use the loan "to close a valuable real estate deal" but instead used it to "live a lavish lifestyle").

debtor falsely promises that he will convey an ownership interest to his creditors.[13]

These broad categories of fraud just scratch the surface of (2)(A)'s reach. It also applies in the context of:

- A misrepresentation about the scope of repairs a debtor made to a houseboat. *In re Loignon*, 308 B.R. 243, 248 (Bankr. M.D.N.C. 2004).
- A scheme that lured in customers via the false pretenses of providing them a free gift for listening to a presentation about soap. *In re Fravel*, 143 B.R. 1001, 1000-1011 (Bankr. E.D. Va. 1992).
- A contractor who padded his bills by misrepresenting the cost of materials. *In re Brush*, 460 B.R. 448, 456 (Bankr. D.S.C. 2011).

In sum, (2)(A) is alive and well in the Fourth Circuit.

If our approach actually created "line[]" "drawing" problems (Pet'r Br. 32)—or took "a huge bite out of" (2)(A) (*id.* at 33)—Lamar or its *amicus* would have identified evidence proving as much by now. They have not. Three decades of Fourth Circuit experience confirm that the rule we advance is administrable and that (2)(A) retains a significant function.

[13] See, *e.g.*, *In re Dovan*, 2015 WL 10437756, at *7 (Bankr. M.D.N.C. 2015) (debtor "falsely and continuously represented" that the creditor "was an owner"); *In re Mona*, 2013 WL 4017126, at *8 (Bankr. D. Md. 2013) (debtor promised to make the creditor a partner but had no intention of doing so).

C. The statutory text undermines Lamar's "honest debtor" maxim.

Lamar asserts—ten times, see Pet'r Br. 2, 5, 7, 19, 34, 35, 36, 38, 45, 47—that bankruptcy's purpose is to protect the "honest but unfortunate debtor." This hoary phrase does not permit the atextual construction that Lamar seeks.

The statute's text alone requires rejection of Lamar's argument. Because "the text is not ambiguous" (Pet. App. 12a), Lamar's attempted refuge in a supposed substantive canon of construction is unavailing. That is to say, a "distaste for dishonest debtors does not empower judges to disregard the text of a statute." *Ibid.* See also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 57 (2012) ("[P]urpose * * * cannot be used to contradict text or to supplement it."). Regardless, Lamar's contention fails on its own terms.

1. Beyond the meaning of the word "respecting," Section 523(a)(2)'s structure fatally undermines Lamar's argument. The statute is designed so that a certain kind of dishonestly obtained debt *is* discharged in bankruptcy—those debts incurred by *oral* misstatements "respecting the debtor's financial condition." Lamar does not disagree. See Br. 30-31.

There are "perfectly sensible" reasons for this congressional judgment (see Pet. App. 13a-14a), on which we will later elaborate (see pp. 48-57, *infra*). But, for present purposes, it suffices to say that this is inescapably the statute that Congress wrote.

Because *this* particular statute manifestly permits discharge of debts incurred by a specific kind of dishonest conduct, Lamar's generic anti-dishonesty principle sheds no light on its proper construction.

When construing a statute to achieve its purpose, "the purpose must be derived from the text, not from extrinsic sources such as * * * an assumption about the legal drafter's desires." Scalia & Garner, *supra*, 56.

2. Lamar's effort to elevate this judicial aphorism to rule of statutory construction, moreover, is misguided. Lamar's premise (Br. 34-36) is that Congress wrote the 1978 Bankruptcy Code with knowledge that, in earlier cases, the Court had observed that bankruptcy law generally protects the "honest but unfortunate debtor." From there, Lamar concludes that this adage has become a substantive rule of construction governing the whole of the Bankruptcy Code.

But that is not the lesson to infer from the 1978 Bankruptcy Code. One need look no farther than Section 523(a)(2). Congress heightened the reliance requirement (from justifiable to reasonable) in (2)(B), the effect of which is to make it harder for creditors to prevail on certain kinds of fraud claims. See *Field*, 516 U.S. at 66-67. Even Lamar recognizes that the 1978 Code "balance[d] the scales more fairly" in favor of *debtors*. Pet'r Br. 11 (quoting H.R. Rep. No. 95-595, at 131, 1978 U.S.C.C.A.N. 5963, 6092 (1977)).

