NO. 01-1418

IN THE

Supreme Court of the United States

A. ELLIOTT ARCHER AND CAROL A. ARCHER,
Petitioners,

v.

ARLENE L. WARNER,
Respondent.

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

BRIEF FOR AARP AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Bankruptcy Code § 523(a) renders debts "obtained by" fraud nondischargeable in bankruptcy. The question presented here is:

Whether a debt for money obtained by fraud becomes dischargeable merely because the debtor settles the claim for fraud and agrees in the settlement to return some or all of the amount obtained by the fraud.

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This brief is filed on behalf of AARP as amicus curiae in support of petitioners.[1]

INTEREST OF AMICUS CURIAE

AARP is a non-profit organization dedicated to addressing the needs and interests of people aged 50 and older. As the largest membership organization in America serving those over 50, AARP is greatly concerned about the rampant deception, fraud, and unfair practices perpetrated in a broad

[1] Letters of consent from both parties have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae or its counsel made a monetary contribution to the preparation and submission of this brief.

range of consumer transactions. Older Americans are disproportionately victimized by such practices, and AARP thus supports laws and public policies designed to protect their rights and to preserve the legal means for redress when they are harmed in the marketplace. AARP believes that the interpretation of the Bankruptcy Code adopted by the decision below improperly undermines the ability of those victimized by fraud to obtain recovery for their injuries, contrary to both the language and the policies of the Code.

ARGUMENT

1. "The Bankruptcy Code has long prohibited debtors from discharging liability incurred on account of their fraud, embodying a basic policy animating the Code of affording relief only to an 'honest but unfortunate debtor.'" *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (quoting *Grogan v. Garner*, 498 U.S. 279, 287 (1991)). That long-settled policy is set forth today in § 523(a) of the Bankruptcy Code, which bars the discharge of "any debt . . . for money . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). As this Court has repeatedly held, this provision broadly encompasses debts existing "on account of" fraud, *Cohen*, 523 U.S. at 217, "arising from" fraud, *id.* at 221, "resulting from" fraud, *Field v. Mans*, 516 U.S. 59, 61 (1995), or "traceable to" fraud, *id.* at 64.

All of these formulations make clear that the question of dischargeability in this context is simply one of *causation* – does the debt exist *because of* fraud? Put differently, if the debtor would not owe the creditor money but for the debtor's act of fraud, then the debt necessarily "results from" the fraud.

The central question in this case is whether a debt imposed by the settlement of a fraud claim results from the initial fraud. The answer is plainly yes: but for the initial act of fraud, the debtor would not have the creditor's money. To be sure, the creditor must prove up in the bankruptcy case the initial act of fraud. *See Brown v. Felsen*, 442 U.S. 127, 138 (1979). But assuming the creditor proves that the debtor obtained the creditor's money by an act of fraud, nothing about an intervening settlement of the amount due to be returned to the creditor changes the fact that *the money is due only because the debtor obtained it by fraud in the first place*.[2] In other words, because the debt imposed by the settlement would not exist but for the initial fraud, the settlement debt is directly traceable to the fraud, and thus is nondischargeable under § 523(a).

2. This straightforward application of § 523(a) is fully consistent with the Act's fundamental policy of affording a "fresh start" only to "honest but unfortunate" debtors. *Grogan*, 498 U.S. at 287. The fact that a perpetrator of fraud has been persuaded to agree to refund all or part of the proceeds of his misconduct does nothing to change the fact that the money was initially obtained by an act of dishonesty (assuming, again, the creditor can prove up the fraud). And this Court has repeatedly recognized that bankruptcy policy does not seek to protect the perpetrator by denying his victims full restitution for their losses. *See Cohen*, 523 U.S. at 223 ("it is 'unlikely that Congress . . . would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting the victims of fraud'" (quoting *Grogan*, 498 U.S. at 287)).

3. The members of amicus AARP can attest to the harms that would be inflicted if the Court interpreted § 523(a) to

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[2] In the language of tort, the settlement would not be an "intervening" cause of (dischargeable) liability, absolving the debtor of the prior (nondischargeable) liability, because the settlement is not an "independent" causal factor – that is, the settlement liability was itself "caused or set in motion" by the same acts that created the initial monetary liability. Keeton et al., *Prosser & Keeton on the Law of Torts* 301-02 (5th ed. 1984).

allow perpetrators of fraud to use the bankruptcy laws as shield to protect themselves from their victims who seek recompense. It is well-established that older Americans are disproportionately likely to be victimized by fraud. *See*, *e.g.*, Friedman, *Confidence Swindles of Older Consumers*, 26 J. Consumer Affairs 20 (1992); Note, *Consumer Fraud and the Elderly: The Need for A Uniform System of Enforcement and Increased Civil and Criminal Penalties*, 4 Elder L.J. 201 (1996) (citing studies). Frauds against older consumers come in all forms; the most oft-cited include telemarketing scams, *see Consumer Fraud and the Elderly*, 4 Elder L.J. at 206-07; health-care frauds, *see id.* at 208-09; home repair swindles, *see id.* at 209-10; insurance frauds, *see* Frolik, *Insurance Fraud on the Elderly*, Trial (June 2001), and predatory lending schemes, *see* Walters & Hermanson, AARP, Public Policy Institute, *Older Subprime Refinance Mortgage Borrowers* 1-2 (2002) (available at www.aarp.org/ppi).

