No. 24-1321

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JASON ROBERT WYLIE and LEAH S. WYLIE,

Appellees,

v.

TIMOTHY J. MILLER,

Appellant.

On Appeal from the United States District Court
for the Eastern District of Michigan, No. 2:23-cv-10952,
Hon. Mark A. Goldsmith, U.S. District Judge

BRIEF OF THE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, the National Consumer Bankruptcy Rights Center and the National Association of Consumer Bankruptcy Attorneys each certify that they are non-profit membership organizations with no parent companies and no publicly traded stock.

/s/David W. Foster
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I. INTRODUCTION

A. Interest of *Amici Curiae*

The National Consumer Bankruptcy Rights Center (NCBRC) and the National Association of Consumer Bankruptcy Attorneys (NACBA) are non-profit organizations dedicated to protecting the integrity of the bankruptcy system and preserving the rights of consumer bankruptcy debtors. To those ends, they provide assistance to consumer debtors and their counsel in cases likely to impact consumer bankruptcy law. Among other things, NCBRC and NACBA submit *amici curiae* briefs when, in their view, resolution of a particular case may affect consumer debtors throughout the country, so that the larger legal effects of courts' decisions will not depend solely on the parties directly involved in the case. NCBRC and NACBA also strive to influence the national conversation on bankruptcy laws and debtors' rights by increasing public awareness of and media attention to the important issues involved in bankruptcy proceedings.

Both NCBRC and NACBA have filed *amici curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See, e.g.*, *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689 (2023); *Isaacs v. DBI-ASG Coinvestor Fund,*

III, LLC (In re Isaacs), 895 F.3d 904 (6th Cir. 2018); *Hardesty v. Haber (In re Haber)*, No. 17-3323, 2017 U.S. App. LEXIS 21888 (6th Cir. Oct. 30, 2017); *Jahn v. Burke (In re Burke)*, 863 F.3d 521 (6th Cir. 2017); *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010); *In re Pyatt*, 486 F.3d 423 (8th Cir. 2007); *In re Scarborough*, 461 F.3d 406 (3d Cir. 2006).

The resolution of the question presented in this case is of substantial importance to NCBRC and NACBA. NCBRC and NACBA believe the District Court should be affirmed because the Bankruptcy Court erred in denying a discharge to the debtors pursuant to 11 U.S.C. § 727(a)(2). The Bankruptcy Court erred because its decision appears to apply a *per se* rule that any time a debtor intentionally transfers estate property post-petition in a way intended to prefer certain creditors, it *necessarily* has the subjective intent to hinder the trustee. In doing so, the Bankruptcy Court inappropriately "short-circuited" the factual analysis that is necessary to support the extremely severe result of denying a discharge. That analysis and result is inconsistent with the basic premise that provisions denying the discharge must be narrowly construed in a debtor's favor because denial of the discharge is

fundamentally inconsistent with the "fresh start" that is a cornerstone of bankruptcy policy and, as a result, such denial should only occur where the requisite *mens rea* has been shown to exist. NCBRC and NACBA file this brief to show why the Bankruptcy Court's decision was incorrect and to address the potential far-reaching impact if the District Court is not affirmed.

B. Authorship and Funding of *Amici* Brief

No party's counsel authored this brief. No party, party's counsel, or person other than *amici curiae*, their members, or their counsel provided money for the brief's preparation or submission.