Lamar's argument thus rests on the improbable conclusion that, while enacting express, textual provisions to *protect* allegedly dishonest debtors, Congress simultaneously—yet silently—adopted a rule of construction that obligates courts to reflexively disfavor debtors accused of dishonesty when construing that same provision. Lamar has no evidence that Congress intended for this unlikely result.

And the Court surely has no interest in embracing Lamar's reasoning—that today's dictum, by virtue of congressional silence, will become tomorrow's substantive canon of construction.

It is no surprise, therefore, that the Court does not use this supposed interpretative tool. And that is not for lack of opportunity. Recently, in *Husky International Electronics* v. *Ritz*, 136 S. Ct. 1581 (2016), and earlier in *Field*, 516 U.S. 59, the Court construed the scope of Section 523(a)(2)(A). Far from embracing Lamar's theory that a distaste for the allegedly dishonest must guide the statute's construction, the Court said nary a word about honesty.

The best Lamar can do is point (Br. 4) to *Grogan* v. *Garner*, 498 U.S. 279, 287 (1991). But *Grogan* just identified this principle as a reason to reject a debtor's countervailing "fresh start" argument—not as a stand-alone tool of statutory interpretation.

In sum, Lamar invokes the sort of "abstract[]" statement of purpose that, if accepted, would license courts to substitute their judgment for that of the legislature. Scalia & Garner, *supra*, 57. But "[s]uch a highly generalized purpose is not relevant to genuine textual interpretation." *Ibid.*

3. Lamar's argument is also wrong because it conflicts with an oft-applied canon. The Court has repeatedly invoked "the 'well-known' guide that exceptions to discharge 'should be confined to those plainly expressed.'" *Kawaauhau* v. *Geiger*, 523 U.S. 57, 62 (1998) (quoting *Gleason* v. *Thaw*, 236 U.S. 558, 562 (1915)). See also *Bullock* v. *BankChampaign, N.A.*, 569 U.S. 267, 275 (2013) (adopting a construction that "is consistent with the long-standing principle that 'exceptions to discharge

should be confined to those plainly expressed'"). To the extent there is any doubt about the reach of Section 523(a)(2), the Court should construe it narrowly.

The clarity of the statutory language obviates the need for these interpretative tools. But, if recourse to any canon is proper, it should be to the one that the Court routinely uses.

4. Lamar is wrong, moreover, to assume that its construction of the statute furthers the end of distinguishing sinner from saint. As this case exemplifies, saddling a bankruptcy court with the task of adjudicating the contents of alleged oral statements describing individual assets or liabilities—statements often made years or decades earlier—is unlikely to yield accurate results. It is only likely to bedevil bankruptcy courts with intractable disputes, often animated by grudge more than rational judgment. This case is illustrative: the bankruptcy court disbelieved crucial parts of Robert Lamar's own testimony, and contradictions in Lamar's reliance theory remain unresolved. See pp. 56-57, *infra.*

Congress's writing requirement produces fair results for debtors and creditors alike: the dishonest debtor is immediately hoisted onto her own misstatements, while the resentful creditor is barred from constructing a new theory of reliance years after the fact, based on nothing more than his say-so. The writing requirement thus "helps both the honest debtor prove his honesty and the innocent creditor prove a debtor's dishonesty." Pet. App. 13a.

5. The issue presented here has no bearing on the several other provisions in the Bankruptcy Code that police dishonesty. Section 523(a)(4), for example, exempts from discharge any debt "for fraud or defal-

cation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). Section 523(a)(6) exempts debts "for willful and malicious injury by the debtor to another entity or to the property of another entity" (*id.* § 523(a)(6)), which applies to many fraud claims. 3 *Norton Bankruptcy Law and Practice.* § 57:15 (3d ed. 2017). And Section 523(a)(19) exempts from discharge judgments obtained in securities fraud cases.

It is "inevitable" and "unavoidable" that Section 523(a)(2) "overlap[s]" with these other provisions. *Husky Int'l*, 136 S. Ct. at 1588. Construing Section 523(a)(2) consistent with its text not only leaves that exemption a powerful tool for creditors (as the Fourth Circuit's experience proves), but it also says nothing about these other provisions in the Bankruptcy Code that exempt often-overlapping dishonest conduct from discharge.

II. Section 523(a)(2)'s lineage confirms the Eleventh Circuit's construction.

Prior to the Code's adoption in 1978, courts uniformly construed the same material language as encompassing statements about single assets and liabilities. When Congress enacted Section 523(a)(2), the meaning of the language it used was settled.