AARP has for over a decade focused particular attention on the problem of predatory mortgage lending, which disproportionately targets and impacts older and minority borrowers and threatens to undo years of progress in community development across the country. *See* U.S. Dep't of Treasury & U.S. Dep't of Housing and Urban Development, *Curbing Predatory Home Mortgage Lending: A Joint Report* 69-70 (2000) (available at www.huduser.org/publications) (noting that predatory lenders often target people who are elderly because they are likely to have built up significant equity in their homes, may live on fixed incomes and need cash for medical expenses or home repairs, and may be vulnerable to aggressive sales tactics); Woodstock Institute, *Two Steps Back: The Dual Mortgage Market, Predatory Lending and the Undoing of Community Development* 8 (1999) (available at www.woodstockinst.org) (finding that predators target vulnerable populations, including the elderly). Predatory lending, the Woodstock Institute reports, "has reached a scale where it has now been recognized as a major community development problem . . . threaten[ing] decades of effort in promoting homeownership as a means of wealth creation and neighborhood stabilization." *Two Steps Back*, *supra*, at 39.

AARP has also drawn attention to the problem of telemarketing scams directed at older Americans. *See*, *e.g.*, AARP, *Telemarketing Fraud* (www.aarp.org/fraud); Princeton Survey Research Associates, *Telemarketing Fraud and Older Americans, An AARP Survey* (1996). Indeed, the problem of telemarketing fraud against older Americans was severe enough to provoke specific congressional action, the Senior Citizens Against Marketing Scams ("SCAMS") Act, 18 U.S.C. §§ 2325-2327. Nevertheless, telemarketing fraud remains a rampant problem. *See* Baginskis, *Telemarketing Fraud Upon the Elderly Shows No Signs of Slowing*, 11 Loyola Consumer L. Rev. 4 (1999); AARP, *Telemarketing Fraud*, *supra*.

Telemarketing scams, predatory lending and other frauds against older people inflict an especially acute harm, for the "likelihood that an elder person's income is fixed may make it extremely difficult to recover from a financial loss." Dessin, *Financial Abuse of the Elderly*, 36 Idaho L. Rev. 203, 205 (2000). At the same time, many such frauds are perpetrated not by reputable companies averse to bankruptcy, but by fly-by-night, "boiler-room" operations. *See* House Comm. on Gov. Operations, *The Scourge of Telemarketing Fraud: What Can Be Done About It?*, H.R. Rep. No. 102-421, at 3 n.3 (1991); *Consumer Fraud and the Elderly*, *supra*, 4 Elder L.J. at 207. Such marginal outfits almost certainly would have little if any concern about dropping into bankruptcy as a way to avoid paying agreed upon restitution for the consequences of unlawful behavior. To permit discharge of their debt would thus tear open a significant hole in the Bankruptcy Code, for the primary benefit of the debtors least deserving of the law's protection.

4. Adopting respondent's position in this case not only would expose older Americans and other victims of fraud to greater risk of nonrecovery, but would also have the adverse policy effect of encouraging these victims to litigate their fraud cases to judgment, rather than accepted negotiated resolutions. If a fraud claimant knows a settlement debt will be dischargeable even if she could prove in bankruptcy that the debt results from fraud, she will have a much greater incentive to bring that proof to judgment in the underlying fraud case and thereby protect the debt from subsequent discharge. Allowing her to prevent discharge by proving the fraud in the bankruptcy case would enable her to settle the claim with less concern for its loss in the event her victimizer declares bankruptcy.

On the other hand, that rule would not create a comparable settlement disincentive for fraud defendants, for two reasons. First, a settlement for less than the amount claimed would at least reduce the debt still enforceable in bankruptcy. Second, a debtor who settles a fraud claim will still have his day in court on the fraud claim – the settlement itself will not be res judicata against him. For that reason, the debtors *most* encouraged to settle under respondent's rule are those who expect or intend to use the settlement as shield in bankruptcy against the *legitimate* claims of fraud victims. And that is exactly contrary to the result the bankruptcy laws should encourage.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

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