C. Summary of Argument

The District Court's decision should be affirmed. The Bankruptcy Court erred because its decision fails to analyze the subjective intent of a debtor when determining whether 11 U.S.C. § 727(a)(2) applies to deny the debtor a discharge. Instead, the Bankruptcy Court's opinion appears to apply a *per se* rule requiring the denial of a debtor's discharge under 11 U.S.C. § 727(a)(2) any time a debtor intentionally transfers estate property post-petition in a manner intended to prefer certain creditors. *See In re Wylie*, 649 B.R. 852, 880 (Bankr. E.D. Mich. 2023), *rev'd and remanded sub nom. Wylie v. Miller*, 657 B.R. 602 (E.D. Mich. 2024)

("Thus, the Debtors' intent that their 2020 income taxes be paid in full was at war with the priority and distribution scheme of the Bankruptcy Code, and with the Trustee's duty under 11 U.S.C. § 704 to follow that scheme in administering the assets of the bankruptcy estate, including the Debtors' rights to 2019 income tax refunds, which were property of the bankruptcy estate."). This deemed *per se* rule was adopted because the Bankruptcy Court drew a direct line from (1) a debtor intentionally transferring property post-petition in a way intended to prefer certain creditors to (2) a debtor having the subjective intent to hinder a trustee in his duties to administer estate assets, seemingly without any further evaluation of the debtor's subjective intent or, more fundamentally, the debtor's knowledge of any wrongdoing. *See id.* at 879 ("In the post-petition context, the Debtors making a transfer of estate property with this [preferential] purpose is wholly inconsistent with the duties of the Chapter 7 Trustee. This means that in substance, the Debtors had, at a minimum, an intent to hinder the Trustee."); *id.* at 880 ("The Court assumes that the Debtors were not intimately familiar with the foregoing legal principles about bankruptcy distributions and priorities, although their attorney no doubt was. But the Debtors' actual subjective intent in

transferring property of the bankruptcy estate, when they made their 2019 Tax Refund Transfers, still was, in substance, an intent to 'hinder' the Trustee.").

The Bankruptcy Court's *per se rule* is fundamentally irrational. Caselaw appropriately makes it clear that a transfer preferring a creditor does not by itself evidence the subjective intent to hinder, delay, or defraud *creditors*—the parties a trustee is acting to protect. It would be entirely irrational for a transaction that does not result in the denial of a discharge because of a lack of intent to hinder, delay, or defraud *creditors* to nonetheless result in the denial of a discharge because it evidences a subjective intent to hinder a *trustee's* ability to marshal assets for the benefit of the very same creditors. Indeed, that outcome flies in the face of the general rule that provisions that deny the discharge must be narrowly construed in the debtors' favor, since those provisions fundamentally eliminate the "fresh start" purpose of the Code. *See also* 6 Collier on Bankruptcy ¶ 727.01 (Matthew Bender & Company, Inc., ed., 16th ed. 2024) ("The provisions denying a discharge to a debtor are generally construed liberally in favor of the debtor and strictly against the creditor. Courts have noted that 'a total bar to discharge is an

extreme penalty.' The reasons for denial of a discharge must be real and substantial rather than technical and conjectural." (internal citations omitted)).

Unfortunately, though, the Bankruptcy Court's decision here does appear to reach that *per se* conclusion. And it does so in the context of a comparatively sympathetic type of transfer—a routine tax election to apply a prior underpayment of taxes to future tax liability to ensure that taxing authorities are paid. The Appellant, for his part, asserts that the Bankruptcy Court was merely making a factual determination specific to the facts of this case, and points to a variety of record evidence that the Appellant uses to paint the debtors in a negative light. It may be the case that there could exist a hypothetical set of facts that would permit a court to conclude that the circumstances surrounding a transfer were so negative, reflecting the requisite *mens rea*, that would justify denial of a discharge. But the fact is that the Bankruptcy Court's decision below *did not purport to make that type of factual finding*. Instead, in a handful of paragraphs, the Bankruptcy Court simply drew a direct line: the debtors transferred property post-petition in a manner intended to prefer certain creditors; therefore, the debtors intended to hinder the trustee. In other

words, the Bankruptcy Court's only factual finding was that there was an intentional transfer. This Court should clarify that an intentional transfer, on its own, does not result in a denial of the discharge under section 727(a)(2) of the Bankruptcy Code any more than it results in a denial of the discharge under section 727(a)(1).