1. Section 17(a)(2) of the Bankruptcy Act of 1898 (30 Stat. 544, 550) was the original "antecedent[]" to present-day Section 523(a)(2)(A). *Field*, 516 U.S. at 64-65. As amended in 1903, it exempted from discharge "debts" that "are liabilities for obtaining property by false pretenses or false representations." Pub. L. No. 57-62, 32 Stat. 797, 798.

In 1903, Congress added Section 14(b)(3), which denied discharge in its entirety to one who "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." 32 Stat. at 797-798.

Courts concluded that, because of the "made to" language, a borrower's misstatements to a credit rating agency did not trigger Section 14(b)(3). See *In re Russell*, 176 F. 253, 258 (2d Cir. 1910). Courts adhered to this result following a minor 1910 amendment. See *J.W. Ould Co.* v. *Davis*, 246 F. 228, 231 (4th Cir. 1917); *In re Zoffer*, 211 F. 936, 937-938 (2d Cir. 1914).

2. In 1926, Congress amended Section 14(b)(3) to bar discharge entirely to a debtor who had "[o]btained money or property on credit, or obtained an extension or renewal of credit, by making or publishing, or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition." Act of May 27, 1926, § 6, 44 Stat. 662, 663.

As Lamar contends (Br. 8-9), this amendment captured misstatements borrowers made to credit-rating agencies. Congress achieved this end by substituting the "made to" phrase with expansive, alternative language. But Lamar is wrong to assert (Br. 37-38, 42-43) that the language at issue here—"a materially false statement in writing respecting his financial condition"—accomplished that end. Earlier drafts of the 1926 Amendment, specifically designed "to hit the case of a man who gives a statement to Dun's or Bradstreet's," did not contain this phrase. *Hearing on H.R. Res. 353*, 68th Cong. 45 (1925) (statement of Joseph B. Jacobs).

In all events, courts uniformly held that the 1926 Act encompassed statements about individual assets or debts.

In *Albinak* v. *Kuhn*, 149 F.2d 108, 109 (6th Cir. 1945), a debtor had purported to assign accounts receivable to a creditor, but the amounts were not in fact due. The debtor contended "that these assignments * * * do not constitute a financial statement" because, in the debtor's view, "a financial statement is a term of art and purports to be a complete statement of assets and liabilities by which the precise financial worth of the person making the statement can be determined." *Id.* at 110.

The Sixth Circuit found the debtor's position "tenuous" because "the statute does not use the phrase 'financial statement.'" *Ibid.* And "[n]o 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." *Ibid.* The court indicated that "a written statement listing as assets accounts which have no existence whatsoever, running into many thousands of dollars and including practically all of the receivables of the assignor" was, in fact, a "statement[] respecting the maker's financial condition." *Ibid.* Although the court concluded that the debtor's warrant of solvency necessarily qualified as a statement respecting financial condition (*ibid.*), the court's reasoning confirms our construction. *Albinak*, moreover, is consistent with every other case of which we are aware.

In *Mau* v. *Sampsell*, the Ninth Circuit considered facts analogous to those here. 185 F.2d 400 (9th Cir. 1950) (per curiam). A debtor addressed a letter to his creditor, stating that an existing escrow would soon net him cash in excess of the debt; the debtor requested an extension of credit until the escrow money was released. *Id.* at 400. In fact, no escrow existed. *Ibid.* The court affirmed that this was a "fraudulent report of [the debtor's] financial status," triggering Section 14. *Ibid.*

Later, the Ninth Circuit concluded that implicit statements that the debtor "had some ownership or control of property * * * available for hypothecation by him[] amounts to a statement 'respecting his financial condition.'" *Scott* v. *Smith*, 232 F.2d 188, 190 (9th Cir. 1956). See also *In re Freudman*, 130 F. Supp. 701, 703 (S.D.N.Y. 1954), *aff'd*, 222 F.2d 369 (2d Cir. 1955) (same).

Similarly, in *In re Weiner*, 103 F.2d 421 (2d Cir. 1939), the debtor falsely represented that it held a valuable claim, and it assigned that asset to a creditor. *Id.* at 422. The Second Circuit held that this misrepresentation about "an asset" qualified as "a materially false statement by the bankrupt 'in writing respecting his financial condition.'" *Id.* at 423.