II. ARGUMENT

A. Denial of a Discharge under 11 U.S.C. § 727(a)(2) Is An Extreme Remedy Reserved Only for Debtors Evidencing the Actual *Intent* to Hinder, Delay or Defraud

The denial of an individual debtor's discharge has been accurately described by courts as, *inter alia*, an "extraordinary remedy," "extreme step," "extreme penalty," and a "harsh remedy." *In re Dykes*, 954 F.3d 1157, 1162 (8th Cir. 2020) (harsh remedy); *Smith v. Jordan (In re Jordan)*, 521 F.3d 430, 433 (4th Cir. 2008) (extraordinary remedy); *Berger & Assocs. Attorneys, P.C. v. Kran (In re Kran)*, 760 F.3d 206, 210 (2d Cir. 2014) (extreme penalty); *State Bank India v. Chalasani (In re Chalasani)*, 92 F.3d 1300, 1310 (2d Cir. 1996) (same); *D.A.N. Joint Venture v. Cacioli (In re Cacioli)*, 463 F.3d 229, 234 (2d Cir. 2006) (same); *Rosen v. Bezner*, 996 F.2d 1527, 1531 (3d Cir. 1993) (extreme step). It is one of the most drastic remedies that can be levied against an individual

debtor—depriving such debtor of any hope of a fresh start. *In re Kran*, 760 F.3d at 210 (finding the remedy of denial of discharge to be "an extreme penalty for wrongdoing, which must be construed strictly against those who object to the debtor's discharge and liberally in favor of the bankrupt" because it deprives a debtor of the ability "to 'reorder [his] affairs, make peace with [his] creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" (internal citations omitted) (citing *Grogan v. Garner,* 498 U.S. 279, 286–87 (1991))).[1]

[1] Cases examining specific exceptions to the discharge agree. *See, e.g.*, *Kassas v. State Bar of California*, 49 F.4th 1158, 1163 (9th Cir. 2022) ("Because a fundamental policy of the Bankruptcy Code is to afford debtors a fresh start, 'exceptions to discharge should be strictly construed against an objecting creditor and in favor of the debtor.'" (internal citations omitted)); *Wagner v. Wagner (In re Wagner)*, 527 B.R. 416, 430 (10th Cir. BAP 2015) ("Moreover, due to bankruptcy's 'fresh start' objective, exceptions to discharge are narrowly construed, and doubt is resolved in favor of the debtor."); *In re Pelkowski*, 990 F.2d 737, 744 (3d Cir. 1993) ("Admittedly, it is well accepted that exceptions to discharge, which reflect a congressional determination that other public policies outweigh the debtor's need for a fresh start, should be narrowly construed against the creditor and in favor of the debtor."); *Boroff v. Tully (In re Tully)*, 818 F.2d 106, 110 (1st Cir. 1987) ("In that vein, the statutory right to a discharge should ordinarily be construed liberally in favor of the debtor.").

Courts protect against the improper, inequitable application of this extraordinary remedy—reserving it for circumstances where "a debtor's actions are truly blameworthy in an equitable sense" or the debtor's "alleged wrongful act" is also "accompanied by a sufficiently 'culpable intent.'" *See Belmont Wine Exch., LLC v. Nascarella* (*In re Nascarella)*, 492 B.R. 914, 916–17 (Bankr. M.D. Fla. 2013) (citing *Panuska v. Johnson (In re Johnson)*, 80 B.R. 953, 960–61 (Bankr. D. Minn. 1987), *aff'd*, *Panuska v. Johnson*, 101 B.R. 997 (D. Minn. 1988)). With respect to section 727, courts agree that the denial provisions of section 727 are to be construed liberally in favor of the debtor and strictly against the objecting party. *In re Dykes*, 954 F.3d at 1162 ("As denial of discharge is a harsh remedy, the provisions of § 727(a) 'are strictly construed in favor of the debtor.'" (internal citations omitted)); *Robinson v. Worley*, 849 F.3d 577, 583 (4th Cir. 2017) ("Given the harsh consequences of a denial of discharge, the statute is ordinarily construed liberally in the debtor's favor."); *Walton v. Charno (In re Charno)*, 452 B.R. 299, 305–06 (Bankr. S.D. Fla. 2011) ("Denial of discharge is a harsh sanction which should be construed liberally in favor of the Debtors (and strictly against the Plaintiff).").