3. In 1960, Congress further amended the statute. Congress limited Section 14, which remained a complete bar to bankruptcy discharge, to business debtors. See Pub. L. No. 86-622, 74 Stat. 408, 408 (1960). As to all others, the new Section 17(a)(2) provided an exemption from discharge for debts that:

> are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting [the debtor's] financial condition made or published or caused to be

> made or published in any manner whatsoever with intent to deceive.

Id. at 409. As a result, false statements respecting financial condition, save for certain business debtors, no longer served as a *complete* bar to discharge.

After the 1960 Amendments, courts interpreted the phrase "statement in writing respecting [the debtor's] financial condition" in both the business and non-business provisions to encompass statements describing a single asset or debt.

In *Tenn* v. *First Hawaiian Bank*, 549 F.2d 1356 (9th Cir. 1977) (per curiam), the debtors falsely "represented to the Bank that they were the owners of property located at 3755 Diamond Head Circle." *Id.* at 1357. This was, the court held, "a false statement in writing respecting their financial condition." *Id.* at 1356.

Lamar says that *Tenn* did not "actually engage with the issue." Br. 44. Not so: the Ninth Circuit's holding on this point was necessary to its conclusion. 549 F.2d at 1357. That the court did not undertake an extensive discussion underscores that the conclusion was both obvious and noncontroversial.

Construing Section 14, the Eighth Circuit held that "[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." *Shainman* v. *Shear's of Affton, Inc.*, 387 F.2d 33, 38 (8th Cir. 1967). The court reasoned that "[t]here is nothing in the language or legislative history of this section of the Act to indicate that it was intended to apply only to complete financial statements in the accounting sense." *Ibid.*

Courts held similarly for statements regarding other assets of a corporation, including false invoices. See, *e.g.*, *In re Simard*, 254 F. Supp. 609, 613 (W.D. Ark. 1966) ("[A] fraudulent invoice is not a financial statement, but is a false statement respecting the financial condition of the bankrupt."); *In re Salzman*, 61 B.R. 878, 887 (Bankr. S.D.N.Y. 1986) ("There is no question that an assigned fraudulent invoice is a materially false statement in writing respecting the financial condition of the assignor.").

The same was true for statements describing accounts receivable. See, *e.g.*, *In re Butler*, 425 F.2d 47, 49 (3d Cir. 1970) (holding that a corporation's false statements as to select accounts receivable qualified as "statements * * * respecting * * * financial condition"); *In re Lurie*, 385 F. Supp. 784, 793 (E.D.N.Y. 1974) (same); *In re Bernfeld*, 247 F. Supp. 89, 95 (E.D.N.Y. 1965) (same).

With Section 17, courts held that "[t]he bankruptcy act does not speak of a 'financial statement' in the sense of a formal listing and detailing of assets and liabilities." *Dial Fin. Co.* v. *Duthu*, 188 So. 2d 151, 154 (La. Ct. App. 1966). "Insofar as concerns the Federal Bankruptcy Act a 'statement in writing respecting his financial condition' means any written reference to the assets or liabilities of the debtor." *Ibid.* That a statement describing an asset or debt "is not a part of a complete listing of assets and liabilities is immaterial." *Ibid.*

4. When Congress enacted the present-day Section 523(a)(2) in 1978, it used the same material language—"statement respecting the debtor's financial condition."

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). "The Court has followed" this ratification "rule with particular care in construing the scope of bankruptcy codifications." *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986).

This principle applies when Congress acts in accord with uniform lower court holdings, as it did here. See *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2519 (2015); Scalia & Garner, *supra*, 322 ("If a word or phrase has been * * * given a uniform interpretation by inferior courts * * * , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.").

Because Congress reused language in 1978 that had by then acquired a settled meaning, Congress is presumed to have adopted that interpretation.

Against all this, Lamar claims that "the vast majority of cases" applying the earlier language "involved similar financial statements describing the borrower's *overall* financial health." Br. 43 & n.5. That is possibly true, but it is certainly irrelevant. Everyone agrees that statements describing a debtor's "*overall* financial health" are within the meaning of the phrase. Not one of Lamar's cases says that statements describing single assets or liabilities do not qualify. Nor has Lamar identified any case, much less a plurality of cases, so as to call our conclusion into doubt.

Apparently recognizing that it cannot explain these cases away, Lamar says—without explanation—"that some courts may have erred in construing the phrase." Br. 45. That misses the point. Our main argument is not that these cases are persuasive for how they construed the law, although they are useful on that score, too. We cite these cases principally for the fact of their holding; they demonstrate that the phrase "statement respecting financial condition" had an established meaning when Congress reused it in 1978.

5. Lamar has one last argument: Lamar is of the view that, prior to 1978, oral misstatements respecting financial condition rendered debts nondischargeable. See, *e.g.*, Pet'r Br. 4, 20-21, 35-36. Lamar thus asserts that, prior to 1978, a broad understanding of the phrase "was a basis for *denying* discharge rather than allowing it." Br. 45. That is why Lamar says our approach would turn the 1978 amendment into a "sledgehammer" (Br. 35, 36) or a hidden "elephant" (Br. 20).

But Lamar offers no evidence in support of this assumption. The leading treatise, by contrast, explained that the 1960 Act worked just as the 1978 Code was written: "[b]y the express terms of the 1960 amendment, * * * if the false representation is in the form of a false financial statement, it must be in writing." *Collier on Bankruptcy* § 17, at 1638 (14th ed. 1978). See also *Sears, Roebuck & Co.* v. *Sofio*, 138 So. 2d 616, 617 (La. Ct. App. 1962) ("[T]he language of the bankruptcy law is explicit in the requirement that to prevent the discharge of a debt the false statement by the debtor as to his financial condition must be in writing.").

Regardless of the history, Lamar's argument turns foundational principles of statutory construction on their head. In Lamar's telling (Br. 45), although Congress reused the same language, it silently intended for it to take on very different meaning. But the clearest indication of what Congress meant is always the text that it used; that Congress reused the same text indicates that Congress intended for the same meaning.

III. The Eleventh Circuit's construction advances Section 523(a)(2)'s express purposes.

Section 523(a)(2), as construed below, is "perfectly sensible." Pet. App. 13a. The Eleventh Circuit's construction is necessary to achieve Congress's stated goal of debtor protection and to promote efficient and reliable bankruptcy administration.

A. Congress expressly designed the debtor protections in (2)(B) to apply to statements that do not reveal overall net worth.

In amending Section 523(a)(2) in 1978, Congress intended to protect debtors from "practices of consumer finance companies, which sometimes have encouraged * * * falsity by their borrowers for the very purpose of insulating their own claims from discharge." *Field*, 516 U.S. at 76-77 & n.13.

Congress detailed the kind of improper practices it sought to eliminate. It observed the "frequent practice" of "consumer finance companies to take a list from each loan applicant of other loans or debts that the applicant has outstanding." H.R. Rep. No. 95-595, at 130, 1978 U.S.C.C.A.N. 5963, 6091. Unscrupulous creditors provided forms that had "too little space for a complete list of debts." *Ibid.* The loan applicant may have been "instructed by a loan officer to list only a few or only the most important of his debts." *Ibid.* But, on "the bottom of the form, the phrase 'I have no other debts' is either printed on the form, or the applicant is instructed to write the phrase in his own handwriting." *Ibid.* The creditor would then later claim the borrower made misstatements and use that as a basis to exempt its debt from discharge. *Id.* at 130-131.

In describing these practices, the House Report cited (*id.* at 130 n.82) a bankruptcy decision that had been entered into the record, *In re Hill*, No. 28,738 (E.D. Tenn. 1971). See *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32*, 94th Cong. 981-992 (1975) (Hearings). In that decision, bankruptcy referee Clive Bare explained that these statements were "*not* a 'financial statement' as such." *Id.* at 991 (emphasis added). These documents "contain[ed] no listing of assets," they were "not a balance sheet from which net worth [could] be obtained," and there were "no supporting statements or other financial data." *Ibid.* It was not reasonable for creditors to rely on this information "in determining whether a loan should be made" (*ibid*)—which is precisely why (2)(B) contains a reasonable reliance requirement.

To make matters worse, abusive creditors would threaten suit, as the mere threat of suit "and its attendant costs [were] often enough to induce the debtor to settle for a reduced sum." H.R. Rep. No. 95-595, at 130-131, 1978 U.S.C.C.A.N. 5963, 6091-6092. "[C]reditors with marginal cases" could often extract value "even though the merits of the case [were] weak." *Ibid.*

To end these practices, Congress crafted the safeguards contained in (2)(B). *Field*, 516 U.S. at 76-77. In particular, the 1978 Code introduced the reasonable reliance requirement, which precluded creditors from relying on misstatements that they effectively manufactured. *Ibid.*

This was undeniably the motivation underlying the debtor protections in (2)(B): the legislative reports described the need for particular safeguards against abusive creditors, the statute adopted those protections, and the Court has since recognized this purpose in *Field*. Lamar even acknowledges (Br. 36-37) as much.