Accordingly, any basis for denial of discharge "must be real and substantial, not merely technical and conjectural." *Dilworth v. Boothe*, 69 F.2d 621, 624 (5th Cir. 1934); *see also Mass. Dep't Rev. v. Shek (In re Shek)*, 947 F.3d 770, 779 (11th Cir. 2020) ("In addition, we have noted in the past that we should, where possible, construe exceptions to discharge 'in favor of the debtor, and recognize that the reasons for denying a discharge must be real and substantial, not merely technical and conjectural.'" (internal citations omitted); *Cadle Co. v. Matos (In re Matos)*, 267 F. App'x 884, 886 (11th Cir. 2008) ("Moreover, courts generally construe the statutory exceptions to discharge in bankruptcy liberally in favor of the debtor, and recognize that the reasons for denying a discharge must be real and substantial, not merely technical and conjectural." (internal citations, quotation marks, omitted)); *In re Tully*, 818 F.2d at 110 ("The reasons for denying a discharge to a bankrupt must be real and substantial, not merely technical and conjectural." (internal citations omitted)).

Mens rea is required to deny a discharge under section 727(a)(2), and courts look to the actual, subjective intent of a debtor when analyzing whether *mens rea* exists. *In re Retz*, 606 F.3d 1189, 1196 (9th Cir. 2010)

("This does not alter the burden on the objector, but rather means that 'actual, rather than constructive, intent is required' on the part of the debtor."); *Georges v. Solodky (In re Georges)*, 138 F. App'x 471, 472 (3d Cir. 2005) ("The objecting party must prove an 'actual intent on the part of the bankrupt to hinder, delay, and defraud his creditors.'"); *Pavy v. Chastant (In re Chastant)*, 873 F.2d 89, 90–91 (5th Cir. 1989) ("[E]vidence of actual intent to defraud creditors is required to support a finding sufficient to deny a discharge."); *In re Krehl*, 86 F.3d 737, 743 (7th Cir. 1996) ("Before a debtor may be denied a discharge under section 727(a)(2), he must be found to have acted with the actual intent to defraud, hinder, or delay creditors."); *Wines v. Wines (In re Wines)*, 997 F.2d 852, 856 (11th Cir. 1993) ("In order to deny a bankruptcy discharge, evidence of actual intent to defraud creditors must be shown.").

Because the denial of a discharge requires *mens rea*, courts refuse to look to the constructive intent of a debtor. *Cadle Co. v. Pratt (In re Pratt)*, 411 F.3d 561, 565 (5th Cir. 2005) ("The intent to defraud must be actual, not constructive."); *Robertson v. Dennis (In re Dennis)*, 330 F.3d 696, 701 (5th Cir. 2003) ("Moreover, evidence of actual intent to defraud creditors is required to support a finding sufficient to deny a discharge.

Constructive intent is insufficient."); *Groman v. Watman (In re Watman)*, 301 F.3d 3, 8 (1st Cir. 2002) ("Section 727 requires a showing of actual intent, not constructive intent."); *Lovell v. Mixon*, 719 F.2d 1373, 1376–77 (8th Cir. 1983) ("On the other hand, in order to deny a bankrupt's discharge under 11 U.S.C. § 727(a)(2), the Trustee must establish that the property was transferred with actual intent to hinder, delay or defraud creditors. Constructive intent cannot be the basis for the denial of a discharge in bankruptcy."). Thus, absent a showing of some type of fraudulent intent or motive "at the time of the transfer," section 727(a)(2) cannot be a basis to deny discharge. *C.f. In re Pisculli*, 426 B.R. 52, 66 (E.D.N.Y. 2010), *aff'd*, 408 F. App'x 477 (2d Cir. 2011) ("The requisite actual intent to hinder, delay or defraud must exist at the time of the transfer.").