But only the Eleventh Circuit's construction captures the example that motivated Congress—a "list" of "loans or debts." H.R. Rep. No. 95-595, at 130-131. Because such a list says nothing about a borrower's assets, it is not the sort of "holistic snapshot" of a debtor's "financial status" that Lamar requires. Pet'r Br. 29. Indeed, referee Bare explained that these documents did *not* reveal "net worth" or any other overall financial metric. Hearings at 991. Lamar's atextual construction thus does not capture the very example for which Congress designed (2)(B).

Beyond that, Lamar would destroy Congress's carefully calibrated policy in the whole. Conniving creditors could tailor their questions to ask a debtor for almost everything but leave out one discrete piece of information—perhaps the value of one's car or one's personal effects. Through such gerrymandering, institutional creditors could purposefully skirt the safeguards that Congress put in place. Or, if Lamar contends that staged disclosures do not trigger (2)(B) (as it must to win the case), a creditor could ask for a list of assets on Monday and then a list of debts on Tuesday.

That is not the law Congress wrote. The term "respecting" is an anti-circumvention tool. Given that devious creditors are the *raison d'être* of (2)(B)'s protections, it was sensible for Congress to ensure that the statute is not easily evaded. The text of the statute lines up precisely with manifest congressional objectives.

B. Writing promotes accurate transactions and reliable dispute resolution.

The Eleventh Circuit's construction also captures Congress's purpose of incentivizing greater reliance on written instruments, which "promotes accuracy and predictability in bankruptcy disputes that often take place years after the facts arose." Pet. App. 13a.

Congress "designed" the Bankruptcy Code to provide "predictability" in bankruptcy proceedings. *Schwab* v. *Reilly*, 560 U.S. 770, 790 (2010). And the Court interprets the Code with an eye toward "minimiz[ing] the need for potentially costly additional evidentiary proceedings." *Till* v. *SCS Credit Corp.*, 541 U.S. 465, 479 (2004) (plurality opinion). The writing requirement in Section 523(a)(2)(B) furthers these ends in two main ways.

First, written statements foster accuracy at the outset. While an oral statement "is often informal and spontaneous" (*Joelson*, 427 F.3d at 707), writing imbues a statement with precision and formality. For this reason, "providing an incentive for creditors to receive statements in writing may reduce the incidence of fraud." Pet. App. 13a-14a.

Second, written statements create a record that allows predictable and efficient dispute resolution. In the course of a bankruptcy, parties often dispute the particulars of transactions that occurred years—if not a decade or more—earlier. The malleability of oral representations makes dispute resolution so far removed in time exceedingly burdensome and error-prone. Not only do memories fade with time, but debtors and creditors also have drastically different incentives that inevitably color recollections. Thus, "a contemporaneous record is inherently superior to a later recollection which is subject to the fallibility of human memory." 5 Mark S. Brodin et al., *Weinstein's Federal Evidence* § 803.07[1], at 803-49 (2d ed. 2017).

As the Court has already observed (*Field*, 516 U.S. at 76-77), Congress designed (2)(B) to mold creditor behavior. The statute "gives creditors an incentive to create writings before the fact," "which provide the court with reliable evidence upon which to make a decision." Pet. App. 13a.

Such writing requirements are commonplace. As the Eleventh Circuit observed, "the requirement of a writing is not at all unusual in the history of the law." Pet. App. 13a. "From the Statute of Frauds to the Uniform Commercial Code, law sometimes requires that proof be in writing as a prerequisite to a claim for relief." *Ibid.*

Congress often enacts writing requirements. ERISA requires that employee benefit plans be "established and maintained pursuant to a written instrument" (29 U.S.C. § 1102(a)(1)), which "gives the plan's participants and administrators a clear understanding of their rights and obligations." *Cefalu* v. *B.F. Goodrich Co.*, 871 F.2d 1290, 1296 (5th Cir. 1989). And it avoids "costly, litigious disputes over what informal modifications may have been made to [the] written instrument." *Coleman* v. *Nationwide Life Ins. Co.*, 969 F.2d 54, 60 (4th Cir. 1992).

Congress likewise requires writing in the bankruptcy and debt contexts. See, *e.g.*, 11 U.S.C. § 524(k)(2) (reaffirming debts); *id.* § 524(m)(1) (similar); 15 U.S.C. § 1681a(o)(5)(iii) (consumer reporting); *id.* § 1681b(a)(2) (same); *id.* § 1681b(b)(2)(A) (consumer report for employment purposes); *id.* § 1692g(b) (requiring a consumer to dispute a debt in writing).

Against this, Lamar says that there was no evidence "that this *was* in fact the legislature's purpose." Br. 39. The evidence of this "purpose" is "the text" of the statute that Congress enacted. Scalia & Garner, *supra*, 56. Congress adopted a writing requirement, and the reasons for doing so are ancient. See *Robinson* v. *J.R. Williston & Co.*, 266 F. 970, 972 (1st Cir. 1920) ("Congress was very careful to provide that the statements which should constitute a bar to a discharge * * * should have been made in writing, so that the bankrupt might not be deprived of the benefit of a discharge by evidence of any alleged oral statements.").

Lamar fears the implications for "small businesses and individuals." Br. 42-43. But the protections of (2)(B) *favor* small businesses and individuals in the aggregate. Concerned with abusive policies of some "consumer finance companies," Congress sought to "moderate the burden" imposed on those less sophisticated. *Field*, 516 U.S. at 76-77 & n.13.

In nonetheless attempting to demonstrate implications for small businesses, *amicus* NFIB points (at 13, 16) to its own survey, *NFIB National Small Business Poll: Getting Paid* (2001), perma.cc/6SVV-XV4D. In that report, NFIB evaluated the evidence and concluded that the "direct losses small businesses incur from bankruptcies do not appear to be great" and that "[l]osses due to bankruptcies occur relatively infrequently." *Id.* at 8. It is hard to understand how NFIB relies on that same report for the contention that "the total losses are staggering." NFIB Br. 17. NFIB itself concluded otherwise.

Lamar suggests (Br. 39-40) that the reasons for favoring writing could arguably apply to other sorts of frauds covered by (2)(A). But the task here is to interpret the statute that Congress wrote. The legislative history reveals that Congress was especially concerned with the practices of creditors involving statements respecting financial condition. See *Field*, 516 U.S. at 76-77 & n.13. That is the "answer" that "softens" any "ostensible anomaly" between the requirements of (2)(A) and (2)(B). *Ibid.*

Finally, *amicus* NFIB (but not Lamar) fears a "super-Statute of Frauds." NFIB Br. 9-11. That concern makes little sense in the bankruptcy context. As Lamar says, "the uniformity of federal law * * * is fundamental to the proper administration of the bankruptcy system." Pet. 16. See also *Bullock*, 569 U.S. at 276. The Constitution authorizes "*uniform* Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4 (emphasis added). Section 523(a)(2)(B)'s enumeration of elements, including reasonable reliance, confirms that Congress enacted just such a purposefully uniform law here. See *Grogan*, 498 U.S. at 289 (noting that Congress has designed "nondischargeability" to be a "question of federal law.").

C. This case exemplifies the problems inherent in reconstructing the details of decade-old oral conversations.

The proceedings below confirm the wisdom of the statute that Congress wrote. This case, the bankruptcy court observed, turned on "nothing more than a disagreement as to recollection." J.A. 135. And, in resurrecting the oral conversations a full decade later, the court disbelieved testimony from both Appling *and* Lamar.

True, the bankruptcy court did not credit some of Appling's testimony, even though it was corroborated by his wife. See Pet. App. 58a. But the court *also* found that Robert Lamar's account was not accurate. In Lamar's version of the March 2005 meeting, Appling said that he "had *already* prepared the tax return." J.A. 54 (emphasis added). But even Gordon—who was on Lamar's side—disputed Lamar's story. J.A. 35. The bankruptcy court therefore did not accept Lamar's testimony. Pet. App. 54a.

Perhaps Lamar misremembered what had been said a decade prior. One can hardly be faulted for failing to recall, with legal precision, ten-year-old oral conversations. Or perhaps, intentionally or not, Lamar embellished his account. Either way, the bankruptcy court determined that a significant portion of Lamar's recounting of the 2005 oral conversations was not true. The court nonetheless based its judgment, in the main, on finding "Lamar's testimony more credible." See Pet. App. 55a-60a.