Moreover, due to the cataclysmic nature of denial of discharge, courts seek to employ alternative, less apocalyptic remedies—such as avoiding a transfer—before resorting to denial. *See, e.g.*, *Rosen,* 996 F.2d at 1531 ("Completely denying a debtor his discharge, as opposed to avoiding a transfer or declining to discharge an individual debt pursuant to § 523, is an extreme step and should not be taken lightly."); *see also*

United States v. Kapila, 402 B.R. 56, 59 (S.D. Fla. 2008) (where debtor errantly made an NOL election, court allowed trustee to avoid the election as a fraudulent transfer but was not asked to (and did not) deny or revoke the debtor's discharge); *In re Russell*, 927 F.2d 413, 419 (8th Cir. 1991) (similar).

B. A Debtor's Intent to Prefer Creditors Is Not Equivalent to the Intent to Hinder, Delay, or Defraud Creditors or the Trustee

It is black letter law that a debtor's "intent to prefer creditors is not equivalent to the intent to hinder, delay or defraud creditors . . . ." 6 Collier on Bankruptcy ¶ 727.02 (Matthew Bender & Company, Inc., ed., 16th ed. 2024).

It is illogical to adopt—as the Bankruptcy Court did—a different rule with respect to a debtor's intent to hinder, delay, or defraud a chapter 7 trustee. Indeed, courts evaluating chapter 7 trustees' section 727(a)(2)(B) causes of action agree that an avoidable transfer, alone, is insufficient to establish the requisite intent. *See, e.g.*, *Nickless v. Fontaine (In re Fontaine)*, 467 B.R. 267, 274–75 (Bankr. D. Mass. 2012) (dismissing chapter 7 trustee's 727(a)(2)(B) cause of action for failing to show the requisite "fraudulent intent" required by 727(a)(2)(B)—despite

the debtor's post-petition transfer of a horse for no consideration); *U.S. Trustee v. Arnold (In re Arnold)*, 652 B.R. 883, 906 (Bankr. E.D. Ark. 2023) (dismissing chapter 7 trustee's section 727(a)(2)(B) cause of action based on debtor's transfer of an interest to debtor's parent's company for failure to establish debtor's intent to "hinder, delay, or defraud a creditor or an officer of the estate").

More directly, it is black letter law that "[t]o justify the refusal of discharge, there must have been more than a preferential payment or preferential transfer." 6 Collier on Bankruptcy ¶ 727.02 (Matthew Bender & Company, Inc., ed., 16th ed. 2024); *see also In re McKeever*, 550 B.R. 623, 636 (Bankr. N.D. Ga. 2016) ("The Eleventh Circuit has made clear that a preferential transfer is not the type of transfer which will bar a discharge."); *In re Miller*, 39 F.3d 301, 307 (11th Cir. 1994) ("A mere preferential transfer of this sort is not tantamount to a fraudulent transfer for the purposes of denying discharge."). The Bankruptcy Court properly recognized that in its opinion. *See In re Wylie*, 649 B.R. at 866 ("The evidence persuades the Court that the Debtors' 2018 tax refund transfers were made with the sole intent of trying to insure that there would be enough money for the Debtors to pay their *2019* federal and

state income taxes, to the Internal Revenue Service and the State of Michigan. Such intent *does* amount to an intent to give preferential treatment to those two taxing authorities, which were creditors of the Debtors, compared to the treatment of other creditors. But as a matter of law, a debtor's mere intent to prefer one creditor over other creditors cannot be deemed an intent 'to hinder, delay, or defraud' a creditor or creditors, within the meaning of § 727(a)(2)(A)." (emphasis in original)).

Accordingly, where a debtor does make a transfer that prefers particular creditors, section 727(a)(2) "does not make [such] preference an objection to discharge." *In re Ayers*, 25 B.R. 762, 770 (Bankr. M.D. Tenn. 1982). Why? Because "[t]here is no element of moral turpitude connected with the giving of a mere preference." *Id.* Absent "evidence of actual intent to defraud creditors" a preference is insufficient "to support a finding sufficient to deny a discharge." *In re Lee*, 309 B.R. 468, 483 (Bankr. W.D. Tex. 2004). Further, a mere "[p]reference of one creditor over another does not automatically establish the requisite intent, even though the debtor's actions may hinder or delay a creditor." *In re Marra*, 308 B.R. 628, 630 (D. Conn. 2004). Put more strongly, "a mere preferential transfer is not the equivalent of a fraudulent transfer for

purposes of an objection to discharge and would further not constitute evidence of actual fraud." *In re Reddington*, 36 B.R. 62, 65 (Bankr. S.D. Fla. 1984).

The Supreme Court recognized this rule early on:

> Making a mortgage to secure an advance with which the insolvent debtor intends to pay a pre-existing debt does not necessarily imply an intent to hinder, delay, or defraud creditors. The mortgage may be made in the expectation that thereby the debtor will extricate himself from a particular difficulty and be enabled to promote the interest of all other creditors by continuing his business. The lender who makes an advance for that purpose with full knowledge of the facts may be acting in perfect 'good faith.' But where the advance is made to enable the debtor to make a preferential payment with bankruptcy in contemplation, the transaction presents an element upon which fraud may be predicated. The fact that the money advance is actually used to pay a debt does not necessarily establish good faith. It is a question of fact in each case what the intent was with which the loan was sought and made.

Dean v. Davis, 242 U.S. 438, 444 (1917). If this were not the case, exemption planning would be a *per se* violation of section 727(a)(2)—which it is not. *In re Johnson*, 80 B.R. at 960–61, *aff'd*, *Panuska v. Johnson*, 101 B.R. 997 (D. Minn. 1988); 6 Collier on Bankruptcy ¶ 727.02 (Matthew Bender & Company, Inc., ed., 16th ed. 2024).

That is the context in which this appeal is taken. That context shows that denial of the discharge on the basis of the reasoning set forth

in the Bankruptcy Court's decision appears to wield the sledgehammer of a denial of the discharge to squash a fly, with that fly being the making of a routine tax election.

It is true that the authority in this area is focused on transfers not constituting a subjective intent to hinder, delay, or defraud *creditors*, rather than transfers not constituting the subjective intent to hinder, delay, or defraud the *trustee*. But the distinction between the two that the Bankruptcy Court's decision formulated would undermine every case that has concluded that a preferential transfer does not justify the harsh remedy of a discharge. And it is a completely irrational distinction, to boot. The Bankruptcy Court held that the tax election at issue here was problematic because it hindered the trustee's ability to marshal assets for the benefit of creditors in general. *The harm*—assets only being available for the preferentially-treated creditor rather than all creditors—*is precisely the same* whether the creditors or the trustee is hindered.

To be sure, whether a debtor subjectively intended to hinder a trustee—the issue at appeal here—is a question of fact. Appellant is correct that such a factual determination is subject to substantial

deference. The problem at the heart of the Bankruptcy Court's decision, though, is that the Bankruptcy Court's decision does not appear to rely on that kind of factual determination. Instead, in a manner of a handful of paragraphs, it appears to apply a *per se* rule that an intent to make a transfer (*i.e.*, preferring a taxing authority, in lieu of other creditors) *necessarily* reflects a subjective intent to hinder a bankruptcy trustee, even though such a transfer does *not* reflect a subjective intent to hinder, delay, or defraud creditors. *See In re Wylie*, 649 B.R. at 879 ("In the post-petition context, the Debtors making a transfer of estate property with this purpose [(a preferential transfer)] is wholly inconsistent with the duties of the Chapter 7 Trustee. This means that in substance, the Debtors had, at a minimum, an intent to *hinder* the Trustee."). This basis for decision fundamentally appears to set down a sweeping legal rule that is inappropriate as a general matter, but particularly inappropriate in the context of making a routine tax election.