Additionally, Lamar's reliance theory is at odds with its own conduct. Lamar's argument is not that it relied on Appling's statements to extend *new* credit.[14] Between the March and November 2005 meetings, Appling paid about $25,000, which was more than the value of work performed during that interval. See Bankr. Ct. Dkt. 66, at 99-100. Appling's debt to Lamar thus decreased by roughly $2,000 over this period. Pet. App. 66a.

Rather, Lamar's theory is that it forwent collection efforts between the 2005 meetings and when it supposedly learned of the truth in June 2006. Pet. App. 61a. Had it "known the truth" in 2005, Lamar says that it would have "immediately" "begun collection activities." *Ibid.* Yet, in June 2006, Lamar did not "immediately" attempt collection. It sued Lamar in state court *six years later*—in 2012. C.A. App. A113.

Because Lamar's actual behavior contradicts its own theory, Appling argued in the court of appeals that Lamar's reliance argument is implausible. See Resp't C.A. Br. 34-37; Resp't C.A. Reply 29-31. This inconsistency suggests that Lamar's reliance theory was an after-the-fact invention. The court did not

[14] Nor is Lamar's theory that it relied on a promise as to what Appling would do with the refund once received. See Pet. App. 55a, 59a-60a. Appling made no such promise. See pp. 6-8, *supra.* And such a theory is untenable: "normally, fraud cannot be predicated on statements which are in the nature of promises as to future events." *Sims* v. *Natural Prods. of Ga., LLC*, 785 S.E.2d 659, 662 (Ga. Ct. App. 2016). Lamar did not prove—and the bankruptcy court did not find—that Appling represented any future plan "with a present intent not to perform" or with knowledge "that the future event will not take place." *Ibid.* To the contrary, the bankruptcy court found that Appling made the decision as to the use of the refund money *after* the November meeting. Pet. App. 58a.

reach this issue, which therefore remains live in this case.[15]

The statute's text reveals a congressional determination that writing should lie at the heart of a fraud claim, like this one, about the debtor's financial condition. Writing guarantees that dishonest debtors cannot discharge fraudulently incurred debt. It simultaneously protects honest debtors from overreaching creditors, who, in reaction to a bankruptcy petition, may attempt to piece together a new reliance theory years after the fact.

IV. Appling prevails under Lamar's new rule.

Now, for the first time, Lamar says (Br. 29) that "any number of * * * statements providing a more holistic snapshot of one's financial status" qualify as a "statement respecting the debtor's financial condition." Appling wins under this rule.

During the 2005 meetings, Robert Lamar knew that "everything" Appling owned was "tied up in the business" and thus Appling had "no other assets." J.A. 54-55. Lamar explained that, other than the refund, "there were absolutely no assets of any type available to satisfy our fees." *Ibid.* This "knowledge

[15] This is also relevant to an additional, live issue: whether Lamar proved damage causation. See Resp't C.A. Br. 29-33; Resp't C.A. Reply 21-29. The bankruptcy and district courts held that (2)(A) does not require Lamar to prove that its alleged forbearance caused it injury. See Pet. App. 64a-66a. The Seventh and Ninth Circuits disagree, holding instead that a creditor must prove that it lost valuable collection remedies because of the forbearance. See BIO 27-30. Appling had several other creditors, many of whom had priority to Lamar; Lamar did not, therefore, attempt to prove that its alleged forbearance caused the injury that it asserts. See Bankr. Dkt. 69, at 32.

of [Appling's] financial condition" was a core component of Lamar's "justifiable reliance" contention. Pet. App. 62a. In particular, Lamar "clearly believed that the tax refund was the only source of cash [Appling] would have to pay the fees." *Ibid.*

Lamar's theory, therefore, is that it relied on Appling's statements about the refund and viewed them as material, *because* those statements completed its "holistic snapshot" of Appling's "financial status." Pet'r Br. 29. Having depended on it below, Lamar cannot now walk away from its theory of the case.

It can make no difference if a debtor provides a "holistic snapshot" all at once or if a debtor does so via staged disclosures. In bankruptcy law especially, the Court refuses the "sacrifice of substance to form." *First Nat'l Bank of Cincinnati* v. *Flershem*, 290 U.S. 504, 519 n.11 (1934).

If a creditor could evade the protections for debtors contained in Section 523(a)(2)(B) merely by asking questions piecemeal, then the statute would be toothless. Congress's use of the broadening term "respecting" precludes that result.

CONCLUSION

The Court should affirm the judgment entered below.

Respectfully submitted.

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MARCH 2018