It is critical not to lose sight of what the alleged bad act in this case was: the decision of whether to receive a tax refund or to have a tax overpayment applied to future taxes (an "Overpayment Credit") is a routine matter reflected on a tax return. Instructions to Form 1040

(2018) at p. 66, *available at* https://www.irs.gov/pub/irs-prior/i1040gi--2018.pdf ("Enter on line 21 the amount, if any, of the overpayment on line 19 you want applied to your 2019 estimated tax."). Once such election has been made in one year, it is unsurprising that the same election would be made in subsequent years, especially by an overwhelmed taxpayer using the same tax return preparer that the taxpayer has used for many years. In fact, the standards for tax services by the AICPA require a tax return preparer to begin with and rely upon a prior year return whenever feasible. Statement on Standards for Tax Services No. 3, Certain Procedural Aspects of Preparing Returns at para. 9 (Effective prior to Jan 1. 2024) ("A member should make use of a taxpayer's returns for one or more prior years in preparing the current return whenever feasible."); *see also cf.* I.R.C. § 6107(b) (requiring tax return preparers to keep copies or lists of prior returns prepared).

Yet, the Bankruptcy Court's decision appears to make any such election that is made post-petition result in denial of the discharge on a *per se* basis. Falling into a trap for the unwary should not be enough to cause a discharge to be denied.

It is true that, here, there is record evidence that the debtors historically received tax refunds but chose to change to an Overpayment Credit with an eye to ensuring that their tax debts would be paid before other creditors. *See* Brief of Appellant at 6. Perhaps in the right case, that kind of change in a debtor's historical manner of filing taxes, together with other evidence, would be enough to justify a bankruptcy court's factual determination that a debtor had subjective intent to hinder a trustee. The gist of Appellant's argument on appeal is that this is, in fact, such a case, and that the Bankruptcy Court took those facts into account in reaching a specific factual determination that the debtors subjectively *intended to* hinder the trustee in a way that goes beyond a *per se* rule that equates preferential transfers to an intent to hinder the trustee. But that read of the Bankruptcy Court's decision is difficult to square with the limited references to the factual record in the part of the decision that led to the denial of the discharge and with the factual findings the Bankruptcy Court did set out.

Indeed, the Bankruptcy Court determined that the *first* decision to make the Overpayment Credit election (with respect to the debtors' 2018 tax return) was not an issue, and only the debtors' 2019 tax return was

problematic. *Compare In re Wylie*, 649 B.R. 852 at 866, *with id.* at 879. If the Bankruptcy Court's decision was based on a factual determination that the debtors were somehow attempting to ultimately receive a cash tax refund in lieu of *any* creditor, including the IRS, or otherwise commit some kind of egregious act reflecting the *mens rea* that supports the denial of a discharge, it is difficult to understand this distinction. Notably, here, the Bankruptcy Court itself indicated that "[t]here [was] no evidence that in March 2020 [when the first tax return was filed] the Debtors intended to hinder, delay, or defraud *a future Chapter 7 trustee, in a future bankruptcy case*". *In re Wylie*, 649 B.R. at 866. In other words, it appears that the Bankruptcy Court specifically determined that the debtors did *not* make the initial Overpayment Credit election with an eye to hindering, delaying, or defrauding anyone. And, when the debtors ultimately did receive a tax refund because the debtors did not have a tax liability for the prior tax overpayments to be applied against, the tax refund was paid over to the trustee.[2] "No harm done" is, of course, not a

[2] Appellant appears to make an argument that the conduct of the debtors in receiving that refund was problematic. Taken in the light *most unfavorable to the debtors*, the debtors attempted to assert that the tax refund was received in a way that rendered it exempt property. Efforts to transform non-exempt property into exempt property typically cannot

defense, but it ought to be taken into account in determining whether the debtors had subjectively ill intent in the first instance.

The postpetition Overpayment Credit election should not have been made in this case. Appellees do not appear to deny that. To be sure, a very good case can be made that there should be "guard rails" in place to prevent debtors in general from making such improper Overpayment Credit elections. Instructions could be added to relevant tax forms. Specific warnings could be made in bankruptcy materials could inform individual debtors that postpetition Overpayment Credit elections are impermissible if the tax credit cannot be exempted. If such "guard rails" were in place, and a debtor made an Overpayment Credit election

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result in a denial of the discharge; this simply reflects a debtor's effort to avail themselves of the protections provided by the Bankruptcy Code. Otherwise, exemption planning would be a *per se* violation of section 727(a)(2)—which it is not. *In re Johnson*, 80 B.R. at 960–61, *aff'd*, *Panuska v. Johnson*, 101 B.R. 997 (D. Minn. 1988). In any event, the debtors could have made the same legal arguments regarding the tax refund even if the Overpayment Credit election had never been made in the first place. It is hard to fathom how these facts support a subjective intent to hinder the trustee. Indeed, the fact that the debtors thought the property might be exempt further undercuts the claim of fraudulent intent. Individual bankruptcy debtors routinely transfer exempt property postpetition; otherwise they could not use an exempt bank account to pay for groceries.

anyway, then it might be appropriate to conclude that the debtor had the requisite intent to hinder the trustee. Absent that, or absent a clear finding of extenuating factual circumstances that the debtors were acting with an intentional desire to undermine the bankruptcy process, creating this kind of "trap for the unwary" around a routine tax election is simply irreconcilable with the general individual chapter 7 policy that favors giving a debtor a "fresh start." Stated differently, absent a specific finding that there is evidence that the debtors knew their transfer would hinder the trustee and intended to do so, denial of a discharge should not occur. Any result otherwise improperly deletes the intent requirement from the plain language of section 727(a)(2). Ultimately, the District Court recognized this when it reversed the Bankruptcy Court's decision. ("The bankruptcy court did not explain why its conclusion regarding intent was different in the post-petition context. The bankruptcy court offered a detailed explanation for how the Wylies' 2019 election could have hindered the Trustee, but it did not find that the Wylies were aware of this potential effect. In fact, the bankruptcy court even assumed 'that the Debtors were not intimately familiar with the foregoing legal principles about bankruptcy distributions and priorities . . . .'. The

bankruptcy court noted that the Wylies' attorney was 'no doubt' familiar with the legal principles of bankruptcy, but this finding has no bearing on the Wylies' familiarity or intent. As the Wylies point out, the bankruptcy court cited no evidence that the Wylies discussed their tax election with their attorney."). *See* Opinion & Order at 5-6, No. 23-CV-10952.

III. CONCLUSION

The Bankruptcy Court's decision appears to apply a *per se* rule: a debtor that intentionally transfers property of the estate post-petition in a manner that prefers a creditor, necessarily intends to hinder the trustee—resulting in the denial of a discharge under section 727(a)(2)(B). Such a *per se* rule is clearly irreconcilable with a provision that should be narrowly construed in the light of the bankruptcy policy favoring the "fresh start." Accordingly, the District Court's decision should be affirmed.[3]

[3] Alternatively, if the Court does not believe it is appropriate to affirm the District Court's decision, at a minimum, this Court should remand the case with instructions to make the factual findings required by law to support the denial of a discharge.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5). This brief contains 5,737 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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Date: July 25, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2024, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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